CHAPTER 8

HALF A CENTURY OF ARBITRAL DECISIONMAKING: ROOTS, BRANCHES, LEAVES, AND FLOWERS

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Fifty years is a long time in the life of an institution. In this paper, we have looked for large, revealing prisms through which to discover explanations for labor arbitration's successes and its survival during the last half-century. Instead of formulating grand theories, we have concluded that its remarkable growth and flowering since 1947—a period in which many other social institutions have withered or disappeared—are due to its grounding in the daily realities of the workplace, its adaptability to a constantly changing social environment, and its ability to strike a workable balance between the needs of management for efficiency and profitability and the needs of employees for job security and personal dignity.

1947 and All That

For labor arbitration, 1947 was the year of destiny. While the roots of modern arbitration lie deep in the history of American labor relations,[1] there was a confluence in 1947 of three ostensibly unrelated events. Interwoven over the next half-century, they gave definition and shape to modern labor arbitration and included:

1. The enactment of Title II and, especially, section 301 of the Taft-Hartley Act;
2. The Bureau of National Affairs' (BNA) serial publication of arbitration decisions in *Labor Arbitration Reports*;
3. The birth of the National Academy of Arbitrators.

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[1]Of course, there was much labor arbitration before 1947, and there was a rich legacy of reported decisions by the War Labor Board during World War II.

It is impossible to imagine labor arbitration, as we know it, without the interplay of section 301, *Labor Relations Reports*, and the Academy. But in 1947 it would have been equally impossible to forecast their achievements half a century later.

Title II and Section 301 of the Taft-Hartley Act

Title II's endorsement of labor arbitration as the preferred means of resolving labor-management disputes made labor arbitration a feature of national labor policy. It also created the Federal Mediation and Conciliation Service, whose role as a referral agency has lubricated the gears of grievance arbitration. Standing alone, Title II was only a declaration of policy. But coupled with section 301, it created a new legal landscape for labor arbitration.

Section 301 swept away common law impediments to the enforcement of contracts between employers and unions (and between unions) and created a federal common law of arbitration. From *Lincoln Mills*[2] to the *Steelworkers Trilogy*[3] to *Misco*,[4] the Supreme Court's interpretations of section 301 have laid a broad legal foundation for arbitration without which arbitration would be governed today, as it was before 1947, by a patchwork of diverse state laws. Instead, national labor policy favors grievance arbitration, and the federal courts assure—more or less—uniform enforcement of that policy. Justice Douglas said it succinctly in *Lincoln Mills*:[5]

> [Section 301] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[6]

The nationwide uniformity created by section 301 parallels the National Labor Relations Act, and the federal law of labor arbitration is a vital companion to the federal law governing collective bargaining. In the public sector, where state laws and policies prevail, the law of arbitration remains highly fragmented.

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[2] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).
[3] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[4] *Paperworkers v. Misco, Inc.*, 429 U.S. 29, 126 LRRM 3113 (1987).
[5] *Textile Workers v. Lincoln Mills, supra* note 2.
[6] *Id.* at 455, 40 LRRM at 2115.

BNA's Labor Arbitration Reports

When BNA began publishing its weekly *Labor Arbitration Reports*,[7] arbitrators and representatives of labor and management in diverse industries across the country were able to study the opinions of leading arbitrators and to use them as guides. The *Labor Arbitration Reports* are an irreplaceable body of more than 100,000 arbitration decisions, now in 106 volumes. Particularly in its first two decades, the *Labor Arbitration Reports* reflected the best thinking on the most difficult issues by the most experienced and respected arbitrators.

The publication of the *Labor Arbitration Reports* has tended to judicialize the arbitration process. The availability of published decisions made possible the immediate communication of the best arbitral thinking throughout the country. At the same time, it invited the parties to use published decisions as precedents, albeit nonbinding ones. While there was no formal hierarchy in American labor arbitration, when published cases became available, the parties quickly learned that there was, in fact, a hierarchy of intellectual stature in the arbitration profession. Sophisticated advocates learned that citing a relevant decision by Archibald Cox, Harry Shulman, Willard Wirtz, or Ralph Seward, for example, was potent stuff, while citing decisions by less well-known or less admired arbitrators was less persuasive.

