II. The Surprising Strength of an Empty Duty—DFR Issues in Labor Arbitration

The duty of fair representation (DFR), however weak it might be in terms of ultimate judicial outcomes, can influence the plans and strategies of unions and employers in dealing with grievances. A panel of arbitrators and advocates explores the practical and ethical implications of the DFR in the conduct of hearings and in decision-making.

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Panelists: *Advocates*:
Joseph L. Paller Jr., Gilbert & Sackman, Los Angeles, CA
Harry A. Rissetto, Morgan Lewis & Bockius, Washington, DC
Arbitrators:
Elliott Goldstein, NAA, Chicago, IL
Barbara Zausner, NAA, Mt. Tremper, NY
Paula Knopf, NAA, Toronto, ON

BARRY WINOGRAD: Let me introduce the moderator of the next panel, a long-time old friend and a wonderful fellow, Jim Oldham—former vice president of the Academy, long-time labor law professor, student of English-Anglo history in the legal system, great scholar. This is a program that he has spent a lot of time pulling together. Thank you, Jim.

JAMES OLDHAM: Thanks, Barry. It's a pleasure.

Welcome to this session on the duty of fair representation. We have limited time, so I'll be really brief in introducing our participants. We will be presenting several DFR problems to be argued to our three arbitrators, Academy members Paula Knopf of Toronto, Barbara Zausner of New York, and Elliott Goldstein of Chicago. The persons presenting the arguments are very experienced counsel. Representing management will be Harry Rissetto, a partner for many years with Morgan Lewis in Washington, D.C., who has expertise in all aspects of labor law—especially in the arcane world of the Railway Labor Act. Representing the union will be Joe Paller, a partner in the firm of Gilbert & Sackman in Los Angeles, who has equally deep and diverse expertise in all aspects of labor issues—for example, in the field of education.

During this session, we will be working through a hypothetical set of facts, posing DFR problems that have come before labor arbitrators. We will pretend that the case is being presented to a single arbitrator, even though we have three sitting arbitrators, each of whom will give us his/her individual perspective.

First, I will take a few minutes to comment on the DFR generally. Then I'll introduce the hypothetical facts with which we'll be working. Three problems will be put to counsel, the arbitrators, and the audience. Each problem will be argued by Harry and Joe. After each set of arguments, the arbitrators will huddle briefly. We're not going to take much of a deliberation break, but I'm going to ask you in the audience for a show-of-hands response. For these problems, I'm just going to ask you to do it on an instantaneous emotional response to what you feel the right answer should be without having much time to think about it. Then we'll hear from our arbitrator panel as to how they think the case or the questions should be solved.

After we run through the three problems, there will be time for Harry and Joe to step out of their role-playing and to give us some general comments on the duty of their representation and their encounters with that doctrine in practice.

Let me talk for a few moments about the duty of fair representation. In 1978, 33 years ago, Academy member Robert Rubin published an article called "The Impact of the Duty of Fair Representation Upon Labor Arbitration." He introduced that article by observing that the DFR had a more profound impact on arbitration than had previously been recognized. No doubt everyone here knows that the federal courts and the National Labor Relations Board (NLRB) established the perfectly sensible proposition that when a union is given the exclusive right to represent a group of employees, that right carries with it a duty to represent fairly all employees in the group, whether or not they are union members. An alleged breach of the duty can be litigated either by filing an unfair labor practice charge with the Board or by bringing an action in federal district court. This sounds like an important protection for employees. Yet in the 1967 case of *Vaca v. Sipes*, the Supreme Court decided that a breach of the DFR can be established only if the union can be shown to have acted discriminatorily, arbitrarily, or in bad faith. As a practical matter, this gives the union considerable operating room or, as is often said, a very wide range of discretion. The DFR is part of the labor relations law of Canada as well, including the *Vaca v. Sipes* formula.

In a recent speech, the president of the Canadian Labor Watch Association, John Mortimer, reportedly said that the current duty of fair representation provisions in Canadian labor codes are at best "a joke." Labor boards have rendered the unions' duty so low that work claims against unions are almost always dismissed. Another example: A dissident group from the British Columbia Local of the United Food and Commercial Workers Union, a group called Members for Democracy, posted a two-part series on the DFR, copyright 2011. Part one is called "The Straight Goods on the Duty of Fair Representation." It begins by stating the widely held belief that the DFR provides union members with a guarantee of good representation by their union and its officials, whereas in reality, nothing could be further from the truth.

As mentioned above, the three key tests from *Vaca v. Sipes*—arbitrary, discriminatory, and bad faith—migrated to Canada. According to "The Straight Goods on the DFR," Canadian DFR legislation allows unions to defend virtually any decision not to file or advance a grievance on the basis that "we didn't think we could win it."

Part two of the DFR posting by this dissident group, Members for Democracy, was even more emphatic. It is called "The Duty to Go Through the Motions." Fellow union members in this part are warned that in a DFR complaint, the deck is stacked against you—"You get more justice when you're fighting a speeding ticket."

Well, the title of this session is called "The Surprising Strength of an Empty Duty." I have just illustrated the view of some that the doctrine is an empty duty. What then is the surprising strength of the DFR? Referring again to part two of the DFR posting by Members for Democracy, the advice is: "Turn up the heat!" And, I'm quoting now, "As lame as DFR legislation is, many unions absolutely dread being DFR'd. Although they are highly likely to win, a DFR suit means that they will need to spend time and money, sometimes a lot of both, defending themselves."

