CHAPTER 13

PAPERS FROM THE 2003 FALL EDUCATION MEETING

Editor's Note: This chapter goes beyond the June meetings in Puerto Rico and brings the reader four papers that were delivered at the National Academy of Arbitrators' Fall 2003 Education Conference in Boulder, Colorado, on October 26, 2003. I felt that the quality and content of the papers would prove interesting to the readers of this volume. The chapter begins with a three-paper discussion about selection of arbitrators. Arbitrator Bickner presents the study and adovcates Boone and West comment on it from the union and management perspectives, respectively. William Marcotte's paper on developments in the Canadian courts completes this chapter.

I. ARBITRATOR ACCEPTABILITY: ARBITRATORS' AND ADVOCATES' PERSPECTIVES

MEI LIANG BICKNER*

Introduction

How management and union advocates select arbitrators has always seemed mysterious to most arbitrators. The subject is of substantial interest not only to arbitrators individually, but also to the Academy, because the Academy's future is founded on its membership and broad acceptability is a prerequisite for membership in the Academy. This mysterious selection process has an inevitable influence on the current and future character of the Academy.

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In the early 1990s, in an effort to learn more about the variables that might affect an arbitrator's acceptability, I conducted a series of in-depth, semistructured interviews with arbitrators, union and management advocates, and agency administrators—about 20 interviews in all. When I was asked to give a presentation at this Fall Education Meeting based on the results of those earlier interviews, it seemed appropriate in light of continuing developments in the field of dispute resolution to update the data and also to canvass a larger and broader audience.

The idea of parallel surveys to be administered to both arbitrators and advocates developed after discussions with my fellow panelists, Dan Boone and John West. While my initial interviews form the basis for the questions on the survey, Dan Boone made invaluable contributions in the development of the survey and the reformulation of the survey questions. Technology made it possible to post the survey on-line to facilitate easy access and response by a readily accessible population of arbitrators, union advocates, and management advocates. Arbitrators were canvassed on the National Academy of Arbitrators mail list. Management attorney advocates in the United States and Canada were either canvassed individually by John West or through the Employment Law Alliance mail list.[1] Union attorney advocates were canvassed on the AFL-CIO Lawyer Coordinating Committee's Arbitration mail list. In order to encourage frank responses by advocate survey respondents, union advocates responded directly to Daniel Boone and management advocates directly to John West. I was given only aggregate data to compare with the responses I received from the arbitrators.

The Survey

Based on the responses obtained from the earlier interviews, four different types of variables were identified as important in determining an arbitrator's acceptability, and these were incorporated into the survey as four categories of questions: factors relating to the arbitrator's background or personal characteristics, factors relating to the advocate who is selecting an arbitrator, factors relating to the specific case involved, and factors relating to

[1]The survey was posted on the Employment Law Alliance mail list by Stephen Hirschfeld, Curiale Dellaverson Hirschfeld Kraemer & Sloan, LLP, at the request of John West.

the arbitrator's perceived performance or competence. The specific items on the survey were as follows.

Variables That Relate to the General Background and Characteristics of the Arbitrator

Variables that describe and define the arbitrator in terms of his or her education, experience, and background characteristics were:

1. legal background
2. academic background
3. advocacy experience
4. visibility as a speaker or as an author
5. the extent of arbitration experience
6. the extent of collective bargaining and/or labor relations experience
7. the arbitrator's race and ethnicity
8. the arbitrator's gender
9. the arbitrator's age
10. the arbitrator's perceived integrity
11. the arbitrator's perceived values (e.g., toward sexual orientation or drug use)
12. membership in the National Academy of Arbitrators

Variables That Relate to the Advocate Making the Selection of the Arbitrator

Variables that may affect the advocate's decision whether to select an arbitrator that are directly related to the advocate's assessments and preferences, or experiences vis-à-vis the arbitrator were:

1. whether the arbitrator is known to the advocate
2. the extent of the arbitrator's familiarity with the advocate's industry
3. the extent of the arbitrator's familiarity with the parties' relationship
4. whether, in the advocate's assessment, this involves a "big case" for the advocate's client
5. the extent of the advocate's own experience and sophistication
6. the advocate's assessment of the "predictability" of the arbitrator's decision

7. the attorney advocate's preference for an attorney/arbitrator
8. the arbitrator's relationship with opposing advocate[2]

Variables That Relate to the Case for Which the Arbitrator Is Being Selected

Variables that relate to the nature or type of case and the arbitrator's perceived attitude toward such a case based on the arbitrator's track record included:

1. the extent to which there were complex issue considerations
2. whether there were procedural complexities
3. the arbitrator's track record vis-à-vis a particular issue in the case
4. the arbitrator's track record in discipline cases
5. the arbitrator's track record in contract language interpretation cases
6. the arbitrator's perceived attitudes or reactions to the race of the grievant
7. the arbitrator's perceived attitudes or reactions to the gender of the grievant
8. the arbitrator's perceived attitudes or reactions to the sexual orientation of the grievant
9. the arbitrator's perceived attitudes or reactions to language or cultural factors of the case

Variables That Relate to the Arbitrator's Performance and the Arbitrator's Perceived Competence

This group consisted of items in a number of areas, including the conduct of the hearing, the writing of awards, and the arbitrator's sensitivity to the parties' needs, as well as questions dealing with the pragmatic side of arbitrating, such as fees and billing policies:

1. the arbitrator's availability
2. the arbitrator's flexibility and responsiveness to the needs of the parties
3. the arbitrator's ability to control the hearing
4. the arbitrator's ability to move the hearing forward

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[2]This question was added by Daniel Boone to the survey sent to union advocates.

5. the arbitrator's ability to make evidentiary rulings
6. the arbitrator's ability to issue awards in a timely manner
7. the arbitrator's ability to write well-reasoned awards
8. the arbitrator's deference to due process issues
9. the arbitrator's deference to the broader impact of the award
10. the arbitrator's fee structure and billing policies
11. the arbitrator's ability to achieve settlement[3]

In addition to the four categories of questions, survey respondents also were afforded the opportunity to offer comments and observations about the questions or any other variable that may affect arbitrator acceptability in some way. Many of these insightful comments are quoted in my discussion; others are quoted separately following presentation of the survey results. Most of these comments were from arbitrators.

Survey respondents were asked to assess the importance of these variables in the selection of arbitrators using the following scale:

5	Very significant factor in the selection decision
4	A factor often influential, or a typically important factor in the selection decision
3	A factor that may be important in the selection decision in some cases
2	A factor less often influential, not usually an important factor in the selection decision
1	A factor rarely influential in the selection decision

Caveats and Omissions

In making the survey questions appropriately brief, I recognized that the meaning of the word "acceptability" varied from question to question, sometimes relating to an arbitrator's general acceptability, in other questions relating to an arbitrator's acceptability for a particular type of case, or even for a particular case. I am aware—and I believe our respondents are aware—that, for example, an arbitrator may enjoy broad acceptability and yet be considered by some advocates to be unacceptable for a particular

[3]This question was added by Daniel Boone to the survey to union advocates.

type of case. I do not believe that this variability in meaning created any serious problems for the respondents.