Once published decisions by prominent arbitrators became widely available, it was inevitable that parties would use them in the same way that lawyers and courts cite nonbinding judicial decisions for their persuasive value. In a 1946 article, Leo Cherne[8] argued against publication of arbitration awards for that reason:

> The effects of publishing domestic arbitration awards are inevitable and inevitably undesirable. The fact of publication itself creates the atmosphere of precedent. The arbitrators in each subsequent dispute are submitted to the continuous and frequently unconscious pressure to conform. A bad award—and there are such in both the courtroom and the arbitration tribunal—will have the effect of stimulating other bad ones; a good one, by the weight of precedent, may be applied where the subtleties of fact should urge a different award.[9]

Just as predicted, the publication of awards has, indeed, put pressure on arbitrators to conform to what they perceive as main-

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[7]Actually the first volume of *Labor Arbitration Reports* was published in 1946.
[8]Cherne, *Should Arbitration Awards Be Published*, 1 Arb. J. 75 (1946).
[9]*Id.* at 75.

stream thinking of arbitration's early luminaries: Cox, Fleming, Kerr, Platt, Seward, Shulman, Wallen, and Wirtz—and more recently, Feller, Nicolau, Rubin, and Harkless.

For a number of reasons, since 1980,[10] the *Labor Arbitration Reports* have published few awards by nationally known arbitrators but many more by less well-known, new arbitrators. While, of course, new arbitrators deserve to be heard, the fact that most of those whose decisions are published today are little known substantially undermines the authority of the *Labor Arbitration Reports* and, in a broader sense, does harm to the field of arbitration.

The Academy

Labor arbitration would undoubtedly have grown and matured without the Academy, but it would have done so less cohesively. The Academy's role has been crucial to the development of modern labor arbitration in three main ways:

1. It has professionalized labor arbitration. It has done this by promulgating ethical standards, providing for continuing education, encouraging new entrants, and establishing membership standards to identify candidates of good character and acceptability. The Academy deserves credit for taking arbitration out of the hands of well-meaning amateurs with little experience in either interpreting contracts or understanding the culture of the workplace and putting arbitration in the hands of those who bring experience, training, and a broader perspective to the process.[11]

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[10]The main reason is that in 1981 the Federal Mediation and Conciliation Service (FMCS) ended its practice of making available to the major legal publishers copies of all FMCS decisions at its Washington, D.C., office. Since then BNA has published only decisions sent to it directly by arbitrators themselves with the consent of the parties. Few established arbitrators have chosen to do so.

[11]At the Academy's founding meeting in January 1948, Edwin Witte of the University of Wisconsin observed:

> [T]he fact remains that many arbitrators have not measured up, particularly amateur and ad hoc arbitrators. It is still widely believed that the only qualifications needed in an arbitrator are honesty and impartiality. These are prerequisites, a sine qua non. But enduring success in labor arbitration calls for very much more on the part of the arbitrator than honesty and impartiality. It demands a broad knowledge of industrial relations and a good deal of specialized information on the issues arising in labor disputes. It requires a disposition not easily ruffled and a keen appreciation of the rights and feelings of others. It calls for an understanding of human nature and a realization that the matters to be dealt with are basically human relations problems. Beyond that, it requires what might be termed an "uncanny" ability to grasp the real situation, amid pretenses and arguments, which often are made for purposes ulterior to the arbitration. And it calls for imagination and ingenuity for finding acceptable bases of settlement within the framework of reference—which, of course, may never be departed from.

2. Its annual *Proceedings* are a treasure of arbitration literature. The *Proceedings* are the source of informed, thoughtful commentary on issues of topical and long-term importance by leading scholars, advocates, and arbitrators. Year after year, papers published in the *Proceedings* have critically examined current issues and reexamined traditional ideas.[12]
3. It has been a fulcrum for forging consensus. Perhaps the Academy's most enduring—if least appreciated—role has been to help create consensus among arbitrators with respect to fundamental principles. At Academy meetings, in formal and informal sessions, arbitrators discuss important trends, criticize each other's thinking, and explore new and unconventional viewpoints. Persuasive new ideas are applauded and eventually adopted in arbitration decisions, while less persuasive ones are exposed and eventually rejected.[13]

Protection From Unjust Dismissal

Just cause swept away hundreds of years of common law. It did nothing less than stand on its head the "employment-at-will" standard, under which the employer had the right to fire employees for virtually any reason and replace it with the presumption that a worker is entitled to continued employment.[14] The just cause standard created a wholly new balance in the workplace.

When arbitration clauses became widespread in labor contracts in basic industries in the 1930s and 1940s, the responsibility for interpreting the just cause standard fell to arbitrators. The task was

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Witte, *The Future of Labor Arbitration—A Challenge*, in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books 1957), 1, 16–17.

[12]Fine examples, among many, include Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30, and Dunsford, *Arbitral Discretion: The Tests of Just Cause: Part I*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 23.

[13]The Academy's current Common Law of the Shop project may articulate consensus in an unprecedented way.

[14]Abrams and Nolan wrote that under just cause, "the employee is entitled to continued employment, provided he [or she] attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with [the] employer's business by . . . activities on or off the job." Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594.

daunting. The just cause standard is equal in breadth to the Due Process clause of the Fourteenth Amendment and, like the Due Process clause, must be given meaning in countless situations.