Here is a different example from a transcript of an arbitration case in the United States some years ago in which the business agent for the Teamsters said the following: "If somebody comes in and writes a grievance, whether I believe it is contractually correct or not, I will process that grievance or other grievances. Because, number one, if I don't they'll sue me. And number two, quite honestly, I can pass that grievance that I feel has no merit up the food chain. It goes to a grievance panel." To this, the arbitrator responded, "Maybe you missed your calling. I think you should

become a lawyer." The Teamsters' business agent responded, "No, sir. You are all nice folks, but I spend more time with you than I care to." This exchange was reprinted in an article by Eugene Scalia—one of Justice Scalia's nine children—and in a conversation with him recently, he told me that the arbitrator in this case was our own Dennis Nolan.

Turning the matter to a slightly more positive view, it is very easy to demonstrate how the DFR, this empty duty, has prompted union after union to coach their business agents and stewards to be careful, even scrupulous, about handling, processing, investigating, and presenting grievances, in deciding whether to take cases to arbitration, and of course, in conducting the hearing itself. This cautionary attitude extends as well to employers who are customarily joined as defendants in DFR suits in federal court. Some of the caution is reflected and was prompted by the *Penn Plaza v. Pyett* case.

For example, in a 2009 posting by a Winston & Strawn attorney, the author says that "employers should make sure that the arbitration provision does not operate to prevent employees from effectively vindicating their rights under the law." Also, "employers should resist the temptation to limit the arbitrator's ability to remedy any violation of the law which may be found, *i.e.,* not allowing the arbitrator to award damages and attorney's fees." So much for the surprising strength of this empty duty.

Now let's go to our hypothetical problems. We have posed a situation involving an employee named Mary Jones. She worked for an upscale retail department store as an inventory clerk. She was an active supporter of women's rights. Just before the close of her shift on Friday, October 1, 2010, she circulated an e-mail to unit employees encouraging them to wear blue jeans the next day in honor of the 18th Annual Lee Denim Day supporting the fight against breast cancer. Many employees responded by wearing blue jeans to work on October 2nd, including some who worked in the public sales areas. The store manager was infuriated by this, and on learning that Mary Jones had been responsible, he discharged her immediately.

Mary telephoned the union business representative, who agreed to file a grievance claiming that Mary had been discharged without just cause. Mary never received a copy of the grievance, despite multiple requests to the union office. She was never interviewed by the union and heard nothing until she got a phone call

saying that the grievance had been denied, but the union planned to take her case to arbitration.

A few weeks later, a friend who still worked at the store called Mary and told her of a conversation the friend had overheard between a supervisor and the union business rep in which the supervisor and the business rep both said they were glad to be rid of Mary—she was a real pain in the ass and had been a thorn in their side for years.

Mary then consulted a lawyer. On the lawyer's advice, she filed an unfair labor practice charge with the NLRB against both the company and the union. Independently, she filed a complaint against the company with the EEOC.

The arbitration case goes forward. The grievant appears with her own lawyer. She says that she has learned that the union was glad that she had been fired—so clearly the union could not represent her fairly. The union objects to her lawyer's presence and asks the arbitrator to order him to leave. The company is willing to allow the grievant's lawyer to participate, but only on condition that the grievant agrees to drop the EEOC complaint and the unfair labor practice charge that she filed with the NLRB. The company points out, correctly, that the collective bargaining contract contains a comprehensive *Pyett*-type nondiscrimination clause providing that the grievance and arbitration procedure is to be the sole and exclusive recourse for any claim of discrimination, including any claim made pursuant to Title 7 of the Civil Rights Act of 1964.

Under these circumstances, should the arbitrator (1) order the grievant's counsel to leave the hearing room as requested by the union? (2) Allow outside counsel to stay but issue the order requested by the company? Or, (3) do something else, and, if so, what?

We'll now have arguments on this first phase of this problem. We'll hear from the union first, Joe Paller, then from Harry Rissetto.

JOSEPH PALLER: Thank you. First things first; before we even get into the issue of whether or not the attorney ought to be excluded from the hearing room, let's turn back to the facts of Mary's case.

Now, it's true. The union didn't do everything it could have done in this case. But, there's no breach of the duty of fair representation. The union may have, like the company and perhaps other people in the workplace, considered Mary Jones to be a

thorn in their side. The union may have in fact not communicated well with the grievant. But the union has taken her case to arbitration, and not only to arbitration but before a panel of internationally renowned arbitrators, all of whom possess the wisdom of Solomon, the incisive intellects of Socrates, the legal prowess of an Oliver Wendell Holmes or his Canadian equivalent. Under those circumstances, how can the union's representation of the grievant be deemed a breach of the duty of fair representation? Regardless of whatever errors that may have occurred in the earlier stages of the grievance procedure, the union has taken the case to arbitration.

Now, getting back to the question about whether or not the attorney should be permitted to be in the room. Well, first off, there's no contractual or legal right that gives a grievant power to insist on an attorney of her own choosing to represent her instead of union counsel or even instead of the union's business representative. She has no right to have her attorney in the hearing room. This is established first and foremost by the terms of the collective bargaining agreement itself. The grievance and arbitration clause does not give grievants a right to select their attorneys. It doesn't give them a right to have any input or decision-making responsibility in the arbitration process. In fact, the contract confers upon the union the sole and exclusive right to decide to go to arbitration in the first place, and complete control of how the union presents its case.

Any attempt by this distinguished panel of arbitrators to actually change that would be to add to, subtract, or modify the rights of the union under the collective bargaining agreement and would therefore lead to the award being set aside, which I'm sure this panel would never want to happen.

