CHAPTER 3

INVITED PAPER: THE HEART OF THE MATTER

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Little in this paper will be new to many in this audience. Indeed, as I reread it in the past few days, I had some regrets about covering so much old ground. However, what I have tried to do is to place some well-established truths in new packages so that we can better understand *what* it is we do and *how* we might do it better. That is a plea for self-improvement, born of my yearly chats at the new-member orientation sessions.

There are many ways of looking at arbitration. For the most part, we view the process as if we were microbiologists. That is, we gaze through our case experiences, our "microscope," to seek insight into the nitty-gritty subject matter of arbitration. Papers are written about discipline, contracting out, past practice, and so on. Hornbooks—whether Elkouri & Elkouri, Hill & Sinicropi, or Bornstein & Gosline—address each such subject in detail, extracting principles and exceptions from the published awards. All of this work has produced excellent source material and thoughtful analysis.

However, it is possible to view the process from another vantage point. If you examine arbitration as a cosmologist in an attempt to see the entire arbitration universe as one, a different picture emerges. That picture is rarely written about, but, assuming one's "telescope" has a high degree of resolution, it can tell us a great deal about what we do and how best to do it.

The purpose of this paper is to focus on the vast discretion arbitrators possess, the different skills we employ at different stages of our work, and the kind of self-awareness essential to the wise exercise of those skills. Of course, it is critical to attain a better understanding of the subject matter of arbitration. But it is also critical to find the paths to an ever-better use of our skills.

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The Hearing: Pragmatism

The hearing is, of course, the starting point. Because the collective bargaining agreement says practically nothing about how a hearing is to be conducted and because the Code of Professional Responsibility speaks in very general terms about our role, we are left largely to our own devices. Our discretion is almost boundless. We must, above all else, be *pragmatic*. That is, we must develop the ability to see how our world functions—its values, its expectations, its practices. Without such sensibilities, an arbitrator is not likely to grow.

Two goals stand out—first, to make certain the parties are free to pursue their case in whatever way they see fit with a minimum of disruption, and, second, to make certain we, as arbitrators, have sufficient evidence and argument before us to allow for an informed decision. But the freedom given to the parties to shape their case must not be abused. Excessive repetition, obvious irrelevancy, disruptive behavior, and the like should be resisted. A balance between freedom and order must be struck in the interest of fairness and expedition. Rulings on the parties' objections should be explained where possible. Difficulties that arise should be explored with the parties in an attempt to find an amicable solution.

To what extent should an arbitrator intervene during the hearing? Should you question witnesses only to clarify what they have already said or should you, when appropriate, explore areas nowhere raised in their testimony? Should you seek additional evidence the parties failed to produce? Should you state (and restate) the issues during the hearing to make sure everyone is "on the same page"? Should you try to mediate a resolution of the dispute and, if so, under what circumstances? Should the sophistication of the parties or the quality of their representation at the hearing influence your response to these problems? In short, just how active or passive a role should you play at the hearing?

There are a limitless number of such questions. The answers are likely to change from case to case. Whatever the answer, we should avoid antagonizing the parties' spokesmen or compromising the image of impartiality we wish to project. Our ability to handle a problem sensibly will depend on how carefully we have listened to what was said or what was left unsaid. It will depend as well on how quickly we have absorbed and processed what we have heard. Tact, timing, respect for others, balance, and self-control must be dis-

played. The hearing tests not just the parties' powers of persuasion but also the arbitrator's ability to oversee the dispute with a fair, firm hand without being overly intrusive and yet to be involved enough to help illuminate the issues.

There are no hard-and-fast rules. Pragmatism is the key, an elastic, commonsense approach based on thoughtfulness and fair play. One learns this skill, case by case, over the years. How wise you are in exercising this large discretion is bound to influence your acceptability.