Other questions ask the survey respondents to assess variables that lend themselves to both positive and negative interpretations, with the choice potentially affecting the rating. In discussing the variable of the arbitrator's age, for example, the comments of one of the arbitrator respondents is illustrative:

> Age can be a factor, on either end of the spectrum. A youthful arbitrator may have acceptability problems because of the perception they may lack experience or lack the "air of authority" to control a fractious hearing. But youth can be a positive if the parties have a case with evolving issues and may feel a youthful arbitrator is more likely to be on top of new issues and developing law, or be more likely to take a different approach than an older, established arbitrator who has developed a settled attitude toward certain issues.

It also must be noted that the survey makes no pretensions to be exhaustive. Two areas that were not explored deserve mention. The survey does not attempt to make distinctions between novice arbitrators and experienced arbitrators, even though the variables affecting their acceptability may not be equivalent. The earlier interviews I conducted suggested, for example, that parties are less forgiving of "unpredictable" or surprise awards by novice arbitrators than they are if those same awards are issued by experienced arbitrators whose reputations have been established.

Another area not explored by the survey is the role, if any, that panel administrators play in affecting the arbitrator selection process. My earlier interviews suggest that, unless random lists were generated, panel administrators could have considerable influence on arbitrators' acceptability by the frequency with which their names were circulated, and by the makeup of the lists (i.e., what other names were on the list).

Finally, it should be noted that the survey respondents were not a random sample of arbitrators and advocates. The survey was posted on the three professional mail lists and the survey respondents were arbitrators and advocates who were self-selected—those who elected to participate—and who were sufficiently comfortable using computers and navigating the Internet to respond to the posting on-line. It is a matter of conjecture how representative they were of the general population of arbitrators, union advocates, or management advocates. Moreover, all advocate respondents, union and management, are attorneys, since the mail lists and the population canvassed consisted only of attorneys.

The Survey Profile of Respondents

Judging by the rate of response, interest in the subject matter of the survey was high. Of the 230 arbitrators on the National Academy of Arbitrators mail list, 85 arbitrators (37 percent), responded to the survey. Approximately 25 percent of the union advocates on the AFL-CIO Lawyer Coordinating Committee's Arbitration mail list (37 of approximately 150) returned a response. For the management advocate group, the absence of a "ready-made" mail list of management advocates practicing labor relations law considerably limited the distribution of the survey and the collection of responses. Initially sent to 41 individual advocates and later posted on a mail list for management advocates practicing employment (rather than labor) law—the Employment Law Alliance mail list with approximately 150 advocates—the survey received 25 usable responses, 12 coming from Canadian advocates, for a 13 percent response rate.

Overall, the survey respondents consisted of fairly senior, very experienced professionals in the field. The overwhelming majority—92 percent of the arbitrators, 83 percent of the union advocates, and 65 percent of the management advocates—had 15 years' or more experience in arbitration. The arbitrators were on average older than either group of advocates: 76 percent of the arbitrators but only 48 percent of the management advocates and 37 percent of the union advocates were in the 55-years-and-older category. Approximately half of the union advocates were in the 45–55 years-of-age category, and the management advocates were even younger—approximately half of them were in the 35–45 years-of-age category. While the union advocates were virtually evenly divided among men and women, the arbitrators and the management advocates were predominantly male, although 13 percent of the arbitrators declined to indicate their gender.

With respect to the region of the country in which the survey respondents had their practice, the distribution among the various regions was fairly even for the union advocates. Of the management advocates, about half were Canadian, and the rest were more or less evenly distributed among the various regions. For the arbitrator group, over 44 percent of the respondents practiced in the Northeast, followed by the West and Midwest with 21 percent and 20 percent, respectively, with the remaining from the South, Southeast, and Canada.

It can be said, then, that the survey enjoyed excellent nationwide participation by a very experienced population of professionals.

The Survey Findings

Tables I, II, III, and IV show the responses for the three groups of respondents side by side, indicating how the three groups rated the importance of the various items on arbitrator acceptability:

- Table I identifies the ratings of those variables dealing with the arbitrator's background and characteristics;
- Table II shows the ratings of those variables related to the advocate;
- Table III shows the ratings of the variables related to the case; and
- Table IV shows the ratings of those variables related to the arbitrator's performance and perceived competence.

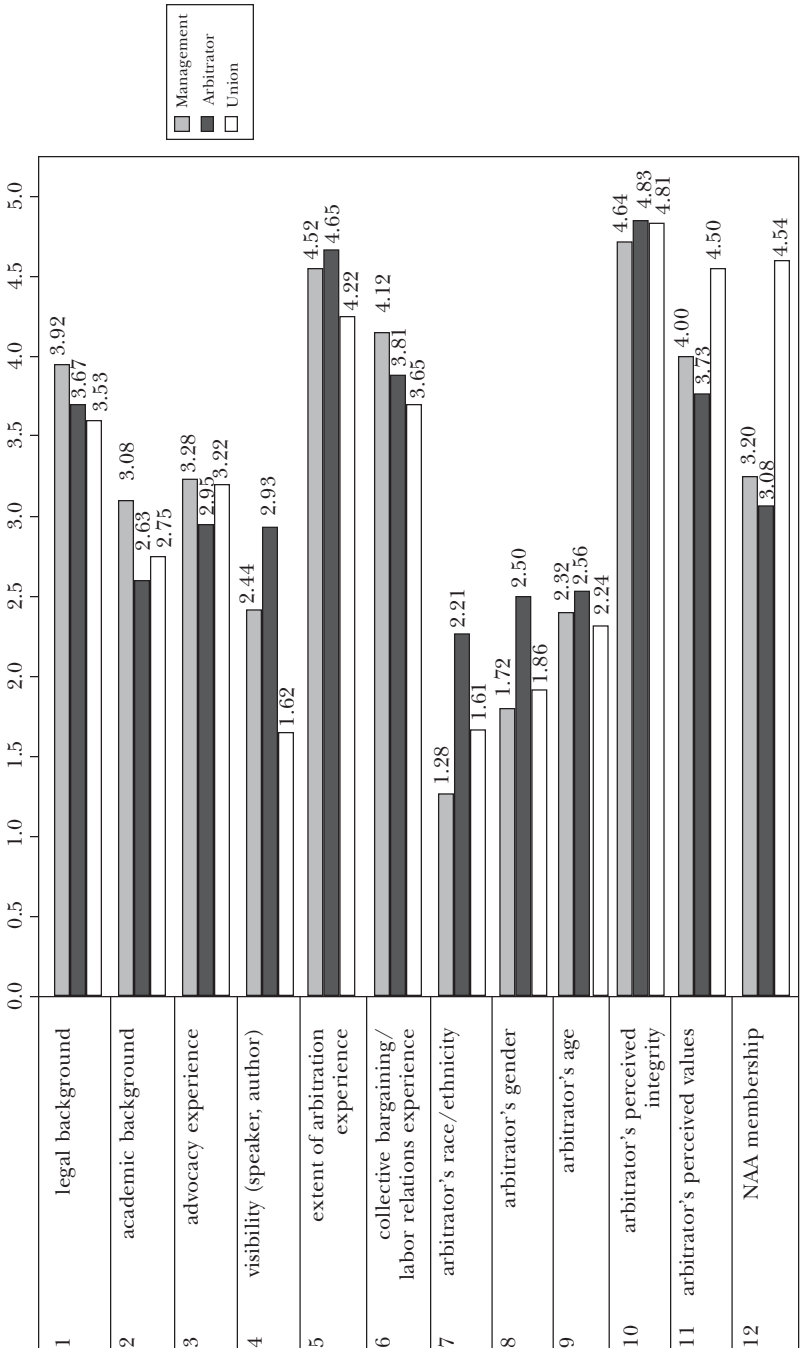
One reassuring, and perhaps remarkable, finding of the survey is the degree of consensus among the three groups surveyed with regard to the one or two items in each of the four categories that were considered most influential in affecting arbitrator acceptability. These were the variables receiving an average ranking of 4 or above (on the survey scale of 1 to 5) by all three groups. In fact, with only a few notable exceptions, the overall rankings showed general agreement among the three groups. There was often considerable variation among individual respondents within the three groups, however.