It's possible that Miss Jones or her attorney may argue that the union itself is under some other legal duty, extraneous of the contract, to allow her to choose an attorney to represent her in arbitration. But, I'm sure you all read my brief in this case. If you'll look at the cases beginning at page 19,[1] you'll see that all the cases uniformly hold that the DFR does not require the union to provide representation by counsel at all, including counsel of the grievant's own choosing. In most instances, a union business

[1]See Joseph L. Paller Jr., "Fair Representation and the Attorney-Client Relationship in Labor Arbitration: Dilemmas for Union Counsel," in Chapter 6.I of this edition of *The Proceedings*.

representative will be found to be perfectly adequate to represent the grievant, even in the most complicated cases.

Before leaving the issue, I'd like to address the application of the Supreme Court's decision in the *Pyett* case. *Pyett* adds to a twist to this analysis. As was discussed by the panel yesterday, the Supreme Court's *Pyett* decision holds that a union can effectively waive an employee's rights to litigate his or her statutory claims in court. A typical nondiscrimination clause won't have this effect, and there is plenty of case law to that effect. But here, the collective bargaining agreement does appear to contain provisions that clearly and unmistakably waive the grievant's right to sue with respect to specific enumerated statutes, which is what the *Pyett* case requires.

There are two caveats that I'd like to point out to the panel here. First off, it's not at all clear that the *Pyett* duty extends to NLRB charges that may have been filed relating to the union's breach of duty to fair representation itself. To date there isn't a single case that holds that that kind of NLRB charge is subject to *Pyett* deferral to arbitration. At this time, there's no basis for the arbitration panel to read *Pyett* as requiring that it address the merits of the DFR claims asserted in Miss Jones's unfair labor practice charge.

The second thing is that the Supreme Court's decision in the *EEOC v. Waffle House* case is still good law. The EEOC and other federal agencies have a right to investigate complaints of discrimination even if the union signed a *Pyett*-style agreement waiving the grievant's right to file EEOC charges or sue for discrimination, although the EEOC may not have the power to award damages or restitution.

Let me make one final point here. There are many, many tactical reasons why a union might choose to allow an attorney for a grievant to stay in the hearing room and even to present the case on behalf of the union. But that's not the issue here since the union, in this instance, has objected to the attorney's presence. The contract here gives the union and the employer exclusive control over the grievance and arbitration proceedings. As such, without both the union's and the company's consent, Miss Jones's attorney has no right to be in the hearing room and no right to take over the union's presentation of its case. Thank you.

JAMES OLDHAM: Thank you, Counsel. And, for the company.

HARRY RISSETTO: The company generally agrees with the union's position on the absence of a right of the grievant's coun-

sel to attend or participate in the hearing. Nevertheless, having practiced, members of the board, for quite a number of years, I can foresee that this particular grievance is going to keep the employer busy and will be generating fees for my firm for at least until I retire. And, there are concurrent proceedings before the EEOC and the unfair labor practice proceedings before the NLRB. I think under these circumstances, there is some virtue in attempting to resolve the whole matter in one proceeding.

We would ask the board to do two things: One, to meet with the counsel for the parties, and attempt to persuade them to enter into an arrangement whereby the grievant would agree to drop the EEOC case and drop the unfair labor practice. In return for that, the attorney for the grievant would have an opportunity to attend and participate in the hearing. I think that is a resolution that has some practical appeal, and it would be nonprecedential, obviously. Second, in the absence of agreement by the union, we would ask the members of the board to order that arrangement.

This is a difficult case. It's going to be a challenging case on the merits. We recognize that. And it also has a certain appeal. My client is in the high-end clothing business. We don't want to be all over the newspapers with an EEOC case involving Denim Day and Breast Cancer Awareness. So, we think that the grievant acted inappropriately—otherwise we would have settled this case before we appeared before this board. But in this situation, we think it ought to be wrapped up in one proceeding. Thank you.

JAMES OLDHAM: Thank you, Counsel. Now, we're asked to do one of three things: (1) Order the grievant's counsel to leave the hearing as requested by the union. (2) Allow the grievant's counsel to stay as conditioned by the employer's request. Or, (3) do something else, and, if so, what?

I should tell you that our arbitration panelists are not responding to these facts instantaneously. They have had these fact patterns for a week or two and have been able to think about them and to formulate a position. What they have not heard is argument by counsel. So these arguments are fresh and first-hand—here for the first time. While our arbitrators deliberate, I want to get a general, instantaneous impression from the floor. How many of you would, first, order the grievant's counsel to leave the hearing room as requested by the union? I'll call that one-third. How many of you would allow the counsel to stay under the conditions posed by the employer? I see three hands.

So, there are a great many of you who would do something else. The majority of our audience has another plan in mind, and we'll see if it corresponds or not to what our arbitrators have to say.

I'm going to ask Paula Knopf to speak first, and then Elliot, and then Barbara.

PAULA KNOPF: Thank you, Counsel. First of all—and to address your submissions, in terms of the union's counsel—flattery is lovely, and we love it. But, it doesn't work.

JOSEPH PALLER: Did I mention that your fees are way too low?

PAULA KNOPF: We thought that. And that takes me to management counsel. While we are concerned about your fees, we're not going to take into that consideration either. Turning to the merits of the submissions, let's deal with first principles first. The parties to the collective agreement that have given the grievor the right to just cause protections are the union and the employer. The collective agreement and the governing legislation also give the union the exclusive right to represent the members of the bargaining unit. That right carries with it the obligation to represent the membership fairly and that means without discrimination, bad faith, or by taking into consideration any arbitrary considerations.