As commentators at the first few Academy meetings lamented, there were few accepted standards for applying just cause.[15] At the second annual Academy meeting, George Taylor said that he thought it "virtually impossible for most ad hoc arbitrators . . . to acquire a sound basis for making the value judgments involved in [just cause] cases" and argued that their decisions would be hopelessly inconsistent.[16] Over the next decades, however, arbitrators have in fact developed clear, reliable criteria for applying the just cause standard in a wide range of cases. Much of the reason for the continuing vitality of labor arbitration is that it has provided specific criteria for different just cause issues, that these criteria have emerged from the realities of the workplace, and that they continue to evolve as problems in the workplace change.

There are dozens of discrete just cause issues. Any one would serve as a prism for exploring emerging doctrine, from the early discussions of progressive discipline[17] to arbitral treatment of theft, workplace violence, negligence, sleeping on the job, or disloyalty. We have chosen off-duty misconduct as an especially good example.

For arbitrators first applying just cause in off-duty misconduct cases, the fundamental question was whether just cause limited the employer's right to discharge for conduct that occurred beyond the bounds of the workplace. In 1944, Dean Harry Shulman, in a well-known *Ford Motor Co.*[18] decision, answered this question:

> We can start with the basic premise that the Company is not entitled to use its disciplinary power for the purpose of regulating the lives and conduct of employees outside of their employment relation. . . . What the employee does outside the plant is normally no concern of the employer.[19]

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[15]As Professor Edwin Witte argued in his address to the first annual meeting of the Academy, "acceptable standards for the decision of many, if not most, of the issues in disputes over contract terms are lacking." Witte, *supra* note 11, at 15.

[16]Taylor, *Effectuating the Labor Contract Through Arbitration*, in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books 1957), 20, 28.

[17]Arbitrators have also developed consensus on procedural issues that were unsettled 50 years ago. In *Douglas Aircraft*, 28 LA 198 (1957), Edgar Jones, Jr., faced vigorous arguments from the employer that the union should present evidence first in a discharge case and that the discharged grievant should be excluded from the hearing room during the testimony of management witnesses. Few employers would raise these issues today.

[18]Opinion A-132 (1944).

[19]*Id.*

Shulman cautioned, however, that the question was connection, not location. He wrote: "the jurisdictional line that limits the Company's power to discipline for misconduct is a functional, not a physical line. It has the power to discipline for misconduct directly related to employment."[20]

It is worth pausing for a moment to contemplate the deep change embedded in this answer. Unlike the employment-at-will doctrine, just cause for the first time created limits on the employers' right to control the private lives of employees.

In the mid-1940s arbitrators were in agreement on the broad principle articulated by Shulman. The challenge was to define this boundary, this functional line, in practice. In reviewing off-duty misconduct cases reported in the *Labor Arbitration Reports*, what stands out is that each decade brought with it a new wave of off-duty misconduct problems. In the late 1940s, reported off-duty misconduct decisions dealt almost exclusively with off-duty fights or off-duty crimes, such as driving under the influence, burglary, or violent crimes.[21] In these early reported decisions, arbitrators discussed the boundary between work and private life in very general terms. Some early decisions demonstrated that, just as George Taylor feared, the general principle, in the hands of some ad hoc arbitrators, could be a rather blunt instrument. In a 1946 case, an arbitrator ordered reinstatement of an employee who physically attacked her supervisor while off-duty. The arbitrator refused to consider the source of the argument, concluding that "[t]he . . . only authority over the personal lives of employees, once they leave their place of employment, is the civil authority. For such alleged assaults, the courts provide an appropriate remedy."[22] During this decade, other arbitrators put forward the criterion that soon prevailed: that off-duty fights are cause for discipline if they originate in the workplace.[23]

In the 1950s, arbitrators continued to deal with cases involving off-duty fights and off-duty crimes. This decade also brought a wave of cases involving a very different type of off-duty activity: the McCarthy era "loyalty-security" cases. These cases again provided a stark contrast between, on the one hand, employees' fates under

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[20] *Id.*

[21] There were also a few cases involving "immoral behavior." For example, in 1949, Arbitrator Harold Gilden explained to an employer that it did not have just cause to fire a woman for setting a bad example by having an illegitimate child. *Crane Co.*, 12 LA 592 (1949).

[22] *Pioneer Gen-E-Motors Corp.*, 3 LA 486, 488 (Blair 1946).

