Chapter 7

IMPLEMENTING REMEDIES AND RETAINING JURISDICTION

I. Retaining Jurisdiction: (1) The U.S. Perspective

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I'm going to talk a bit today about the retention of jurisdiction in the United States. To those who don't think about it much, retention of jurisdiction hasn't been particularly controversial. To illustrate that thesis first I'm going to cite the opinions of four past presidents of the Academy.

The Views of Four Presidents

I was the unsuccessful mediator in a pilot and flight engineer seniority integration dispute of two merging airlines, Pan American and National—some of you may be old enough to remember them. After my singular lack of success, that wonderful man Lou Gill, who was Academy President in 1971, was appointed to arbitrate that conflict. Those proceedings, in Lou's words, were exceptionally lengthy. They went on for weeks and weeks over a period running from July 1980 to March 1981. Lou's interim determinations, advisory board meetings, and proposed opinions culminated in a 59-page final opinion and a 14-page final award containing pages and pages of conditions and restrictions. During the course of those proceedings a group of furloughed Pan Am pilots known as the Janus Group hired their own counsel, and they decided that it would aid their cause if they called Lou at 4 a.m. every once in a while to remind him of their presence and to engage in other behavior that could be characterized only as harassment. Those of you who know seniority integration matters know that conditions and restrictions—who gets to fly what aircraft and for how long—require post-award determination after post-award determination. Although the then-ALPA merger policy

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allowed the retention of jurisdiction, as it does now, Lou, without ever saying why he did it, wrote himself out of that process, while setting forth an elaborate procedure by which another unnamed arbitrator—guess who—could decide what Lou meant when he wrote A or when he wrote B. So Lou Gills' view of the retention of jurisdiction is, "I'm just not going to do it."

Let me contrast that with the view of 1988 NAA President, Thomas T. Roberts. After a difficult and prolonged post-merger airline seniority integration case involving the pilots of Northwest and Republic, Tom issued a final award on November 6, 1989. That procedure, by the way, was probably not as contentious as the one at Pan Am and National, but it is rumored that a number of the Red Book and the Green Book pilots still do not speak to each other. In any event, those pilots had been frozen in their positions—"fenced" is the appropriate word—since 1996, and Tom's conditions and restrictions essentially continued that arrangement with some variance for new or replacement aircraft for 20 years, up to 2006. And Mr. Roberts retained jurisdiction just in case any disputes arose. So in two relatively similar situations one past president said, "Not me," and the other said, "Be happy to."

Then we have the views of two other presidents, Arnold Zack, 1994 NAA President, and Jack Dunsford, 1984 NAA President. Arnold will tell you that he has never retained jurisdiction and never will. Jack, on the other hand, in a brilliant paper entitled "On Retaining Jurisdiction"[1] said "retain jurisdiction, you bet, forever if necessary and besides sua sponte," which my wife Siobhan describes as the adult equivalent of "*me do.*" In some respects I echoed Jack's view in a similar paper delivered the same day in 1998 called "O Functus Officio: Is It Time To Go?"[2] On that *unanimity* of opinion among those four past presidents I want to overlay the view of the American Arbitration Association expressed at the meeting in Boulder last year, which can be paraphrased as: "We have a policy of discouraging the retention of jurisdiction." I'm happy to say that the AAA has rethought that policy of discouragement, but more of that later.

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[1]Dunsford, *On Retaining Jurisdiction*, in Arbitration 1998: The Changing World of Dispute Resolution, Proceedings of the 51st Annual Meeting, of National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 1999).

[2]Nicolau, *O Functus Officio: Is It Time To Go?* in Arbitration 1998: The Changing World of Dispute Resolution, Proceedings of the 51st Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 1999).

Why the Divergence?

What's going on here? Why the divergence? What is the real problem and what answer makes the most sense? The problem from the AAA's view was the possibility of overreaching, of arbitrators trying to extend their connection to a dispute or to a collective bargaining relationship for reasons in their own interests, not necessarily in the interest of the parties.

What happens when an arbitrator does not retain jurisdiction? I think the best example is found in a Ninth Circuit case, *Teamsters Local 631 v. Silver State.*[3] In that case a driver was fired for absenteeism in January 1994. In a decision in December of that year, an arbitrator concluded that the termination was without just cause and the penalty should have been a three-day suspension without pay. The company, Silver State, took the employee back but didn't pay him back pay for that 11-month period (outside of the three-day suspension) because the award made no mention of it. The union wrote the arbitrator telling her what the employer had done and asking her to clarify her award—did she mean to deny back pay for other than the three days? The employer objected on the expected grounds, i.e. that she was *functus officio.* A week later, the arbitrator issued an amended award providing for back pay for the period. The company refused to comply and it won the case in the lower court, citing our own rule 6D—"No clarification or interpretation of an award is permissible without the consent of both parties." On appeal, however, the Ninth Circuit said that a joint request wasn't necessary. Even without a joint request, the Ninth Circuit said that an arbitrator could complete an award, clarify an ambiguity, or correct a clear mistake. By the way, this wasn't even a clarification. What happened was that the arbitrator had failed to "complete" the award and it was permissible for her to complete it by addressing the issue that she had not mentioned. My point is not the Ninth Circuit's reasoning—I've taken issue with some of that reasoning before. My point is that the arbitrator completed her award on January 5, 1995, about 13 months after the employee had been fired, and the court's decision approving that completion came down more than two years later.