General Background and Characteristics of the Arbitrator

Table I summarizes the results of the ratings by the three groups of the questions dealing with the arbitrator's background and characteristics.

Arbitrators, management advocates, and union advocates agree that the two most influential variables in the arbitrator's background are the arbitrator's perceived integrity and the extent of the arbitrator's arbitration experience. On the survey scale of 1 to 5, these variables were rated between 4.22 and 4.83 by all three groups. Also rated respectably high by all three groups were an arbitrator's legal background and collective bargaining/labor relations experience.

Table I. General Background/Characteristics of Arbitrator



The differences between the arbitrators' and the advocates' ratings occur in their differing estimates of the importance of an arbitrator's race/ethnicity or gender. Arbitrators rated these variables somewhat more important in the selection decision (2.21 and 2.50, respectively) than advocates, who assigned the lowest scores on the table (1.28 to 1.86) to these variables. There may be two competing explanations for this difference in rating. The conventional wisdom is that arbitration selection is, or should be, a race- and gender-neutral decision. Yet it is a matter of record that there are relatively few minority arbitrators and, until the last 10 years, relatively few women arbitrators. One explanation may be that arbitrators are concerned that race, ethnicity, and gender still play a bigger role in the selection process than might be appropriate. The other explanation is that arbitrators may see the variable as often favoring the selection of arbitrators based on race or gender under certain circumstances—for example, when advocates might select a female arbitrator to hear a sexual harassment case rather than her male colleague. As one arbitrator puts it:

> As to the race and gender issues, we would all like to think that we, arbitrators, are being selected on a race- and gender-neutral basis. I have been told, however, that I was selected for certain cases because I was a woman, and have even been told by certain advocates that their clients don't like women arbitrators!! It's a shame we are not covered by Title VII!

Age as a factor was commented on earlier; however, this comment by an arbitrator may indicate that age as a variable presented ambiguities and dilemmas for the respondents and that not much significance can be placed on the ratings it received: "Some items like age are important and then may become a negative as an arbitrator ages."

The two other significant differences in the ratings among the groups involve the role that visibility and Academy membership play in the selection process. Arbitrators clearly consider visibility to be significantly more important than either union or management advocates do, and significantly more important than either race, gender, or age.

> Visibility is particularly important for an emerging arbitrator. When parties see a name on a list, if they can recognize it because of seeing the person at a conference or a byline in the State Bar Journal, for example, they are much more likely to give a newbie a chance. Once an arbitrator has an established reputation based solely on the parties' past experience with that person, being visible at conferences or in the professional literature becomes much less important.—*Arbitrator*

> We choose based on our anecdotal experience with arbitrators, not on their knowledge of an issue, writings, or record. They are often surprised to hear this, thinking we selected them because of articles they have written or expertise in a particular area.—*Union advocate*

While Table I does not show it, the importance of Academy membership was the item showing the greatest variability among individual union respondents and (although the variability wasn't so great) among individual arbitrators as well. Comparable data for the management group were not available.

Variables Related to the Advocate

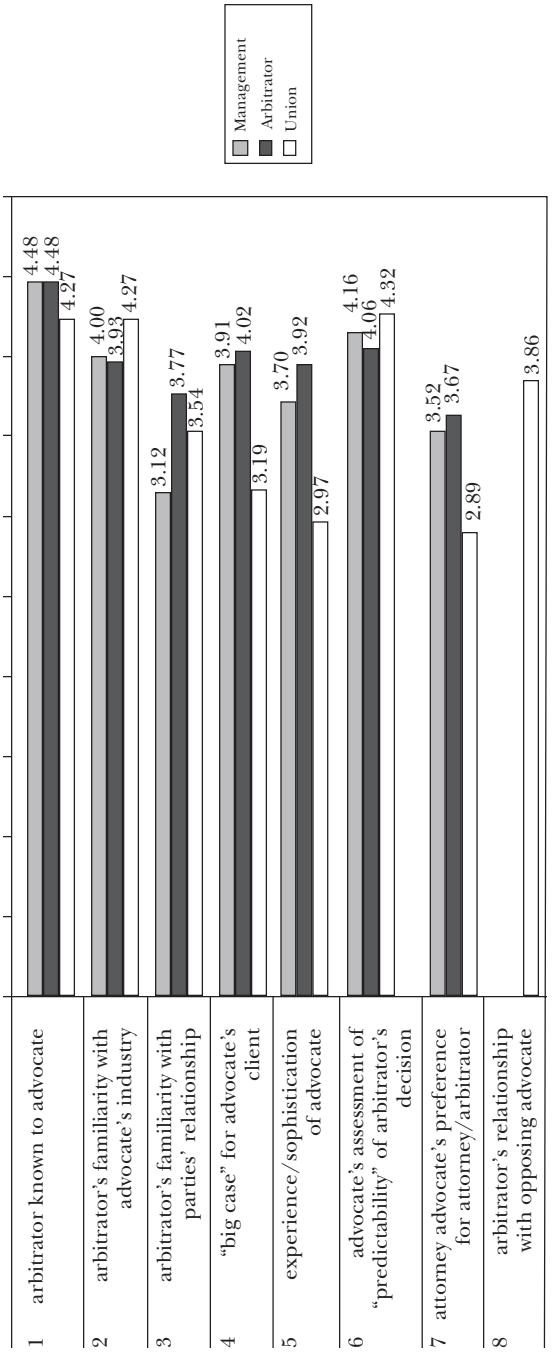
Table II details the results of the ratings by the three groups of the variables associated with the advocate making the selection decision.

As noted earlier, there is agreement among the three groups about the most important advocate-related variable, that is, that the arbitrator is known to the advocate. It was rated by all groups as typically important or very significant in the selection process and received average ratings well above 4 on the survey scale of 1 to 5.