The Decision: Analysis and Intuition

The most critical aspect of our work is obviously the *decision*. Here, the skills are entirely different. Decisionmaking requires *analysis*, the ability to reduce a dispute to its essential pieces, to locate the core components, and to find an answer that seems true to the evidence and arguments and that, more importantly, is likely to meet the parties' reasonable expectations. Those expectations are sometimes apparent. But we must more often attempt to divine, through our experience or through common sense, what is workable, what is sensible. Thus, pragmatism reappears and plays a large role in decisionmaking as well. What I am really describing is an *intuitive* sense, the ability to make an educated guess, an experiential hunch. When analysis takes you to where intuition tells you not to go, it's time for reconsideration. Or where a strong intuition cannot find a sound analytic footing, something is amiss.

Factfinding is often the most significant part of the decisional process. Most cases turn on the facts. The hard job of organizing the facts, in our heads or on paper, is seldom discussed. The conflicts and uncertainties are resolved in a variety of ways. Credibility findings, inherent probability, weight of the evidence, presumptions of one kind or another, "judicial notice," burdens of proof—all serve to help us through the thicket. Intuition is, once again, what we rely upon. And we may end up molding the evidence to support the unspoken intuition because we dare not say in the opinion that our factfinding was the product of an intuition born of experience.

Contract interpretation, however, is essentially *analytic*. One can examine the words in dispute in many ways—their normal meaning, the context in which they were written, their underlying purpose, their relationship to other contract provisions, the bargaining history, or the practice with respect to such language.

These are the customary means of adopting a particular interpretation. They may be buttressed or undermined by past awards in the same bargaining relationship or by the timeworn "rules of contract construction" developed through the common law. When the contract language does not address the issue before us, when a true gap is present in the agreement, we may dismiss the grievance as being outside the scope of the agreement. Or we may find an answer through some reasonable inference or implication from specific contract language or from the agreement as a whole.

Thus, our decisionmaking is fraught with discretion. Sound arguments are offered by labor and management. Choices must be made again and again. Language may be interpreted broadly in one case but narrowly in the next. Words may be construed according to their commonplace meaning in one case but according to their purpose in the next. The analytic process is often dark and uncharted. The intuitions we embrace may be highly subjective. How we find our way through the maze, how well we explain the path we chose, will determine whether we remain acceptable to the parties.

The value judgments behind our decisions also reveal the breadth of our discretion. Consider the most frequent question arbitrators confront: Was discharge too severe a penalty? The relevant factors are familiar to all of us. How serious was the offense? Was the misconduct characteristic of the grievant or a mere momentary aberration? What is his past disciplinary record? How many years of continuous service does he have? Was his misconduct condoned in any way by prior words or acts of supervision? Does the discharge penalty subject him to "disparate treatment"? Has the possibility of correction been exhausted through progressive discipline? Once again, the questions seem boundless. The arbitrator's moral sensibility is brought into play. Our rough sense of justice—or, better yet, injustice—may be the decisive consideration. Indeed, the way in which the issue is framed in the arbitrator's mind may influence the outcome. To ask whether discharge was a reasonable penalty is one thing; to ask instead whether management's decision to discharge was unreasonable is not quite the same thing.

Consider, too, such terms as "work" and "job," which appear so often in a collective bargaining agreement. Those terms are extremely elastic. Narrowly viewed, they produce one result; broadly viewed, they produce an entirely different result. But the parties rarely attempt to define such terms in their agreements. When the

dispute reaches arbitration, the parties define "work" or "job" in whatever way suits their purposes. In doing so, they reveal their underlying interest. The union chooses a definition that will help to ensure the stability of the work force. The employer chooses a definition that will further its need for operational flexibility. Arbitrators move cautiously on this terrain, emphasizing one interest or the other, depending on the peculiarities of each case. Our discretion is large indeed.

The Opinion: Art

The final phase of our work is the written opinion. Here, the skills are again different, although pragmatism still has a large role to play. Opinion writing, unlike analysis and intuition, is a matter of *art*. We should have the ability to express our thoughts in an organized, forceful, and interesting fashion. The acceptability of our ruling may well depend upon how successful we are in crafting an opinion that makes the strongest possible case for our view.