But, no individual has an absolute right to have the grievance arbitrated. No individual has a right to determine how it will be taken through the process. If individuals want to process or progress a grievance on their own, that wish offends the principle of exclusive representation by the union.

Finally, we also have to keep in mind that the control over the arbitration hearing and process itself is the arbitrator's. So, we have to balance those rights and our own arbitral obligations in considering this issue.

So what should we do with the grievor's request to have her counsel present? We know only the parties to a collective agreement have status at the hearing. Therefore, Mary doesn't have status and, hence, she has no right to separate representation. But, as we all know and we must remember, process is as important to the administration of justice and industrial justice as the result itself.

Mary has told us that she feels the union is conspiring against her with the employer to uphold the discharge. There's a real problem of perception here. So, it's easy for us to say to her lawyer, "You cannot be here. You have no right to here. And you have no right to separate representation." But her perception remains a

real problem that may be an ultimate problem for the parties that will fester and fester.

Can we ignore those problems? Or, how should we deal with them? Frankly, her problems with the union are not a problem for this arbitration hearing. Despite what Mary's friend has reported to her about the conversation between the union and the employer that she overheard, we have no actual evidence before us to establish that there is a conflict of interest or a breach of the duty of fair representation by the union to date. Nor do we want this discharge arbitration to be bogged down by questions of representation.

The fact is the case has been referred to us for hearing. The union tells us they're here prepared to defend against the discharge. There's no evidence that's been revealed to us to suggest actual discrimination. We know because we are so old and experienced that there are many times when people will overhear somebody saying, "Gee, we're glad to get rid of so and so." But ultimately the union has to make the decision about whether to go forward and often decides to proceed in any event. And, here we are today with the union willing to process her case, even though, as the union has quite properly admitted, there may have been failures of communication along the way. The fact is, the only way of determining if the union has failed to properly represent Mary is to wait until the end of the process to see whether the union has fulfilled all its duty of representation.

We're concerned here about the situation where the arbitrator is being asked at each step of the way to decide whether the union's duty has been fulfilled. The union's duty lasts until the end of the arbitration, at least.

The last thing as an arbitrator we want to do is complicate the situation or a grievance hearing. Nor do we want this discharge arbitration derailed by having the grievor run off, or allow anyone to run off, at each stage of the process to have some other forum exercise a form of oversight at each step of the union's tactical decisions along the way. If there is a true failure of the union's duty toward a grievor, if there has or was a true failure to represent the grievor with respect to the discharge, at this stage of the proceeding it is not our concern, because the discharge case can and must be heard. The duty of fair representation can and may be determined somewhere else and later.

So, having all those considerations in mind, we see no reason to allow the grievor's lawyer to participate. There's no right to such

representation, and we see no reason to tie his presence or exclusion in any way to the EEOC complaint, which may well be dependent on the outcome of this arbitration. On the other hand, we see no reason to kick him out of the hearing room—that's not a legal phrase!—or to have him excluded from the hearing room. As a matter of our discretion over the conduct of the hearing, we're quite prepared to allow him to remain in the hearing, to advise the grievor, and to give the grievor the kind of support that she clearly feels she needs. As long as he is content to play that role, we have no problem with him being here.

So he can act as an observer. He can act as an advisor, as long as he doesn't interfere with the orderly and expeditious conduct of the hearing. If and when that occurs, we'll allow counsel to make further submissions to see what should happen.

Now, that's our ruling. There's an alternative ruling. Can I give that?

JAMES OLDHAM: Yes. But let's see if Elliott or Barbara wishes to add anything before we look at an alternative.

ELLIOTT GOLDSTEIN: Well, just briefly. You'll notice that in the arguments presented, there was clearly a discussion about counsel's presence. Then in the request by the employer, it went from counsel's presence and attendance to participation. As to the participation, I agree completely that it's the parties' process. If duty of representation can be summarized by the court's smell test, it's not my nose—it's the court's and/or the EEOC or the NLRB. My job is to deal with the discharge case and presume that the parties own the process. If something has gone on to change that, at this point, at least, that's somebody else's call. So, I would say clearly no participation.

As to the advice and comfort of the grievant, I don't think I have the discretion or authority. I would take the parties out in the hall and do my best to pressure and/or cajole for that limited role, but if either the employer or the union dug in their heels, I would order the attorney out.

BARBARA ZAUSNER: Well, I think we're unanimous on that. I would allow outside counsel to stay and keep quiet.

PAULA KNOPF: There's an alternative ruling that arises from counsel's suggestion of trying to mediate this problem, and it's one that I did. On the initiative of the Board of Arbitration, we adjourned a hearing that was heading into a festering nightmare for everybody. We told the parties that the case could only be brought back for hearing when and if the union and the grievor

agreed upon how they could work together. Now, we recognized that this was a bit dicey because you are putting the parties to the expense of another day. But if you can see that the case is going to be a mess because of conflicts between the union and the grievor, and you want to avoid all those problems, you might try to give the parties the time out that the union and the grievor might come together to be able to present a united case.

JAMES OLDHAM: Okay, terrific. Now, let's go to part two of our fact pattern. Assume that in this first case that we just finished discussing that the arbitrator orders the grievant's counsel to leave, and outside counsel departs. The company's case is then presented by company counsel. When the company rests, the arbitrator invites the union business rep to present the evidence. The union's business rep says the following: "Grievant has been a good worker for the company for 10 years. Observance of Lee Denim Day was for a good cause and did the company no real harm. So the grievant shouldn't have been discharged." He says that, in his opinion, "The company has not carried its burden of proving that the grievant's discharge was valid. The union, therefore, rests." (Privately, the business rep was convinced that the grievant would be a terrible witness.)