Almost as important is the advocate's assessment of "predictability" of the arbitrator's decision. Advocates generally expect to have their assessments of the possible outcome of the case validated by the arbitrator's decision and dislike being surprised. Consequently, arbitrators whose awards are "predictable" enjoy greater acceptability than an arbitrator whose awards cannot confidently be anticipated. In my earlier interviews, predictability was mentioned by everyone interviewed as one of the most important variables affecting an arbitrator's acceptability. The survey cannot reveal how the respondents adjusted their concern with predictability in light of the vagaries and exigencies of individual cases. In this context, the comment from one of the arbitrator respondents, even though it addresses the issue of scorekeeping, captures this dilemma: "In my view, such scorecards are worthless as they fail to take into account the facts of the case and the abilities of the advocates."

One variable that arbitrators considered more significant than advocates did related to the extent of the advocate's experience and sophistication. This difference in ratings may reflect not a difference of opinion, but rather a difference in the nature of the three respondent populations. Arbitrators have to deal with a wide variety of advocates, ranging from the very experienced and sophisticated to the untrained and newly minted. In assessing this

Table II. Advocate-Related Factors That May Affect an Arbitrator's Acceptability



variable on the survey, their assessment understandably would reflect their experience with advocates of every stripe, and understandably would find this a considerably more important variable than the advocate respondents to this survey, who, as noted earlier, are composed entirely of very experienced attorneys. As one arbitrator commented, "In my opinion, the degree of sophistication of the advocate is hugely influential regarding how the advocate will perceive the importance of all the factors listed."

One surprising finding is that the advocate groups, all attorneys, attached less importance than arbitrators to the item that suggested attorney advocates preferred attorney arbitrators. This is consistent with the views of my fellow panelists, both attorneys. Here is a typical comment by a union advocate: "We are likely to choose based on our relationship and familiarity with an arbitrator. Several outstanding non-lawyer arbitrators in our area make attorney status less important."

By contrast, here are two comments from arbitrators:

> I think lawyers generally prefer lawyer-arbitrators, while non-lawyer advocates are more neutral on the subject or may even dislike an arbitrator who is too lawyer-like.

> With the increasing complexities of arbitration cases, and the "seeping" of litigation, especially employment law concepts, into arbitration, I believe having a legal background can be a selection criterion in many cases. This is not to say that such legal training is necessary, but I believe that there is a prevalent perception by advocates that such training is helpful.

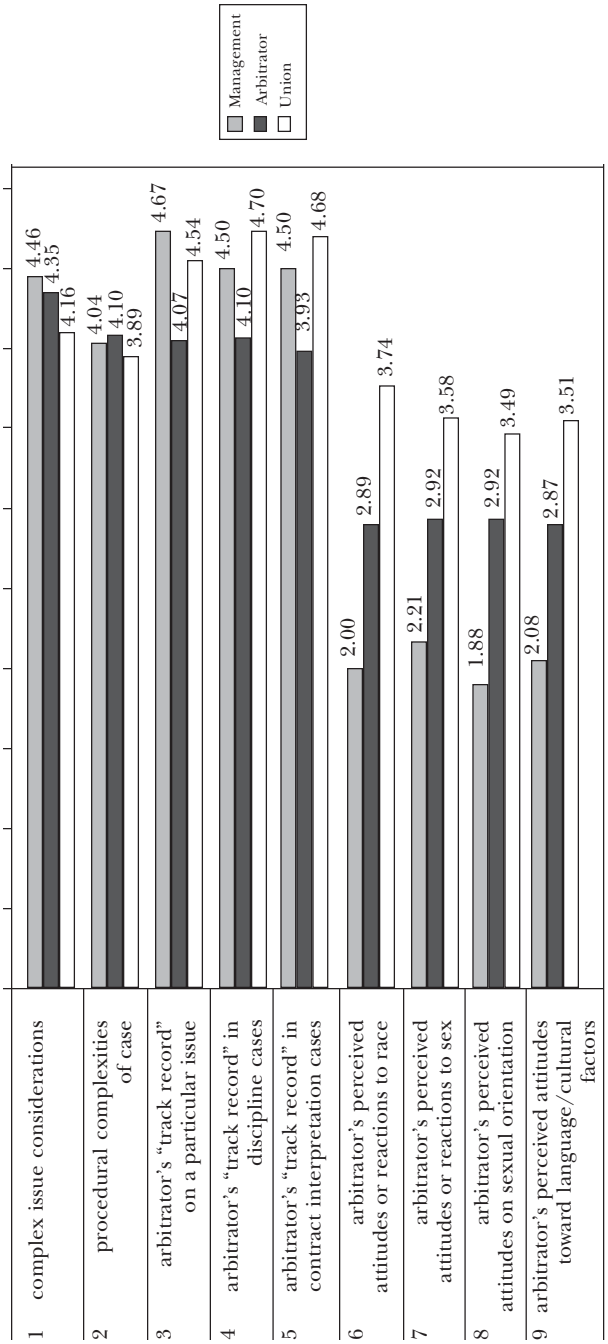
Variables Related to the Case

Table III summarizes the survey results for this category of questions, all related to the nature of the case and how it impacts on the arbitrator's acceptability.

This category displays the most interesting pattern of responses among the three respondent groups. The three groups closely agreed on the relative importance of complex issues considerations and procedural complexities of the case.

However, an arbitrator's track record, whether on discipline cases, on contract interpretation cases, or on a particular issue, was of notably higher concern to both union and management advocates than the arbitrators estimated. This may indicate that advocates research arbitrators' records much more carefully than arbitrators think. There were more comments on this issue than on any other. Compare, for example, these contrasting comments:

Table III. Case-Related Factors That May Affect an Arbitrator's Acceptability



> I research arbitrators extensively and rely on the opinions of fellow union attorneys as well as raw case statistics, prior rulings, and any other available information.—*Union advocate*

> The track record of the arbitrator in cases I am familiar with is the most important factor.—*Union advocate*

> Another important factor is the Arbitrator's published decisions as well as advocates' perception of the arbitrator's predilections.—*Union advocate*

> Prior published decisions. . . . In discipline cases I look at whether the arbitrator will uphold management if s/he finds the misconduct occurred.—*Management advocate*

> Just like checking out the judge you might have in a litigation, it is key to success to know in advance of choosing an arbitrator where he or she stands on various types of cases.—*Union advocate*

> "Track record" will affect the judgment of unsophisticated users of the process.—*Arbitrator*

> These are hard to comment on since it isn't clear that the advocate knows or thinks he/she knows the arbitrator's "track record" or the arbitrator's attitude to race, gender, etc. Most often, an advocate will have no relevant knowledge or perception about these issues.—*Arbitrator*

> As to the "track record" issue, I have been told that some advocates keep such records, and pick arbitrators accordingly. In my view, such scorecards are worthless as they fail to take into account the facts of the case and the abilities of the advocates.—*Arbitrator*

Similarly, the arbitrators' perceived biases toward race, gender, language/cultural factors, and sexual orientation were much more important to the union advocates than arbitrators estimated, but were of much less significance to the management advocates than arbitrators estimated. These perceived attitudes on the part of the arbitrator could have either positive or negative effects on arbitrator acceptability. Thus, if the case involves a gay grievant, it may be a significant and a positive factor for the union if it perceives the arbitrator's attitude toward a grievant's sexual orientation to be accepting or neutral. These variations in the responses may simply reflect ambiguities in the respondent's mind about what the variable was intended to measure.