Silver State is not the only award where this has happened and the simple failure to retain jurisdiction left the parties waiting years, thus delaying finality. Chief Judge Posner had a chance to deal with

[3] 109 F.3d 1409 (1997).

it in a Seventh Circuit case involving a company named Excelsior.[4] Here, the issue was whether the arbitrator could clarify his award based on a post-award event. A grievant was told to complete a rehabilitation program within 60 days after the award. He didn't do it because there was a long battle about who was going to pay for it. When the arbitrator said that he could not rule on this matter because he was *functus officio,* Judge Posner went into a long discussion about *functus officio*, saying that it may be time to get rid of it, as the rule is hanging by its fingernails because of all the exceptions. He decided not to do that, but he did say that the award could be clarified. Again, two years without the person getting back to work.

Other courts have had to wrestle with similar issues. In a case involving a coal company,[5] the arbitrator ordered the reinstatement of five employees. The difficulty was that those employees hadn't really been laid off: they had been transferred to another job. Five others, unmentioned in the award, had been actually laid off. The company refused to ask the arbitrator what he meant, or whether these persons were entitled to reinstatement or not. So the union filed another grievance and it came before Marlin Volz who said, "I don't know what this first arbitrator meant—you can't tell—but I know the courts have remanded cases to an arbitrator to clarify an award, so I am ordering the company to join in asking that arbitrator to clarify the award." Eventually that did happen.

In a more recent case, the second arbitrator didn't believe he had that option. In reinstating an airline employee, a System Board Chairman ordered that she be "made whole for the loss of compensation and the incurrence of damages caused by the termination," but didn't retain jurisdiction in case there was a quarrel over those terms. When the union asked that the arbitrator tell the parties whether he meant to include incentive pay and interest, the company refused to join in the request. As a consequence, a new System Board Chairman, Earle Hockenberry, was appointed. Rightly, he said that because the first Chairman had not defined compensation or damages, he couldn't tell just what that Chairman's intentions were. So without any guidance, he had to decide those issues on his own.[6]

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[4]*Glass & Pottery Workers Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995).
[5]*Peabody Coal and United Mine Workers*, 90 LA 200 (Volz, 1987).
[6]*US Air Shuttle*, 108 LA 496 (Hockenberry, 1997).

Reasons for Hesitancy

Although the arbitrators resolved these cases in a much faster time than courts, time is still the enemy in these cases. It's distressing enough when all of us hear cases where the discharge took place two years ago. It's much worse when two or three more years go by because an arbitrator hasn't retained jurisdiction. What, I ask, would have been the time frame if the arbitrator's award in the cases I cited had simply contained the following few words:

> The arbitrator shall retain jurisdiction to resolve any dispute that may arise over the meaning, interpretation, or application of this award.

What I cannot understand is why there is hesitancy in doing this because there's nothing in the Code that prohibits it. There was a time when the Code said that an award must "reserve no future duties to the arbitrator except by agreement of the parties." That language disappeared 30 years ago. All the Code says now is that an award, when released, must be definite, certain, and as concise as possible.

But what about 6D, that the Ninth Circuit said really has no bearing on this issue? That could be read as a warning or an admonition that clarification or interpretation is prohibited without the consent of the parties. But I think that is not the case because the provision says nothing about the ability of an arbitrator to retain jurisdiction. 6D only tells what you can't do after the award is released, and *Silver State*, Chief Judge Posner, the authors of all of these other opinions, and Professor Dunsford all tell us that an award is released "only when it is final and complete." We all know that the employer doesn't want to raise the issue of remedy because it might be considered to be a signal to the arbitrator that the employer thinks his case is weak. The union, further, doesn't want to deal with issues of mitigation and things like that—save it for another time. As a consequence, almost all awards are general and, thus, there is absolutely nothing wrong with retaining jurisdiction to deal with those kinds of issues.

In addition to the Code, I think some arbitrators may think that retaining jurisdiction is forbidden by the law. Despite the specter of *functus officio,* courts routinely send awards back to the first arbitrator who heard it so we should have no hesitancy in realizing that the fear of illegality is simply unfounded.