[23] *National Lock Co.*, 10 LA 15 (Epstein 1948).

just cause and, on the other, employment-at-will standards. There was no question that without just cause protection employees could be fired on any suspicion of past or present communist leanings. When the earliest of these cases made their way to arbitration, however, arbitrators generally ruled that suspected or admitted membership in the Communist Party, however distasteful to the employer or the arbitrator, was not cause for discharge absent workplace misconduct.[24]

As the era progressed, cases arising in newspaper, defense, and "basic" industries, such as steel, presented the most difficult issues for arbitrators. In cases involving these industries, decisions went both ways on whether employees could be fired as "security risks" when they claimed their Fifth Amendment privilege to refuse to testify before government committees. The best-reasoned decisions of this era bring one of labor arbitration's greatest strengths into sharp focus. In these decisions, arbitrators resisted pressures—which must have been immense—to accept generalizations about security risk and insisted on looking to the specific circumstances. In a 1957 *Republic Steel Corp.*,[25] case the employer argued to Harry Platt that any of its employees who took the Fifth Amendment before the House Un-American Activities Committee (HUAC) were security risks and could be fired. Platt responded: "Whether one is a security risk is a factual question and not something to theorize about."[26] He then looked at the facts, found that the grievant was a pipefitter who was not in a sensitive position requiring security clearance, and ordered reinstatement.

During the 1950s, the glare of publicity surrounding HUAC hearings also forced arbitrators to examine rigorously the effect of publicity on business. Employers typically argued that publicity about employees' responses at the hearings—taking the Fifth Amendment—would harm business. A few arbitrators questioned

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[24]Reported cases began appearing in the late 1940s and became prevalent in the 1950s. In such early cases as *Spokane-Idaho Mining Co.*, 9 LA 749 (Cheney 1947), *Foote Bros. Gear & Mach. Corp.*, 13 LA 848 (Larkin 1949), and *Consolidated W. Steel Corp.*, 13 LA 721 (Pollard 1949), arbitrators held that the fact of Communist Party membership, or suspicion of membership, was not just cause for discharge. In *Consolidated W. Steel*, as in many other cases in this era, arbitrators stressed that the government had the right to prosecute a citizen for disloyalty or deny an employee security clearance. The arbitrator reasoned that absent a specific delegation of such authority to the company, the company did not have just cause to discharge for suspected disloyalty to the government.

[25]28 LA 810 (Platt 1957); *see also Pratt & Whitney Co.*, 28 LA 668 (Dunlop 1957); *but see Bethlehem Steel Co.*, 24 LA 852 (Desmond 1955).

[26]28 LA at 815.

whether this evidence should be considered at all.[27] In most reported decisions, however, arbitrators concluded that the potential fallout from publicity was a real concern for employers and should be considered. On the other hand, they concluded that this evidence must be scrutinized with great care. Although these are not the first off-duty misconduct cases dealing with publicity, they are the earliest reported decisions to include detailed, highly factual analysis of the actual effect of publicity on the employer's business.[28] For example, in *Worthington Corp.*,[29] Arbitrator Joseph McGoldrick painstakingly reviewed Springfield, Massachusetts, area newspaper, television, and radio reports of the grievants' refusals to testify. He concluded:

> Certainly publicity of this sort would be unpleasant and embarrassing to any employer. Its effect upon his business would depend on many factors. . . .
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> The Worthington Company is a very old company. It has been in business for over a hundred years. It has a nation-wide reputation. It has plants in many different, widely scattered locations. Its products, too, have long enjoyed a good reputation. They are not, for the most part, sold to the retail market. . . .
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> . . .
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> A careful appraisal of the publicity . . . does not convince us that it would do any appreciable harm to the business of the Worthington Company or its Holyoke plant.[30]

The HUAC cases also raised the issue of co-workers' unwillingness to work with suspected communists. In some of these cases, arbitrators questioned whether a group of employees should be allowed to dictate the fate of a fellow employee.[31] As with publicity, most arbitrators considered the evidence, but looked closely to see whether assertions were supported by the facts. By the end of the 1950s, debate over the potential relevance of both publicity and co-worker sentiment in off-duty conduct cases had largely ended, but arbitrators had collectively become more rigorous in demanding hard supporting evidence.

The reported cases reflect that by the end of the 1950s considerable consensus had emerged on questions to be asked and criteria to be considered when determining whether or not there is a nexus between off-duty misconduct and the workplace. Much more than

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[27] *Bethlehem Steel Co., supra* note 25.
[28] *See, e.g., J.H. Day Co.*, 22 LA 751 (Taft 1954).
[29] 24 LA 1 (1955).
[30] *Id.* at 10.
[31] *Republic Steel Corp., supra* note 25.

in the 1940s, arbitrators were asking specific, predictable questions to discover the circumstances of each case: What exactly was the off-duty misconduct? What exactly does the company do? Who are its customers? What does the worker do? Does he or she work with the public? Has there been publicity? Was the employer named? What do co-workers think about working with the employee?