Immediately after the union business rep finishes speaking, the grievant cries out, "No, you can't do that—I want to tell my side!" The business rep tells her to sit down. The grievant gives him a cold stare, then leaps to her feet, walks rapidly to the witness chair in the center of the U-shaped table arrangement in the conference room, faces the arbitrator, raises her hand and asks to be sworn in. She says, also, that three co-workers want to testify on her behalf, and she has made sure that they were available. In fact, they were waiting in the hotel lobby.

The company counsel objects to allowing the grievant or the other witnesses to testify, since they have not been called by the union, and argues that just cause for the discharge was clearly established by the company's case. The company requests that a bench ruling should be issued in its favor.

The business rep looks confused but says nothing. The arbitrator at this point says, "It's a good time for a lunch break."

During the lunch break, the union business rep telephones the union's outside counsel and tells him to get to the hearing room ASAP—that the grievant is nearly out of control. When the hearing resumes, the attorney for the union appears and tells the

arbitrator that he supports the position that the union business rep has taken.

HARRY RISSETTO: They didn't hear our evidence—that's the problem.

JAMES OLDHAM: We're going to hear from the company first on this case.

HARRY RISSETTO: As usual, the management and the employer have relatively little appeal in this audience. What we neglected to point out in the assumed facts is that the employer did present a significant case, showing the business justification for the decision that it made, and the fact that this particular employer engaged in all sorts of initiatives to support women's causes—and not only women's causes, but also the fight against breast cancer. What the grievant was doing in this by her actions was unilaterally preempting important employer managerial responsibility. I think that would lay a more favorable groundwork for a decision. In making the decision, the board should not be confused by the ultimate decision on the merits, but simply by the procedural question of whether or not the grievant ought to be able to testify. And, I'm afraid, based on the show of hands, you are conflating those two questions. Thank you.

JOSEPH PALLER: Harry's wrong, of course. There's a legion of federal court cases discussed in my brief that hold that a union's mistakes in judgment don't constitute a breach of the duty of fair representation. This is true of trial tactics of the kind that might constitute legal malpractice. The court cases also established that a union does not breach its duty of fair representation by refusing to present evidence that may be requested by the grievant. That includes refusing to make arguments or objections that the grievant might want to make. And at least one federal Court of Appeals panel, in an unpublished decision, has said that a union doesn't breach its duty of fair representation by not calling the grievant as a witness at all and by not allowing her to call additional witnesses.

The union's business representative satisfied the union's duty of fair representation by highlighting the weaknesses—the fatal weaknesses—of the employer's case, and by pointing out the great merit of the grievance. First of all, he pointed out the obvious: Mary Jones's discharge was an extreme and unjustifiable overreaction to her efforts to promote an important societal goal—the elimination of breast cancer. And, which one of you members of the panel is against that?

In addition, there is absolutely no reason to call Miss Jones as a witness. There's no dispute whatsoever about any of the facts, at least none that would require the grievant's testimony. Her motives are irrelevant. The important issues are whether the employer can, in fact, prove that the store lost sales, or that its reputation was damaged, or that employee morale suffered as a result of the noble efforts of Miss Jones to promote awareness of breast cancer. Miss Jones's testimony would be irrelevant on those issues. So as a matter of the law governing the duty of fair representation, and as a matter of trial tactics, the union was fully justified in making the decision not to call Miss Jones as a witness and also to not allow her to call her own witnesses.

HARRY RISSETTO: The company's request is that both sides addressed the merits, and we request a decision on the merits, without allowing her—the grievant's—testimony.

JOSEPH PALLER: We'll go along with that, even though Harry's still wrong about everything else.

JAMES OLDHAM: Now, how should the arbitrator rule? (1) Grant the company's request for a bench ruling in its favor? (2) Swear in the grievant to hear her story, despite the positions taken by the company and the union? (3) Allow not only the grievant to testify, but also the three witnesses in the lobby? Or (4), do something else, and if so, what?

Someone has asked, "Isn't the question here just how many people would grant a bench ruling of some sort?" On this, I would say that if you think that you would not grant a bench ruling of any kind at this point, then vote no on question number one. If you think that the company's case was persuasive and sufficient to carry its burden of proof and you're prepared to rule at this moment, then say yes. So [to the audience], how many of you would vote for the company's request to give a bench ruling in its favor here? Anyone? I did have one vote over here. Then how many of you would swear in the grievant and hear her story, despite the positions taken by the company? There are a handful. And, how many of you would allow not only the grievant but also the three witnesses in the lobby to testify? A smaller handful. Everybody else would do something else. Okay, let's hear from our arbitrators—Barbara.

BARBARA ZAUSNER: When I first read the fact pattern and some of the earlier materials, it struck me that what we were talking about was a sensitivity to DFR issues. I'm assuming much less sophisticated parties than what we have here. I'm also assuming

that I know them well enough to have some idea of how sophisticated they are. My first act would be to take the representatives out into the hall, find out what their positions are on the DFR issue, and to see if the parties think it would be better to have the grievant testify to let her have her say.

I would not swear her in and take her testimony or anybody else's on her motion. I would really try to conciliate something that allowed at least the grievant to testify.

JAMES OLDHAM: Thank you. Paula, what would you do?