Consider the range of questions on which we ought to focus. For whom are we writing the opinion? How can we best persuade the loser that it ought to have lost? How neutral should our recitation of the facts be? Or should the write-up of the facts be shaped in such a way as to strengthen our ruling? Which of the several arguments available to us should be used? Which should be discarded? How can our rationale best be presented? What use, if any, should be made of arbitration precedents? To what extent should our perception of the parties' needs, or our own felt need to demonstrate impartiality, intrude into the opinion writing? And there are, in addition, the countless questions of form, style, and content.

This is a veritable feast of discretion. Of course, it can be argued that the parties are primarily interested in the result. That is probably true. But an emphasis on art, although it may go unappreciated, has a far more important purpose. It is a fail-safe device, a means of forcing arbitrators to think through a decision once more with great care before it is formally issued to the parties. Artistry can be realized only through hard work, and sound decisions are likely to be the product of hard work. Every paragraph, every sentence, every word has a potential impact on how the award will be received. And, at a personal level, it is important to find your own voice. That is possible only if we experiment, only if we avoid repetitive use of the same devices. Let the opinion arise

from the nature of the dispute and let its form and style emerge from the unique circumstances of each case.

An Overview

To enhance our performance, it is important to keep in mind the many different skills we employ at different stages of a case. A highly developed pragmatism is invaluable. Our decision should be reasonable, that is, sensitive to the parties' needs and within the parties' broad expectations. A ruling that meets these standards is likely to be acceptable even if your analysis and art are mediocre. A ruling that falls outside the parties' range of expectations is almost certain to be unacceptable notwithstanding a virtuoso display of analytic skill and artistry. Logic has its limitations. A good feel of what is sensible, what is likely to work, often trumps the other more sophisticated skills.

Analysis, with an occasional assist from intuition, can usually lead us to the correct answer. Assuming the existence of these skills, you should be able to uncover any flaw in your reasoning. Because the parties' arguments rarely touch upon every facet of the case, analysis offers the possibility of finding fresh ways of examining the issues. Some of these newly opened paths often provide a key to solving the problem.

Artfulness in opinion writing will reinforce sound analysis. It may even, to the untrained eye, obscure poor analysis. And a lack of art may undermine sound analysis. How well we express ourselves on the written page is a reflection of how well we have analyzed the problem before us. The written opinion is a way of testing the validity of our conclusion as well as persuading the loser that it ought to have lost. No matter how well we perform our job, however, we may produce a wrong-headed award simply because that is what the contract language commands.

All of these skills interact with one another in varying degrees. You cannot be truly practical without being analytic; you cannot be sound analytically without being practical; and you cannot be artful without the others. How well you perform is based on the sum of these parts.

Self-Knowledge

Skills can be improved through study and experience. But there are certain personal characteristics as well that are likely to be even

more important in the quest for excellence. They are *self-discipline*, *self-restraint*, and *self-criticism*. They play an important role in determining how well we perform our work. All of us possess these qualities to some degree, but each of them can be refined to ever higher levels through a greater self-awareness. A conscious, continuing effort to exercise self-discipline, self-restraint, and self-criticism will help us do our jobs better. There are no limits to such a self-improvement project. Wherever you happen to be on the self-awareness continuum, you can reach a higher plateau.

As to *self-discipline*, I refer to the determination and fortitude to stay with a problem until it is fully understood. That means mastering the evidence and arguments until you feel you understand the case as well as the parties. That often may be impossible. But it is the pursuit of this goal that produces an intimacy with the issues that will improve your chances of finding the best answer. To work too fast, to work with too much self-confidence, is likely to be inconsistent with the self-discipline I urge. Sound analysis and insight are earned only through time and effort. The core truth of a case, the point on which all else turns, may not be easily identifiable. To stay with the search, to dig ever deeper into the formless material before us, is what must be done. As one professor explained more than a century ago, what is important is "to lose oneself in that which one would create."[1]