The 1960s left behind HUAC and brought in the counterculture. This decade brought a flood of cases involving off-duty use or sale of drugs. In a typical early 1960s case, *Linde Co.*,[32] an employee who pleaded guilty to possession of marijuana was fired. The company argued that anyone convicted of a drug charge was "an undesirable employee." Arbitrator Hubert Wyckoff held that the company could not rely on the bare fact of a conviction, without considering the specific facts, including the court's decision to place the grievant on probation. As in the HUAC cases, arbitrators looked past general assertions and asked specific questions tailored to determine whether there was a nexus between the off-duty drug charges and work performance or harm to the employer's business. What were the circumstances of the arrest or conviction? Did the employer rely only on the fact of the arrest or did it have independent information? Was there any evidence of on-the-job impairment?

Public-sector unionization, which began in the 1960s, led to a new wave of off-duty misconduct cases that began rolling through in earnest in the 1970s and 1980s. These cases required arbitrators to reexamine many of the criteria developed in private-sector cases. In early public-sector cases, employers argued that all public employees should be held to a higher standard, that they should be "above reproach."[33] Predictably, arbitrators rejected this general assertion and focused on the specific employer, the specific job, and the specific misconduct. In *City of Wilkes-Barre*,[34] Arbitrator John Dunn ordered reinstatement of a street-sweeper operator who had been fired after he pleaded guilty to possession of marijuana:

> The City does have certain unique qualities which must be upheld in public dealings, but the Grievant does not fit into the group in which these qualities rest. Police officers should be free of criminal taint. Firemen should be void of the tinge of pyromania. Controllers and

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[32] 37 LA 1041 (1962).
[33] *County of Allegheny*, 66 LA 185 (Stonehouse 1976).
[34] 74 LA 33 (1980).

> treasurers should be free of the suspicion of embezzling tendencies. . . . City service, in and of itself, [however] does not deprive men of the normal inadequacies and failings to which all of human nature is entitled.[35]

In public-sector cases, arbitrators had to adapt many criteria. How is damage to the employer to be measured when profit is not the employer's goal? To what standard should police be held, in light of their responsibility to uphold the law? What is the balance between teachers' private lives and their responsibility to provide guidance and command respect?[36] Arbitrators continue to address new off-duty misconduct issues in the public and private sectors today.

Using off-duty misconduct cases as a paradigm for the evolution of arbitral thinking on a single just-cause issue, what do we find?

First, arbitrators reached consensus on a core principle, a fundamental question to be asked, to reach a fair result in this type of case.

Second, arbitrators resisted pressures to accept general allegations and, instead, grounded their decisions in the specific circumstances of each case. In cases like *Republic Steel Corp.*, *Linde Co.*, and *City of Wilkes-Barre*, arbitrators looked below the cloud cover of general, often ideological assertions and were guided by the actual landscape of specific information about the employer, the grievant, the grievant's job, the circumstances of the off-duty conduct, and its actual effect on the employer and the workplace.

Third, over time and with guidance from the parties and each others' best-reasoned decisions, arbitrators agreed on specific functional, flexible criteria[37] to help them decide these cases. To turn to our botanical metaphor, what one sees is the organic development of an intricate branching set of criteria to address different types of cases within this particular just-cause area. As one steps farther back, one can see similar intricately branched arbitral doctrine, sometimes fully formed and sometimes emerging, for virtually every just cause issue the parties and arbitrators face today.

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[35] *Id.* at 36.

[36] *Archdiocese of Philadelphia Secondary Sch. Sys.*, AIS 178-10 (Galfand 1983).

[37] For a thorough examination of arbitral criteria, see Hill & Kahn, *Discipline and Discharge for Off-Duty Misconduct: What Are the Arbitral Standards?*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), 121.

The Great Management Rights Debate and the Silent Contract

Collective bargaining means power sharing between labor and management in the workplace, and that has not come easily. The collective bargaining contract exposes tensions, compromises, and unresolved conflicts over power sharing in the workplace. It has been particularly difficult in the penumbral area known as management rights. Discussion of management rights has always been contentious. It pushes the ideological buttons of labor and management partisans like no other subject. In arbitration, the most contentious issue in the management rights debate has been over questions involving the silent contract. This is a subject that Donald Crawford once described as "pandemonium."[38]

When a contract does not address an issue explicitly, management typically argues that it has an inherent or reserved right to act unilaterally. The theory on which this argument rests is that management possessed all rights before collective bargaining and that it continues to possess all rights except those that have been expressly limited by contract. The reserved rights theory is sometimes spelled out in a broad management rights clause. Ironically, however, even if a contract is silent on the subject of management rights, employers continue to argue that their rights are implied and inherent. Management would like to have it both ways.