PAULA KNOPF: I don't disagree with Barbara. But, too many times in a discharge case, after the employer's evidence is complete, it seems as if the employer has failed to meet its burden. Then the union goes forward and calls evidence, the grievor takes the stand and just puts the nail in his/her own coffin.

So while you are concerned about this grievor wanting to testify and trying to protect the union from a charge of failing to meet its duty of fair representation, if she does testify, she might end up without a job; whereas, if she didn't testify, you might have reinstated her. I know we're not supposed to think backward, but sometimes we can't help but do that.

In this case, having heard the employer's evidence and having had the union's submissions, and having had both parties ask for a bench ruling, and knowing that I'm going to reinstate her, I wouldn't let her take the stand. I mean, what is she going to complain about when I order the employer to take her back? And that puts the end to everything.

JAMES OLDHAM: Elliott?

ELLIOTT GOLDSTEIN: Assuming you're going to reinstate her, I would agree with point two. Yes, I think that sort of makes it easy. The problem is it gets to the question for the bench ruling, which I would not grant. That just adds to the smell of the case. My job is not to create DFR cases—so I just wouldn't do it. Now, that's presuming that I have questions as to whether a prima facie case has been made out. If I, in my mind, say I'm going to reinstate, then I suppose what I would do is say to the grievant, "I'm ready to make a ruling in your favor. Do you still want to testify?" And, go from there.

I just think that we do have a responsibility to protect the record and the ownership of the process by the parties. So my inclination would be to do exactly as I said.

JAMES OLDHAM: All right. Thank you. Now, let's go to our third part of this problem.

Suppose that this case did go forward and was heard on the merits. The arbitrator ruled that the discharge was too severe a penalty for what the grievant had done, and no more than a two-week suspension would have been appropriate. The arbitrator therefore ordered the company to reinstate the grievant and to provide her with back pay except for the two-week suspension.

The company vigorously disagreed with the arbitrator's decision, but, grudgingly, put grievant back to work. The company drew the line, however, on back pay and refused to pay it despite repeated requests by Jones.

Several months passed, and then Mary Jones consulted her outside attorney, who advised her to file another grievance—this one against both the company and the union—against the company for not honoring the arbitration award and against the union for not taking the company to court to enforce the award. Her counsel also advised filing a hybrid DFR action in federal court, pointing out that there was a six-month statute of limitations. The grievant filed this second grievance as suggested and her counsel filed the DFR complaint.

Company and union representatives then met and agreed that it would be to their mutual advantage to avoid the expense of defending the hybrid DFR action. Thus, they agreed to allow the new grievance to be sent directly to arbitration if the grievant would drop the DFR case.

On advice of counsel, the grievant agreed to drop the DFR case if the company and the union would stipulate that the issues to be put to the arbitrator were (1) whether the union had breached the DFR by not taking the company to court to enforce the back pay part of the prior arbitration award, and (2) if such a violation were to be found, what would be the proper apportionment of damages under the Supreme Court's *Bowen* case? The company and the union agreed to these stipulations.

Now the case is before the arbitrator. How should the arbitrator rule on the two stipulated issues? And on this, we'll ask the union to argue first.

JOSEPH PALLER: Let's admit it—the union did make a mistake here. But it did not breach the duty of fair representation. And it should not bear any of the liability for any back pay that may be owed by the employer. Everyone in this room knows a union breaches its duty of fair representation when its processing of a grievance or handling of an arbitration is arbitrary, capricious, discriminatory, or in bad faith. Simple negligence and

simple errors of judgment do not constitute a breach of the duty of fair representation, no matter how serious the consequences to the grievant. Mistakes and carelessness do not violate the duty.

I recognize that this case is being heard in San Diego, in the jurisdiction of the Ninth Circuit. The Ninth Circuit has a slightly different take on this than other Courts of Appeal. Its decisions hold that a breach of the DFR in an arbitration or earlier stages of the grievance process will occur if the union's mistake is, and this is a quote, "the solitary and indivisible cause of the complete extinction of the employee's grievance rights." That means that the union's mistake must have wiped out any chance that a meritorious grievance can advance to arbitration or result in a meaningful award. Here, nothing of that kind has occurred. The case is now before this distinguished panel of arbitrators, and the panel can issue complete relief to the grievant.

So, what kind of relief is appropriate? Well, the fact pattern talks about the *Bowen* case. I don't know how many of you are familiar with *Bowen*. It's a horrible Supreme Court decision from 1983. In that case, a postal worker decked his supervisor. The union refused to go forward on his grievance under those circumstances. The grievant filed a DFR action that went to a jury trial, and the jury held the union responsible in part for the damages. The jury ruled that the employer was responsible to pay the grievant more than $20,000 under the theory that an arbitrator would have awarded the grievant that amount of back pay if the grievance had been arbitrated. The jury also held that the union was responsible for all losses that would have occurred after the date the grievant would have returned to employment pursuant to the arbitrator's reinstatement order. According to the jury, that amounted to about $30,000. Now, that may not seem like much, but in 1983, $50,000 or $60,000 was considered a lot of money.

Here, we don't have these kind of issues. The fact that the union didn't confirm the award didn't cause the grievant to lose any more than she would have received, because she was in fact reinstated after a two-week period. So, she suffered no loss. But, meanwhile, because of the employer's intransigence, the union has been forced to come back here and re-arbitrate this case. The union submits that the arbitrators ought to order the company, once again, to pay the back pay that was owing, as well as interest on the back pay. The panel should also issue a cease-and-desist order against refusing to comply with future arbitration awards. The panel should also award sanctions for the employer's repudi-

ation of its obligations under the grievance arbitration provisions of the contract, as well as punitive damages of—I don't know—$500,000 or so. Finally, the arbitration panel ought to order the president of the company to kneel down before the grievant and apologize for the company's refusal to comply with the award. That's not asking very much.