> An arbitrator's perceived attitude on race, gender, etc. would only be an issue if I believed he/she harbored prejudice. In that case, I would never select that arbitrator.—*Union advocate*

> Perceived attitudes may reflect either an unsophisticated user's inference from an outcome he or she doesn't like or an unsophisticated

arbitrator's having allowed personal feelings to affect how he or she manages cases.—*Arbitrator and former advocate*

With respect to questions 6 through 9, some very interesting concepts are raised. I would hope that any decent, established arbitrator would have no demonstrated prejudice or bias against an individual based upon such protected characteristics. Certainly, if an advocate had a good faith reason to believe that such prejudice existed, certainly that would be a basis not to select an arbitrator. My concern is that, in most cases, any such perceptions would not be based upon reality, but upon the mere happenstance that an arbitrator ruled against a particular past grievant who fit in one of these categories—*Arbitrator*

The first five questions are all very significant: 6–8 are of little importance where perception is concerned, and cannot possibly be measured unless you or an attorney whose judgment you trust has actually been in a position to observe an arbitrator's reaction.—*Management advocate*

Of course the parties' perceptions are based on God knows what!—*Arbitrator*

These are really silly questions.—*Management advocate*

Variables Related to the Arbitrator's Performance and Perceived Competence

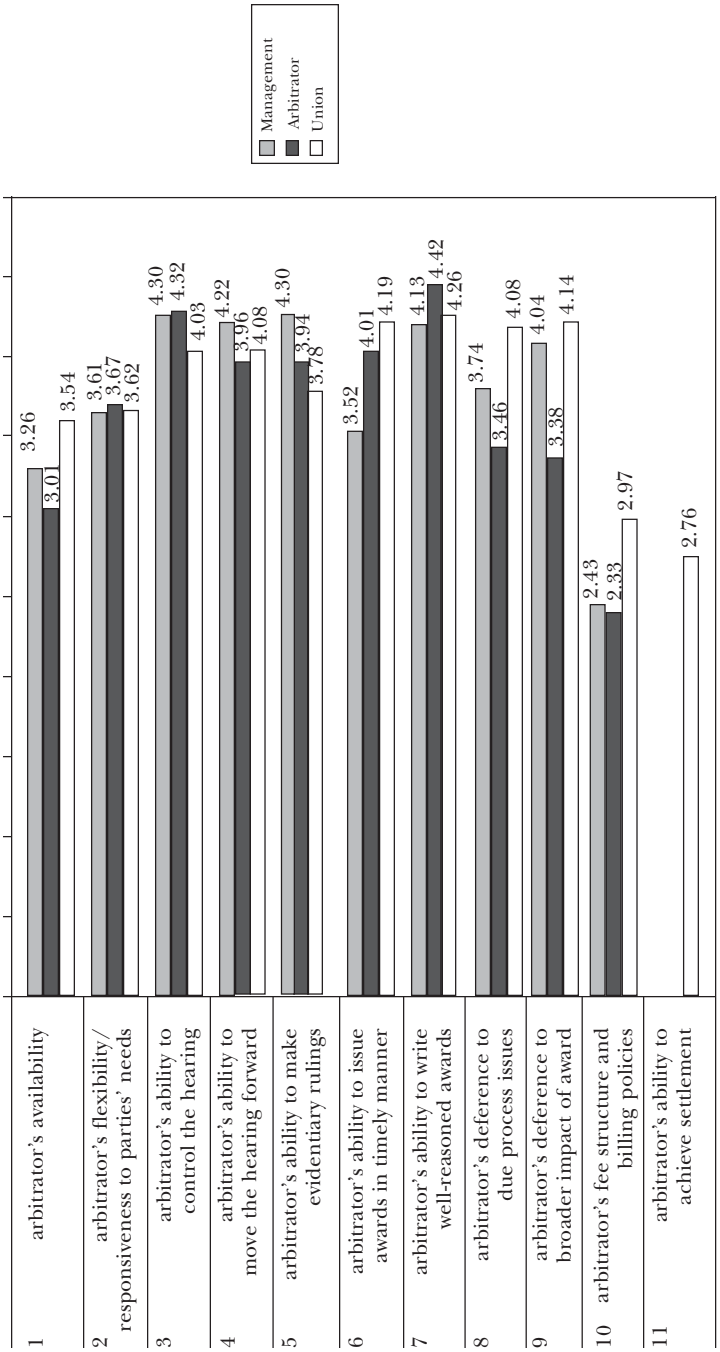
Table IV summarizes the results of the ratings by the three groups of the questions dealing with the arbitrator's performance, competence, and fee structure.

In this category, three variables that received high ratings by advocates also received high ratings by arbitrators, although the order differs among the groups. These include the arbitrator's ability to write well-reasoned awards, the ability to control the hearing, and the ability to move the hearing forward—all three variables earning a rating above 4 (on the survey scale of 1 to 5) by all three groups of respondents. Close behind these variables in ratings are the arbitrator's ability to make evidentiary rulings and the arbitrator's ability to issue awards in a timely manner.

I have come to the conclusion that conduct of the hearing is very important in continued reselection, though in perhaps more subtle ways than your questions allow. Conduct of the hearing is very important, but not so much so that there is never a chance for the parties to relax and feel they know and/or like the arbitrator as a person.—*Arbitrator*

The arbitrator's personality, i.e., whether he or she is someone the advocates enjoy spending time with and their clients react to positively on a personal level.—*Arbitrator and former advocate*

Table IV. Arbitrator's Conduct of Hearings, Perceived Competence, Awards



> As an arbitrator, I perceive that the parties are concerned with the arbitrator's evidentiary rulings as follows: relevancy rulings demonstrate that the arbitrator understands the issues and will not let the case get off track; the arbitrator will not let objections become a tool of disruption by either advocate; while using evidentiary rulings to keep the hearing focused, the arbitrator will allow the parties to put on their case without becoming overly technical about rules of evidence, yet making clear when certain evidence will be given no weight (like uncorroborated hearsay).—*Arbitrator*

> Experienced advocates hate an activist arbitrator who takes over hearing. An inexperienced advocate hates him/her even more.—*Arbitrator and former advocate*

> Arbitrator's skill at handling difficult situations (i.e., aggressive parties, parties with mental problems, parties that are represented by their own attorneys as well as a union).—*Management advocate*

On writing well-reasoned awards and issuing them in a timely manner:

> Ability to write a cogent decision that leaves me with no doubt about why he or she reached the decision.—*Arbitrator and former advocate*

> I have been told by advocates that I am selected again because, even if they lost the last case, the decision clearly explained why they lost.—*Arbitrator*

> I have been told by advocates that significant factors in selecting an arbitrator include getting a decision out in a timely manner.—*Arbitrator*

> Speed at which the arbitrator renders the written decision.—*Management advocate*

However, both advocate groups rated the arbitrator's deference to the broader impact of the award significantly higher than the arbitrators did and, not surprisingly, union advocates rated deference to due process issues considerably higher than either arbitrators or management advocates. One arbitrator who recognized the importance of this first variable wrote:

> Deference to the broader impact of the award is important. It is related to collective bargaining experience as I wrote of it above. I've lost one or two important appointments because of failure to perceive such broader impacts. So have one or two former Academy presidents whom we know well. In short, we should know when a case is "big" even if there's little we can do about it.