Where a contract contains a broad management rights clause, however, unions argue that the contract as a whole contains implications that limit management's discretion to act unilaterally. Of course, if a contract does not contain a broad management rights clause, unions argue that the absence of such a clause means that management has no reserved rights and none should be implied. Unions also would like to have it both ways.

The great debate over reserved management rights and implied obligations has continued unabated for half a century. At the Academy's 1955 annual meeting, for example, James Phelps of Bethlehem Steel Company, complained: "I have found among arbitrators less consistency in their approach to that question [of the reserved rights of management] than I have found in the

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[38]Crawford, *The Arbitration of Disputes Over Subcontracting*, in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1960), 51, 57.

consideration of any other subject."[39] To which Arthur J. Goldberg, then–General Counsel to the Steelworkers, replied: "[The] concept of management's reserved rights has been misused so often and has been expressed so unfairly not only by management representatives but even on occasion by some arbitrators."[40] That was 42 years ago.

More recently, at the Academy's 1989 annual meeting, Mittenthal and Bloch[41] gave a thoughtful paper dealing with silent contracts. They, like the Supreme Court and a host of other arbitrators and scholars,[42] said that a collective bargaining contract should not be interpreted as though it were a commercial contract and that a seemingly silent contract may have myriad implications to be inferred from its context and history.[43] Drawing implications from a contract, they pointed out, may be essential on a case-by-case basis to preserve the parties' bargain. The response to this balanced restatement of familiar ideas was extreme. One would have thought that they had advocated child pornography or flag burning.

Susan Tabler, a management lawyer, said indignantly, "[T]his sounds like reading entrails: it is 'voodoo arbitration.'"[44] And she insisted:

> Management comes to the bargaining table with all the apples, and bargaining is a process wherein the union asks for more apples in return for the employees' continuing to do what they are supposed to do—work. . . . [M]anagement does not need arbitrators to bestow "reserved rights" upon it . . . It is simply a reality, a fact of life in our capitalistic society—a right stemming from controlling the purse strings.[45]

And a union lawyer, Barry Macey, responded with equal indignation:

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[39]Phelps, *Management's Reserved Rights: An Industry View*, in Management Rights and the Arbitration Process, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1956), 102, 106.

[40]Goldberg, *Management's Reserved Rights: A Labor View, id.* at 118, 123.

[41]Mittenthal & Bloch, *Arbitral Implications: Hearing the Sounds of Silence: Part I*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 65.

[42]*See, e.g.*, Cox, *Reflections Upon Labor Arbitration in the Light of the* Lincoln Mills *Case*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), 24, 33–54.

[43]Mittenthal & Bloch, *supra* note 41.

[44]Tabler, *Arbitral Implications: Hearing the Sounds of Silence: Part III. A Management Viewpoint, id.* at 92, 94.

[45]*Id.* at 92.

> [T]his exaggerated concern [of arbitrators] with management operational prerogative has nothing to do with what the parties said, intended, or agreed to at the bargaining table. . . . The source of this preoccupation with managerial prerogative is . . . the view of the arbitrators as to what the appropriate roles of the parties in our capitalist, market economy should be.[46]

This exaggerated, partisan rhetoric masks an important reality. By and large, labor and management agree with arbitrators that difficult issues arising under a silent contract cannot be resolved simply by relying on broad theories and glittering generalities about management rights and implied obligations. If it were that simple, IBM's famous chess-playing computer, Deep Blue, could be programmed to decide such cases far more quickly than any member of this Academy and for a much smaller fee. Instead, on a case-by-case basis, generalities about management rights and implied obligations are subsumed in a close examination of a contract's terms, its history, the parties' past practices, and the economic and human needs of the parties. In silent contract cases, arbitrators engage in a complex decisional process that requires balancing the parties' interests through an exercise of discretion and judgment. Richard Mittenthal and Howard Block observed in an insightful essay of arbitral discretion that the more ambiguous or general the contract language, the greater the arbitrator's discretion will be.[47]

The issue of mandatory overtime under a silent contract is a clear prism through which to look at the development of arbitral principles and the exercise of discretion in the last 50 years. Like off-duty misconduct, the issue of mandatory overtime typically involves a friction between indisputably legitimate interests—management's interest in requiring overtime is based on its need to operate efficiently and to respond to changing demands for its goods and services. Employees, however, have an interest in limiting their work to prescribed hours so they may plan their private lives and devote nonworking time to family, community, and leisure pursuits. For today's two-career families, juggling job duties with family life causes enormous stress and anxiety.

To be sure, the parties can—and many do—resolve the issue of mandatory overtime at the bargaining table. Some contracts ex-

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[46]Macey, *Arbitral Implications: Hearing the Sounds of Silence: Part II. A Union Viewpoint, id.* at 82, 84.