My point can be illustrated in other ways. Consider, for instance, our behavior at the arbitration hearing. We ordinarily listen to *understand* what we are being told. It is useful to listen also to what has not been said and then later attempt to decipher the parties' silence. More important, we should listen for the purpose of *deciding the dispute*. When we do that, the hearing experience becomes far more demanding and a good deal richer. For this multilayered listening may help you identify the gaps in the parties' presentations and thus enable you to ask the unasked question or to seek the unproduced evidence. The result is a better record with which to work when you make your decision. Indeed, by listening to decide, it is far more likely that you will be able to sum up the parties' positions, with accuracy and style, at the end of the hearing and thereby enhance the parties' view of your performance.

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[1]C. Hilty, *The Art of Work* (1898), *reprinted in Albatross*, house publication of Isbrandtsen Co. (Aug. 1948).

As to *self-restraint*, I refer to the need to respect the limitations placed on us by the parties, through both their agreement and their arguments, and the need to place limitations on ourselves in recognition of our capacity for error. It should prompt us to rely on the narrowest possible rationale for our ruling. Such restraint should prompt us to avoid dicta, whenever possible. Such restraint should prompt us to say less, rather than more, in our decisions. Behind all of this is the notion of "damage control." Do as little harm as possible through your award.

Moreover, self-restraint demands that we recognize and place a tight rein on our self-interest. Arbitrators wish to minimize or avoid the displeasure of the parties. To the extent to which self-interest is responsible for a compromise award, you violate the Code of Professional Responsibility (article I, section 2): "An arbitrator must be as ready to rule for one party as the other on each issue. . . . Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional."

Self-restraint is important at the hearing as well. Arbitral intervention should be minimized so that the parties are free to present their case as they wish. Only when they fail to make a coherent presentation, or fail to behave in a reasonable manner, or fail to offer some piece of relevant evidence should the arbitrator intervene. When the parties' representatives do a good job, we are passive. When they do a poor job, we are active. Flexibility is the key.

As to *self-criticism*, I refer to the need to distance ourselves from our work product so that the flaws and weaknesses become apparent. The reason why this is important is that arbitrators receive no real feedback. The parties pay for our services but rarely, apart from some umpire relationships, comment about what they like or dislike about our written opinions. An occasional "poison pen" letter from an angry loser offers little enlightenment. Nor do other arbitrators who have occasion to review our awards tell us what we did wrong. Such uninvited criticism would undermine the collegiality of the profession. Because no one is likely to provide the needed constructive criticism, we must look within ourselves.

Imagine you are an editor and your award, now before you for final review, was written by a stranger. Be prepared to attack your own work, to question without mercy the facts and arguments you strung together days earlier. Pride of authorship must be resisted. To separate yourself in this manner takes a great deal of practice.

But it is essential if you are to catch the inevitable errors, the understandable lapses in your workmanship. I refer not just to the language of the opinion but also to the quality of the reasoning.

Conclusion

Arbitrators should recognize the different skills they are called upon to master and the different kinds of discretion they are called upon to exercise. To identify us simply as decisionmakers is a woefully inadequate description of our many roles. Pragmatist, analyst, diviner, artist—these are the appropriate titles. Because "the entirety of the arbitration process encompasses the exercise of discretion" and because such discretion "represents a measure of personal fiat,"[2] it is critical that we understand as best we can—beneath the surface of the cases themselves—who we are and what we are being called upon to do.

Once having achieved that nirvana, we may experience the joy Judge Learned Hand spoke of in discussing a judge's work:

> [A] judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes it—anyway to those curious creatures who persist in it—a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master. That is a pleasure which nobody who has felt it will be likely to underrate.[3]

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[2]Stockman, *Commentary on Discretion in Arbitration*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), at 103, 106.

[3]*The Preservation of Personality*, VII Bryn Mawr Alumnae Bulletin, No. 7 (Oct. 1927), at 7–14, *reprinted in* The Spirit of Liberty (Knopf 1959), at 33.