HARRY RISSETTO: Contrary to counsel's musings or wishful thinking that you just heard, the jurisdiction of the system board here—and I deal a lot with system boards—is limited to two questions: (1) whether the union breached the duty of fair representation by not taking the company to court to enforce the prior award, which it did not; and (2), if such a violation occurred, what is the proper apportionment of damages?

Where is the employer in these two questions? With respect to first question, the employer can't violate the duty of fair representation. It is not a party to the first question. With respect to the second question, that is derivative from the first question. It only relates to the damages that the employee suffered as a result of the union's breach of the duty of fair representation.

Therefore, it is the employer's position that in this particular proceeding, the board has no jurisdiction to issue a monetary award or any other ancillary relief against the employer. The fact that at one point in time there was a grievance against the company for back pay is irrelevant to the board's decision here, because that question was not submitted as a question before this panel. To the extent that there is a hole or a vacuum, that vacuum rests with either counsel for the original grievant or counsel for the union. But the employer should not suffer as a result of a bootstrap outcome from the panel here in this proceeding.

JOSEPH PALLER: Can I amend my stipulation?

JAMES OLDHAM: Thank you panel, you can consult for a moment. And by the way, this problem was constructed or inspired by two real cases that I'll describe briefly in a moment. But now we have the stipulated issues before the arbitrator. The first is whether the union breached its DFR by not taking the company to court to enforce the back pay part of its arbitration award. How many would say yes to that? Very few; about a tenth of the audience, I would say. How many would say no? A huge majority. I didn't give you the option of something else on this one. Going forward, I don't think we can do this by a show of hands, but assuming the violation was found to have occurred, we have to think about the question of apportionment of damages. One way to put it is, Do

you think that some portion of the damages should be allocated to the employer? How many of you would say yes to that question? About half of you. How many think no? Quite a few, though some of you aren't going to commit yourselves.

Let's hear from our arbitration panel on this one. Elliott, it's your turn to go first.

ELLIOTT GOLDSTEIN: All right. I think it's important to look at how the case comes before the panel. In this case, it's by stipulation, and we specifically have been authorized to decide the DFR question. But, it's by not taking the company to court to enforce the prior award.

The first aspect of this case, it seems to me, would be whether you would allow the context of the two prior problems to be introduced, or whether you would just look at the union's decision to not take the company to court. I would suggest that my opinion would be that I would permit the entire case—that is, the context and the claims to be presented—because I think it's the grievant's theory, as I understand it, that not enforcing the monetary aspects is arbitrary and outside the zone of reasonableness given the context in which this case arose. I think that's a tough question, because it does seem to me that your limitation is to look at the authority of a union to not go after the money damages or to seek enforcement and not anything else. Unions do have broad discretion to make precisely that decision. The only way that I could then find the DFR is by having what happened before be relevant. Then, at least I could say that the case has been influenced by the context of what occurred, and that puts the decision beyond the zone of reasonableness. So, I think that I would permit evidence to come in as to the entire context, but focusing in on what I perceive is a very difficult issue.

The second aspect, though, the dissent in *Bowen* takes the Supreme Court to task for saying that at some point it becomes only the union's fault in terms of apportioning damages. It's the point when they should have had a final arbitrator's decision. Beyond that, it's the union's fault. In this situation, says the dissent, the employer is always the one who acted and continues to maintain that position. They didn't settle, etc. I think that that applies much more strongly here where the actual genesis of this case is the employer's refusal to pay the back pay award, which is a back pay award. The employer is, at this point, taking a position and is a participant and not an innocent third party. I just disagree with the employer's position that they're an innocent third party

at this point. You have a final and binding award. It calls for back pay. The employer, therefore, has made the choice, once again, to be an active participant. Therefore, I think the employer owes some damages.

Would you say then, referring to *Bowen,* that if the union had gone to court, they would have had enforcement of the arbitral decision? Or is it at an apportionment all the way through till the end? I probably would say at that point that if you could figure out when enforcement of the award would have occurred, that after that it's the union's inaction. And, that they would owe the portion of the award after that point. But, the employer owes the back pay up until that point, because the employer is very much an active party in breach of contract and breach of the arbitration award.

JAMES OLDHAM: Thank you, Elliott. Barbara?

BARBARA ZAUSNER: The only damage is the use of the money that the grievant didn't have when she should have had it. I'm not going to speak to the DFR. I agree with Elliott on that.

But, it's a hard question. I'm not sure what obligation the union has to go to court and enforce the award. As I told Mr. Paller, I read his paper several times trying to get a handle on that. The damage issue is an important question, because the only damage is the back pay. I don't know how much you could apportion to the union even though it was the union's failure to go to court that caused the delay in getting the money. It's still only the time value of the money.

JAMES OLDHAM: Paula?

PAULA KNOPF: I'm glad that the Canadians were allowed into the Academy. The questions like this show me there's a huge divide between Canada and the United States. I couldn't begin to understand this question. I'm not going to address the merits of it.