[47]Mittenthal & Block, *The Ever-Present Role of Arbitral Discretion,* in Labor Arbitration Under Fire, eds. Stern & Najita (Cornell Univ. Press 1997), 231, 255.

pressly require employees to work overtime, while others make overtime voluntary. Most contracts, however, are silent on the subject either because the issue has not arisen or because the parties follow a practice that had not been challenged.

Over the last 50 years, scores of published arbitration decisions have resolved mandatory overtime issues under a silent contract. Through the exploration of a variety of fact patterns, these decisions provide comprehensive and predictable guidance to arbitral thinking.

In our discussion of off-duty misconduct cases, we stressed that the basic principle of nexus was settled 50 years ago and that the challenge to arbitration was to adapt it to a changing social environment. The mandatory overtime cases have a different profile. Basic principles were not settled 50 years ago. They were established slowly over a period of years. And as leaves gradually appear on a young tree in the spring, arbitration decisions added a host of new principles to the basic ones.

Several cases in the mid-1940s held flatly that under a silent contract, management may not require overtime. In a 1947 case,[48] Saul Wallen considered a contract that provided for an 8-hour day and a 40-hour week but was silent as to overtime. He reasoned that because the parties fixed daily and weekly hours of work but said nothing about overtime, management could not require overtime. To compel overtime, he said, would mean that the employer would be free to schedule a workweek of any length and to require employees, under the penalty of discharge, to work long overtime hours. He did not even consider management's business need for overtime work. Two decades later, he changed his mind sub silentio.[49]

In 1948, Aaron Horvitz agreed in principle with Wallen. He said that "unless there [is] a clause in the contract giving the employer the right to schedule reasonable overtime work, an *individual* employee not acting in concert with others could in his discretion refuse same."[50] But, according to Horvitz, while an employee has the right to decline overtime, he must give the employer reasonable advance notice of his intention so that the employer can make arrangements. This view is virtually the opposite of the position taken by most arbitrators today.

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[48]*Connecticut River Mills*, 6 LA 1017 (1947).
[49]*Fitchburg Paper Co.*, 47 LA 349 (Wallen 1966).
[50]*United States Rubber Co., Shoe Hardware Div.*, 11 LA 305, 306 (1948) (emphasis in original).

In 1945, Paul Lehoczky ruled that a broad management rights clause did not give management an implied right to require overtime for emergency work. Nevertheless, unlike Wallen and Horvitz, he went on to consider management's business need for overtime and balanced it against the grievant's need to go pheasant hunting on the last day of the hunting season. He concluded that pheasant hunting was an important recreational activity in the grievant's life,[51] plainly more important than management's claim on his time to perform emergency overtime.

When the issue arose at Ford[52] in 1948, Harry Shulman expressed what is the current view of arbitrators. In disagreement with Wallen, Horvitz, and Lehoczky, Shulman reasoned that, where a contract is silent on the subject of mandatory overtime, management is implicitly entitled to require reasonable overtime.[53] But what is reasonable? And when may an employee decline to work overtime for personal reasons? Shulman understood that these questions should be viewed in shades of gray. He rejected a "rule of thumb" and, instead, proposed general criteria for balancing management's needs against employees' needs:

> [W]hile an employee's refusal to work overtime may be a breach of duty for which he may properly be disciplined, his refusal may be justified and, if justified, is not a ground for disciplinary penalty. The refusal may be justified at least in the same way as absence from work during the normally scheduled eight hours. But it may also be justified by further considerations peculiarly applicable to overtime.
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> . . . [E]mployees are not on continuous call 24 hours a day. While they must recognize that they may be called upon to work overtime, they may properly plan their lives on the basis of their customary work schedules. . . . [W]hen an employee is asked to work overtime, he may not refuse merely because he does not like to work more than eight hours, does not need the extra money, or for no reason at all. But if the overtime work would unduly interfere with plans he made, then his refusal may be justified. If he is given advance notice sufficient to enable him to alter his plans, he must do so. But if the direction is given to him without such notice, then it would be arbitrary to require him to forego plans which he made in justifiable reliance upon his normal work schedule . . . . A rule of thumb is not possible. What is required is sympathetic consideration of the individual's situation and make-up.[54]

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[51] *National Elec. Coil Co.*, 1 LA 468 (1945).
[52] *Ford Motor Co.*, 11 LA 1158 (1948).
[53] Ostensibly, Shulman based his decision on a clause that gave management the express right to set starting and quitting times, but the contract was silent as to overtime.
[54] 11 LA at 1160.