While arbitrators and management advocates did not find an arbitrator's fee structure and billing policies a very significant factor, union advocates did, and the only comments received from

union advocates regarding this category of questions all dealt with fees and billing policies.

> Fee structure and burdensome practices (docketing fees, too long cancellation fees) affect our choice to use an arbitrator when they are far outside the norm.—*Union advocate*

> The fees for arbitrators are getting out of hand. For many clients I must now take this factor into consideration in making selections. This is a change.—*Union advocate*

> I have been told by advocates that higher per diem fees are not a deterrent if the arbitrator issues timely awards and is acceptable. Some object to being "nickled and dimed" with small travel expenses. Some advocates object to cancellation fees.—*Arbitrator*

This comment from an arbitrator may put it in better perspective, although some union advocates may disagree:

> In my view, the arbitrator's ability to run a good and fair hearing, and issue a timely and well-reasoned award are the hallmarks of being an acceptable arbitrator. If you meet those goals, the issues of availability and fees are often secondary.—*Arbitrator*

Conclusion

The survey shows that, with some exceptions, there is a good deal of consensus among arbitrators and both groups of advocates concerning the variables affecting the selection and acceptability of arbitrators. Where differences in assessment were found, some were understandable (e.g., experience and sophistication of advocate), while others were the result of ambiguities in the formulation of the variable (e.g., the importance of the arbitrator's race or gender), leaving only a few real differences between the groups. The most significant differences involved the arbitrators' underestimating the importance of certain variables to the parties—for example, the importance to advocates of an arbitrator's track record on a particular issue or on a particular type of case or the importance to advocates of deference to the broader impact of an award.

The results of the survey also underscore the enormous difficulties facing a novice arbitrator as many of the most significant variables affecting acceptability involve the advocate being familiar with the arbitrator, liking the arbitrator, knowing how the arbitrator might rule in a particular case, and the arbitrator's track record. Only an experienced arbitrator can fulfill these requirements.

One arbitrator suggested that acceptability is "a metaphysical state." In view of the multitude of variables affecting the selection of arbitrators, and the subjectivity of many of the perceptions and judgments involved, that characterization has obvious appeal. Still, we must try to understand the concept as well as we can, and we hope this survey will help. Another arbitrator summarized: "I am told that the most important factor in the selection of an arbitrator is the word-of-mouth assessment by other advocates of the arbitrator's ability to comprehend the issues and evidence presented, and write a competent analysis and decision."

II. How Union Advocates Select Arbitrators

W. Daniel Boone*

For almost 20 years, I have been responsible for selecting more than 500 arbitrators per year. I bring to this task a tension between my calling as a union advocate and my understanding of your role as "custodians of the collective bargaining relationship." I have prepared my remarks with growing hesitancy, knowing this audience. You are, collectively, in the 90th percentile of arbitrators in experience, in depth and sophistication of understanding of arbitrations arising from collective bargaining agreements, and in your level of assurance that you do it right. For all of these reasons the prospect that I might say something new, or provocative, or that I might affect your thinking, is daunting. I plan to speak plainly to you.

Most of you responded to Professor/Arbitrator Bickner's survey, where the results include the responses of 37 predominantly highly experienced union advocates. Generally, I agree with the survey results. However, my comments will attempt to offer specific content to the "factors," which we all agree can at one time or another be more or less important.

How do I conceptualize what I value in an arbitrator? The *Steelworkers Trilogy*[1] teaches us that grievance/arbitration is part

*Weinberg, Roger & Rosenfeld, Oakland, California.

[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414, 34 LA 559 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 34 LA 561 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423, 34 LA 569 (1960).

and parcel of the continuing collective bargaining process. Secondly, "Arbitration is the substitute for industrial strife."[2] What does this mean in the day-to-day experience of arbitration? It means that, at some level, every case is different—depending on the nuance and contours of the many human, economic, and institutional relationships presented. It also means that, as in collective bargaining, there are some difficult and rough days.

In order for the arbitrator truly to be the reader of the contract, that arbitrator must understand the workplace and the dynamics of the relationships of those involved, both work relations and labor relations. The arbitrator gives meaning and content to the collective bargaining agreement. If the arbitrator is to adjudicate properly the myriad of cases that the draftsmen of the generalized code cannot anticipate, he or she must be extraordinary.

Therefore, I am not too concerned whether an arbitrator is or is not an attorney. I seek out arbitrators who have past experience with collective bargaining relationships, the more the better. I am interested in an arbitrator's extensive experience with collective bargaining, and especially the functioning of a union at a workplace. I value an understanding of the power and expertise and time imbalances that exist between management and unions. I want an arbitrator who has some appreciation for the role of a well-functioning union in the workplace. Likewise, I want an arbitrator who understands the workings of a union with less than stellar representation, and the tensions that exist between it and its membership. I also want an arbitrator who can understand and deal with both good and bad management, at all levels. I want an arbitrator who understands labor relations, and who has a basic belief in and support for unionization in our society. These are my ideals, but they should be basic requirements for a labor arbitrator.

General Considerations

1. From speaking with my fellow panelist, John West, it is readily apparent that there is less mediation on the day of arbitration in the United States than in Canada, and therefore less expectation that the arbitrator will take the initiative to push for or fashion a settlement. In my experience, the likelihood that the arbitrator can

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[2] *Warrior & Gulf*, 363 U.S. at 578.

take leadership to achieve settlement depends primarily upon the relationship between the arbitrator and the two advocates. Settlement also requires able advocates who have sound relations with their clients. If these relationships are in place, the arbitrator can take an active role in initiating discussions about settlement after presentation of thorough opening statements. The advocates can clearly respond appropriately to the situation.

2. We understand that continuances are endemic, and first requests are almost always granted. Special efforts to hammer out the earliest agreeable date are genuinely appreciated. For workers, the number one beef is how slow arbitration is.

3. The attorneys in our firm want to appear before arbitrators who will allow us to do what we have to do to effectively try the case, and not allow the employer to drag a hearing on with unnecessary evidence or time-wasting activities. If this can be accomplished by taking the advocates aside or with a "heart to heart" talk, that's fine. I value an arbitrator who will tell the parties, or at least the advocates, what you want to hear to make a meaningful decision. It may not work, but it's important to make the effort.

4. I seek out arbitrators who encourage oral argument if a brief is not really needed. If the arbitrator believes a brief will be helpful and explains why, and tells the parties the factual issues or legal points that need addressing, the parties can avoid wasting a great deal of time and money. Again, this will not always be successful.

5. As to the "well-reasoned award" factor, although lawyers may be selecting arbitrators and lawyers may be advocating the cases on both sides, it is union representatives and union members on the one hand, and probably the affected company supervisors and human resources representatives on the other, who will pore over each page and line of your decision. Although it may or may not affect your "acceptability," decisions that workers can read and understand are appreciated. It is their working lives and livelihood that you are deciding.