But, let me address how Canadians would deal with this. This would never, ever happen in Canada. First of all, *Bowen* wouldn't have happened because the courts don't touch this stuff. The courts have no jurisdiction, certainly no original jurisdiction, over issues of DFR. The Labor Boards have exclusive jurisdiction over the union's duty of fair representation and the enforcement of the DFR. The court has only the limited role of judicial review on that. But, they'll never have original jurisdiction over it. That's number one.

Number two: In terms of the implementation of an arbitral award saying you're reinstated with a suspension and compensation for the rest of the time, arbitrators always retain jurisdiction over implementation. So, the question of whether the employer pays compensation or not, or the quantum, is only the original arbitrator's question to answer. It would never go to another arbitrator, ever. No second arbitrator would ever take it. So, it's a simple matter of taking the question back to the first arbitrator. If the union doesn't do that, well, maybe there is a DFR. But, that goes to a Labor Board. It would never go to the courts, because it is well established that we don't want the courts to mess up labor relations, and the courts don't want anything to do with it either.

So, come to Canada. It's a much better place.

JAMES OLDHAM: Just for your information, the two cases that inspired this problem: One was a case involving the rural letter carriers and post office; the U.S. district court ruled that it was, indeed, a breach of the duty of fair representation for the union not to take the post office to court to comply with a back pay order. The second case that inspired this problem was an arbitration decision by Cal Sharp in which Cal had been asked, by stipulation of the parties, to decide the DFR question and the damage issue.

Well, I've been given a few minutes' dispensation from our Program Chair. So, final comments from our counsel.

HARRY RISSETTO: I just have two comments. One, I asked Jim if I could wear a hood today or a bag over my head when I presented these arguments. He said, no, I couldn't. So, I had to stand up here and do them with a straight face. So, I ask you to take that into consideration.

Number two, I grew up in a culture and I still practice in a culture in the airline industry that has had a fair amount of DFR issues of some significance, usually involving pilots. The Air Line Pilots Association, as well as the Allied Pilots that represent American Airlines, have bent over backwards to allow the presence of and representation by individual employee counsel where there is any kind of feeling that there's going to be a DFR case.

I know this is contrary to the policies and the historical practice. But, the unions really want to give credibility to the award when they ultimately get into court, which inevitably will happen with these groups. Allowing counsel to participate is often messy and prolongs the hearing, but actually is of a great help in the subsequent DFR action.

And third, from an employer's perspective, you don't take cases like this to arbitration in other than the most incredible or extraordinary circumstances. Both the duration of the litigation and the likelihood of ultimately having to pay back pay, and attorney's fees, is just too great. This is particularly one where if you can't persuade the employer to settle this case, you ought to hang it up. Thank you.

JAMES OLDHAM: Let's have a final word from Joe Paller. And, let me remind everyone that in your materials on the flash drive is a copy of a splendid paper by Joe on the ethical questions that are presented with regard to the duty of fair representation from the union standpoint.

JOSEPH PALLER: Let me just make three points, briefly. First off, you know, I find myself agreeing with Harry on much of what he said just a minute ago. Most union attorneys out there, in considering question one, would advise the union not to allow the grievant's individual counsel into the hearing room. In the case like this, I would disagree and advise the union to consider having the grievant's attorney sworn in as union co-counsel. This prevents the grievant's attorney from suing the union over its handling of the case—the grievant's counsel is not going to be able to attack his or her own work later on in court. The union can prevent the attorney from bringing a DFR proceeding simply by as appointing the attorney as co-counsel. That's a minority position, by the way.

Second, one of the reasons I wanted to appear on this panel is to emphasize to labor arbitrators that the grievant is not my client. That's the rule under American Bar Association rules, under California's Rules of Professional Conduct, and in every federal court. Under the ABA's Model Rules of Professional Conduct, the grievant is considered merely to be a constituent of an organization, and that organization—not the grievant—is considered my client. Since the grievant is a constituent of my union-client, I owe the grievant only the very minimal duty of explaining to the grievant that she is not my client, and that the union is my client. I don't have to put that in writing, and I don't have to say it until an actual instance of adversity exists between the grievant and the union. That's a very minimal obligation.

The courts have held the same thing. In addition, they've held the practice of grievance arbitration is not even the practice of law. The advocacy that I do as an attorney in a labor arbitration is not the practice of law. Instead, the courts have said that I am performing the duty of a business representative under a collective

bargaining agreement. Every circuit court that has addressed this issue has held that a union's representation in grievance arbitration or contract negotiations is not the practice of law. In the Ninth Circuit, the key case is *Peterson v. Kennedy*, discussed at length in my paper. Every circuit that has addressed the question has come to the conclusion that I'm not the counsel for the grievant. I can't be sued for my malpractice. The only one who can sue me for malpractice is the union.

The third point I wanted to make is that *Pyett* may change everything I've just said. Unlike a labor arbitration, a business representative can't go into court and bring a complex sex discrimination case. Business representatives are not going to be allowed to appear in court for union members because they're not attorneys. Only a licensed attorney is going to be allowed to do that. And business representatives, no matter how knowledgeable they are about the labor contract, don't know anything about the law in most instances.

In representing a grievant in a *Pyett* arbitration, union counsel is bringing the same kinds of claims as a plaintiff's counsel would bring in an employment arbitration. In doing so, does the attorney for the union effectively become the attorney for the grievant? If so, have I become subject to malpractice liability for the mistakes that I make in that arbitration?

We don't know the answers to these questions. But these are the kinds of questions that union attorneys are going to be facing in years to come.

JAMES OLDHAM: All right. Let's thank our panel.

MARGIE BROGAN: I want to thank this tremendous panel, very thought provoking. Thanks very much.