The Shulman view gradually prevailed as to management's basic right under a silent contract to require a reasonable amount of overtime, with reasonable notice, subject to sympathetic consideration of the individual's situation:

1. Harry Platt[55] and Whitley McCoy,[56] in 1948, emphasized the parties' past practices as a guide to when management may compel overtime.
2. Maurice Trotta,[57] also in 1948, ruled that management could discipline employees who acted in concert to refuse overtime.
3. Lewis Tyree,[58] in 1949, ruled that an employee may be disciplined if he reneges on a voluntary promise to work overtime.
4. Harold Gilden,[59] also in 1949, ruled that management must give employees reasonable advance notice of mandatory overtime.
5. Robben Fleming,[60] in 1955, ruled that management must distribute mandatory overtime fairly.
6. Carl Schedler,[61] in 1958, ruled that management may not require so much overtime as to impair employee health, but employees may not decline overtime simply because it interferes with their holiday plans.
7. Tom Roberts,[62] in 1963, ruled that management may not abuse its discretion in requiring overtime.
8. Burton Turkus,[63] in 1966, ruled that there was universal agreement among arbitrators that employees must first obey an order to work overtime and grieve later, whether or not management's overtime order violated the contract.
9. Harold Jones,[64] in 1971, ruled that management may not single out one employee for discipline to set an example to others that they must work overtime.

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[55] *Huron Portland Cement Co.*, 9 LA 735 (1948).
[56] *Dortch Stove Works*, 9 LA 374 (1948).
[57] *Watson-Flagg Mach. Co.*, 10 LA 9 (1948).
[58] *Campbell Soup Co.*, 13 LA 373 (1949).
[59] *Texas Co.*, 14 LA 146 (1949).
[60] *Wagner-Malleable Iron Co.*, 24 LA 526 (1955).
[61] *American Window Glass Co.*, 30 LA 342 (1958).
[62] *Lockheed Missiles & Space Co.*, 41 LA 868 (1963).
[63] *Union Carbide Corp.*, 46 LA 607 (Turkus; chair 1966).
[64] *Vulcan Iron Works*, 56 LA 538 (1971).

10. Reg Alleyne,[65] in 1972, ruled that management may not discipline an employee, at home on his day off, who refuses to report to work to perform emergency overtime.
11. Tim Bornstein,[66] in 1979, ruled that management has the burden of proving that an employee intentionally refused to receive notice from management to report for emergency overtime.
12. Ronald Talarico,[67] in 1985, ruled that an employer, which had gone to considerable lengths to accommodate the religious beliefs of an employee, could discharge her when she declined under any circumstances, even in an emergency, to work overtime on Saturdays.
13. Dennis Nolan,[68] in 1991, ruled that management could discipline an employee who declined to work overtime because of child-care problems but who was unwilling to make any effort to make alternative child-care arrangements.

And so, after 50 years, can it be said that the silent contract is any longer silent on the subject of mandatory overtime? By the gradual layering of decisions, decade after decade, arbitrators have filled the gaps and given clear and predictable direction to the parties. Speaking to the Academy at the 1959 meeting, Archibald Cox said: "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies and the need for a rule even though the agreement is silent all require a creativeness in contract administration . . . ."[69]

In dealing with mandatory overtime—and one might add subcontracting, work assignments, production standards, and a host of other management rights issues under a silent contract—we think that during the last half-century arbitrators have met that challenge.

Conclusion

Fifty years ago—1947—when the Academy and modern arbitration were born, America had just emerged victorious from World

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[65] *Toscopetro Corp.*, 59 LA 604 (1972).
[66] *Xidex Corp.*, 73 LA 864 (1979).
[67] *Centerville Clinics*, 85 LA 1059 (1985).
[68] *Southern Champion Tray Co.*, 96 LA 633 (1991).
[69] Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), 24, 37.

War II. The Great Depression was fading from memory; the economy was booming. A third of the national work force was represented by unions, and creative collective bargaining was providing job security and employment benefits never before enjoyed by the vast majority of American workers. American colleges and universities were achieving international eminence. American science and technology were setting the world's standards. American literature was admired as never before. And abstract expressionism, a uniquely American school of art, dominated the international art scene. America faced the future with boundless self-confidence and optimism.

Since then, much has changed. Foreign wars—Korea and Vietnam—have sapped our national self-confidence. Domestic wars have been fought, without victory, against poverty, racism, crime, and drugs. The economy has had ups and downs, and labor today represents a sharply declining percentage of the national work force. Other nations have risen from the ashes of World War II to compete for jobs, markets, and capital, as well as for the artistic, technological, and scientific preeminence that had once been America's.

We cannot know labor arbitration's future in the coming century. Arbitration has been tied to the kite strings of collective bargaining, and the winds are unpredictable. Be that as it may, for half a century labor arbitration has served labor and management and the broader American community well. It has provided justice in the workplace. It has responded to an ever-changing social environment. It has skillfully balanced the legitimate needs of management and employees. Above all else, it has been a much-admired model for the peaceful resolution of disputes that has been widely copied and adapted.