6. I will stop picking an arbitrator if he or she is persistently slow in issuing decisions.

7. Within the last few years, I have decided not to pick some arbitrators because of excessive charges. I simply do not believe that "two days of study and writing time" is necessary or actually expended by most experienced arbitrators in writing most decisions following a 1-day hearing. I don't have to pay the bills, but many arbitrators are overcharging. The union's half of the fees comes from monthly dues paid by workers. To be blunt, many

arbitrators are taking money for work not performed. Workers are discharged when they leave work at 5:00 and submit a time card stating they remained on the job until 7:00.

8. I pay attention to larger patterns of decisions—track records. I have over 2,600 decisions on my computer. I can and do "keep score," although not mechanically. By reading hundreds of awards, I try to gain some insight about how arbitrators address and decide different types of cases. Union lawyers now have the ability to talk and e-mail each other with ease, and they do so. "Word of mouth" is on the rise.

9. If attorneys from our office report to me on more than a few occasions that they perceive the arbitrator is allowing the other side to drag out the case, or is not in control of the hearing, especially when combined with a slow decision and excessive study and writing time, that combination will be a determining factor to not select that person unless the track record is extremely favorable.

10. I am always actively in search of new or less experienced arbitrators who are acceptable to management. These arbitrators tend to be conscientious in their scheduling and timely in their decisions. Parties do not have to wait 6 months for a hearing date.

What Is Important in Selection for Discipline Arbitration?

1. The survey questions asked about "the arbitrator's perceived values" and "arbitrator integrity." Both are ranked very high by union counsel. What do these phrases mean? I want a discipline case tried before an arbitrator who has life experiences more than going to law school, working as an attorney or academician, and then becoming an arbitrator. Your work experience as an arbitrator is different from that of most union members. You work by yourselves. So what? I believe it to be the case that, in almost all workplaces, nothing works the way it is supposed to. Whether it can be proven with direct evidence, an arbitrator should understand that most rules and procedures are not followed 100 percent. Only some of the people who violate rules and procedures are caught, and fewer are disciplined. It is much easier to recognize and accept these realities having lived the experience.

2. There are myriad social, economic, and emotional pressures that face workers on a daily basis; racism, sexism, and homophobia are pervasive in our society. I want an arbitrator who accepts that these are not just clichés mouthed by a union lawyer, but instead have real, daily, ugly, and subtle manifestations in workplaces

everywhere. Managers and supervisors are often authoritarian and arbitrary, and most workers are trying to survive with a degree of respect and dignity. I look for arbitrators who truly understand the meaning of these statements, who accept them as true, and who do not brush them off as meaningless platitudes.

3. I seek out arbitrators who understand and accept the importance of "industrial due process." I am pleased that my brother and sister union attorneys also highly value that. On the shop floor, and in grievance meetings, the absence of a fair and objective investigation prior to imposing discipline leads to "hardening of positions," obstructs resolution, undermines the proper role of the union, and results in arbitrations that never should take place. Industrial due process is the key to satisfying the duty of fair representation (DFR) without the apparent necessity of arbitrating loser cases to inoculate against DFR claims.

4. I attempt to select arbitrators who will strictly hold the employer to its burden of proof, through direct competent evidence. I expect arbitrators to understand that employers have "all the cards" when it comes to finding out what really happened—they have extraordinary investigatory powers, which means that if they don't really have the goods, they should not be given the benefit of the doubt.

5. I try not to select arbitrators who too easily reinstate without back pay except in very serious cases. No employer issues 12-month suspensions. I look for an arbitrator who gives real meaning to "progressive discipline," meaning the minimal level of discipline that will correct the behavior problem.

6. I try *not* to select arbitrators who have become jaded with years of arbitration experience, cynical in their view of types of cases heard many times, and unwilling to understand and accept the carefully crafted factual presentation and argument for reinstatement.

7. John West states that he does not want an arbitrator who will "impugn the credibility of my clients or other witnesses." I disagree. Sometimes impugning the credibility of supervisors is necessary and appropriate. It is, at times, *the* reason for going to arbitration, as part and parcel of the collective bargaining process. It may be true that a supervisor's credibility and career may be on the line. However, the grievant's credibility and career are also on the line, and in any case where there are credibility issues, and disagreements about what really happened, someone is going to be im-

pugned and embarrassed. An arbitrator has to be willing to call it as it is.

8. In discipline cases, our interest is in efficient presentation, narrowing the issues, and making the parties focus on the real problem and the critical (as opposed to peripheral) evidentiary disputes. In other words, we expect arbitrators to encourage efficient presentation of evidence; there are relatively few discipline cases that should take more than a day.

9. I pick arbitrators who are very reluctant to forfeit a grievance because of a procedural timeliness issue in the filing and processing of a grievance. I want an arbitrator who will rule on the merits, obviating the need to address the procedural issue. Ruling against a grievance on procedural grounds almost always creates a difficult morass for both sides, in the form of a threat of future litigation. It's far better to reach the merits, even if the ruling is against the union, than to have a procedural decision that leaves both the employer and the union facing further proceedings.

Contract Interpretation Cases

1. As a general proposition (overly simplistic), in a disciplinary arbitration, I want an arbitrator with a big heart. For a contract interpretation case, I want an arbitrator with a big mind. That makes it easy. In order to be a terrific arbitrator you need only be a very smart, wonderful person with a deep understanding of human nature, unions in the American workplace, and careful analysis of collective bargaining agreements. I guess that's why you're such a terrific bunch of people.

2. Evidentiary rulings in contract interpretation cases are crucial. Limiting testimony to proper bargaining history evidence and communicating to the parties that hearsay will be accepted but not relied upon are critical.

3. Unions' biggest complaints are that employers don't properly follow the contract in the face of economic pressures. These cases are brought to arbitration with the expectation that the arbitrator will hold the employer to the contract and issue meaningful remedies if violations are found.

To conclude, I suggest that, from the union side, the ideal arbitrator is the individual who, by his or her values, through intimate knowledge of collective bargaining and workplace life, by his or her availability, by his or her conduct to encourage focused

hearings, by the issuance of timely, understandable awards at a reasonable cost to the parties, is exactly the person we want to select. This is the arbitrator described in *Warrior & Gulf*, the arbitrator who does his or her best to make arbitration what it should be.

III. Reflections on Selecting an Arbitrator

JOHN B. WEST *

I don't have a very scientific approach to the selection of labor arbitrators. My approach is experience-based, reflective of anecdotal comments from others, and also intuitive, based on a knowledge of the players in the arbitration community where I practice. My practice is largely a private-sector practice, with a sprinkling of some public-sector employers.

In the jurisdiction where I practice, mediation/arbitration, or med-arb, is a practice that is fairly common and expected and, indeed, is statutorily enshrined.

I don't have an approved list of arbitrators, nor does my office. While I have strong views about certain arbitrators, as do my colleagues, I have not gone so far as to prepare a list of favorites and least favorites. As well, I don't keep any kind of scorecard or win/loss record of arbitrators. Nonetheless, I do have a mental note of how I have fared in the past in front of specific arbitrators and, generally, what that arbitrator's approach is in dealing with certain problems.