A third reason may be that some arbitrators are still reading the wrong edition of Elkouri and Elkouri.[7] Early editions of that monumental work really did cast doubt on the retention of jurisdiction by arbitrators suggesting that it could be considered wrong and might even be illegal. Happily the Sixth Edition, the latest edition, has dispelled that doubt and reversed course completely, expressly sanctioning jurisdiction retention for remedial issues. I was reminded of this by Amadeo Greco, the author of that section entitled "Retaining Jurisdiction to Resolve Remedial Issues."[8]

Another reason for hesitancy may have been that arbitrators had heard of the AAA policy of discouragement and shied away from offending that institution. I can report to you as I've reported to the Board that this policy no longer exists. When it was mentioned last year I wrote our good friend Frank Zotto, asking of its basis and in that letter I set forth various practical and time-related reasons for retaining jurisdiction, emphasizing Jack Dunsford's Academy presentation as well as his more extensive piece on the subject in the *Georgia Law Review*,[9] as well as the earlier views of colleagues such as Chuck Remus, Peter Seitz, and Erwin Ellman. Frank wrote back and said that Christine Newhall and he were reconsidering it and on January 12 he wrote me, with copies to the AAA's Vice-President for Neutral Services and to our liaison Dennis Nolan and to Jack Dunsford. Although stating that the AAA would continue to be watchful for continued abuses; that it would be responsive to client feedback on the issue and that it would remind arbitrators that retention should be done only for proper and appropriate reasons, Frank wrote that the AAA would be advising all of its labor case management staff "that the retention of jurisdiction for the purpose of resolving any dispute between the parties regarding the meaning, application or implementation of the award is an appropriate reason for doing so." So I would suggest that in view of all this the question is no longer *whether* jurisdiction should be retained for the purpose of resolving any disputes arising from an award: it *should* be retained. It is as simple as that. What may subsequently arise is not, as some would have it, a separate dispute—it is part and parcel of the same dispute.

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[7]Elkouri & Elkouri: How Arbitration Works, 6th ed., Ruben, ed. (BNA Books, 2003).
[8]*Id.* at 333.
[9]Dunsford, *The Case for Retention of Remedial Jurisdiction*, 31 Ga. L. Rev. 201 (1996).

Retention: For How Long and Over What?

The only remaining question is how long jurisdiction should be retained. Jack would say that no time limit should be set. Elkouri and Elkouri point out at least one court (California) had said that it would be error on an arbitrator's part to retain jurisdiction for a fixed period rather than for an indefinite period. It has been my practice to set a time limit of 60 days, usually because I think that this is sufficient to focus the parties' attention on the problem and doesn't let them think about anything else. What to do on this score, as Amadeo Greco has pointed out, is disputable. His solution, one clearly to be considered, is to retain jurisdiction for *at least* a particular number of days. That way, if nothing is getting done, and the parties are nowhere near a resolution, a party can report this to the arbitrator. The arbitrator, after hearing what the other party has to say, can then extend the time or set the matter down for hearing so that the disputed issue or disputed issues can be resolved.

Lest you think that remand and retention is appropriate only when the issue is money, or particular benefits, or the identification of those entitled to compensation as a result of subcontracting, improperly forced retirement, and the like, let me close by giving you an example of forced retention when the issue is one of contract interpretation.

An airline, like all other airlines subject to collective bargaining agreements, had an obligation to present the employee with written charges and hold a hearing within specified time limits before dismissing him or her. If those time limits could not be met because of the unavailability of witnesses or other valid reasons, the prerequisite hearing would be held at a mutually agreeable time.

Charges were filed, and then came a furlough notice. The company said, "You did something before you went on furlough, come back, we have to hold this hearing." The union's response was that the furloughee's only contractual obligation was to keep his address current, so the furloughee could properly say, "I'll be back in three years, we can hold the hearing then." The company's reply was that this was unfair; the contract provided that furlough pay would be forfeited in the event of a dismissal for cause, but that could not take place unless the internal hearing was first held. In the course of this contractual dispute, no details of specific cases were presented. It was therefore impossible to tell whether a request to appear, if the company had the right, was or was not

appropriate because the circumstances of the cases behind the grievance were not known to the Board.

I reached several conclusions: (1) that the hearing requirement, without which an employee could be summarily fired, was a benefit to the employee; (2) that the furlough provision was a benefit because without it the employee had no right of recall; and (3) that a furloughed employee who had been charged with misconduct while on active status had a greater obligation than just keeping his address current. Given this, it just seemed to me inconceivable that the parties ever intended the interminable delay the union sought. But it was also inconceivable to me that the company could require the attendance of a furloughee without full consideration of that person's circumstances, such as working elsewhere, having moved a long ways away, or being subject to other circumstances that impinge on attendance at a particular time. Given these provisions and the concepts they embodied, the "reasonable contemplation," I said, was "one of accommodation if the interests and concerns of all involved are to be respected." The full Board agreed that it would be premature to say anything more than the fact that the company could not be arbitrary or capricious in its request. So what we did was to remand the matter back to the parties for possible agreement on guidelines with respect to future cases, retaining jurisdiction to resolve any disputes that might arise.

So, my friends, don't worry about retaining jurisdiction if circumstances call for it. The process, the parties, and the grievants will all be better off for it.