I am receptive to new arbitrators but usually require a recommendation from someone with some experience in front of the arbitrator under consideration. Obviously, I don't wish to be the first to try a new arbitrator, and this is particularly so if he or she is a former management-side lawyer trying to move to the center.

I do "network" with colleagues in the office and occasionally will go outside the office for other views from colleagues at the bar on both the management and union side. I do this particularly if I have not had a recent experience with the arbitrator proposed. As well,

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in certain cases I will have a database search done of decisions by an arbitrator on the topic at issue, but again, I usually do this only when I don't have enough intuitive information to make a decision.

What I Look for in an Arbitrator

My selection of an arbitrator is usually premised on the qualities I want and the outcome that I am hoping for, in terms of both hearing process and final decision.

I have two overriding requirements for an arbitrator.

1. The arbitrator must have integrity.
2. The arbitrator must be helpful, and not say or do anything during the hearing, or decision stage, to impair the relationships of the parties or, equally important to me, my own relationship with my client.

What Integrity Means to Me

I want an arbitrator who is trustworthy and honest beyond doubt. My view is that the arbitrator ought to be preoccupied with doing the right thing for the parties and not with doing the right thing for him or her. If an arbitrator worries too much about pleasing one side or the other, it usually will be transparent and noticed. As well, it usually will lead to a short career.

Being Helpful—What Does It Mean?

For me, being helpful means the following.

- I want an arbitrator to appreciate that in the vast majority of cases (based on my experience), the management side, particularly if it consists of private-sector interests, doesn't want to be at arbitration. Unfortunately, some arbitrators have not figured this out.
- I want an arbitrator, after he or she has figured out that my client usually doesn't want to be at arbitration, to start immediately thinking of ways to try and get my client out of the process as fast as possible on optimum terms; that is, I want an arbitrator who is either going to be able either to mediate a solution or to help my client narrow the issues to make the process as cost-effective as possible. (In my experience this is possible most times.)
- I want an arbitrator who will appreciate that in many instances (again, particularly in the private sector), the grievance procedure

has been less than adequate and has really involved position taking, rather than any serious efforts at dispute resolution.

• I want an arbitrator who realizes that arbitration, more frequently than not, is the first time in which supposedly dispassionate individuals—that is, the arbitrator and counsel—can take a look at the parties' problems from a somewhat detached view.

• I want an arbitrator who will listen closely to the opening statements of the parties, figure out the case fast, and then start thinking of possible mediated outcomes.

• I want an arbitrator who will make a good attempt to persuade the parties of the pitfalls of their own positions and assist in suggesting constructive resolutions.

• I want an arbitrator who will listen when I say mediation is going nowhere and let's get on with calling the first witness. This does not mean I want mediation to come to a complete stop for all purposes. It just means that I think it's time to start calling evidence.

• Once a hearing gets underway, I want an arbitrator to run it efficiently and effectively. I expect an arbitrator to hear the evidence, rule on the objections, and listen to the submissions in an efficient manner. I also expect the arbitrator to show courage and make rulings, rather than defer every issue to "weight" and leave it for ultimate consideration at the time the decision is rendered.

• Even after a hearing has started, I expect the arbitrator to continue to look for clues of where a settlement possibility might arise. I expect an arbitrator to speak up at appropriate stages, and politely and diplomatically continue to point out to the parties the pitfalls of their positions. Chances are, I already have seen the pitfalls myself, but an arbitrator pointing them out to the parties together, or, if need be, separately, can more often than not be very helpful. It takes courage to do this, and I expect an arbitrator to be able to step up and meet the challenge.

What I Do Not Want in an Arbitrator

• I usually will not agree to an arbitrator who views himself or herself as merely an adjudicator. I acknowledge there are occasional cases that are not resolvable through mediation, but, in my experience, those are increasingly rare. In cases where I suspect we will have to litigate, I acknowledge I will look for an adjudicator first. However, my experience causes me to believe that there are fewer such cases and that the vast majority of cases are worthy of efforts at mediation.

• It goes without saying I will not agree to an arbitrator who is too passive and uncommunicative. I want more than small talk from an arbitrator at a hearing.

• Equally, I will not agree to an arbitrator who conducts himself or herself like a trial judge. Fortunately, most arbitrators don't, but, unfortunately, there are a small few who do. I expect an arbitrator to be cordial and polite but helpful. I also expect an arbitrator to understand that arbitration is not civil litigation, but is an adversarial process that is relationship-based.

• I will not agree to an arbitrator whom I suspect of having a cause greater than my own case to pursue. In this regard, while I do agree to them from time to time, I am wary of university professors, theologians, or anyone else who I may suspect wants to establish a reputation by writing an award that will be a useful academic read or—worse for my clients—of media interest. I want my arbitrator to be a practical, real-world person.

• I don't want an arbitrator who will impugn the credibility of my clients, or for that matter other witnesses called by me. In my view, there are ways of expressing disbelief without causing my clients or me embarrassment. I also believe this is the same for the union side. In my view, it is usually not necessary for an arbitrator to say that a particular witness is a liar. What's wrong with an arbitrator saying, "I prefer the evidence of *x* over *y*"? (I do acknowledge there are exceptions when harsh credibility findings may be in order, but it is my view that arbitrators should think long and hard before going down that road and understand the relationship-based process in which they are engaged.)

• I will not agree to an arbitrator who is disdainful, either at the hearing or in an award, of a position I take on behalf of a client. I expect an arbitrator to recognize that sometimes I have to take positions on behalf of clients for internal political reasons and that those positions may not always be the strongest. Again, the arbitrator ought to know how to reject my position without embarrassing me or, more important, my client. As I have stated earlier, arbitration is not civil litigation; it is a relationship-based process.

Conclusion

I don't expect to win every case, but I certainly expect to be treated fairly and not be bullied or embarrassed. Most of all, I want to be able to walk away from a hearing feeling that:

- my clients have had a fair-minded hearing;
- my clients and I have been treated in a respectful fashion;
- the arbitrator has understood the dynamics of the parties, and perhaps some of their internal politics;
- the arbitrator has tried to mediate, where appropriate, and stopped when no longer appropriate; and
- the arbitrator has heard the matter in an efficient and businesslike way and, most of all, has been a helpful, positive force.

These are the qualities I look for.

IV. LEGISLATION AND COURT DEVELOPMENTS IN CANADIAN ARBITRATION

WILLIAM A. MARCOTTE*

Introduction

This paper addresses recent developments concerning judicial standards of review of arbitrators' awards in Canada and provides an update regarding the involvement of the National Academy of Arbitrators (NAA) in a recent decision made by the Supreme Court of Canada.

Judicial Standards of Review of Arbitrators' Awards

Our examination of judicial review begins in 1993, when the Ontario government introduced the Social Contract Act, 1993,[1] which, among other things, imposed wage freezes in the public sector for a 3-year period. Each sector was guided in implementing this mandate by procedures contained in the "Framework Agreement." In the case of public education, virtually every one of the hundreds of locally bargained teacher/school board collective agreements contained a salary grid composed of years of education on one axis and years of teaching experience on the other. The

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[1]S.O. 1993, c.5.