

CHAPTER VI

GAMESMANSHIP IN LABOR ARBITRATION *

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Since I have been sternly admonished by Program Chairman Scotty Crawford to keep these remarks on a scholarly level, it is appropriate at the outset to define our terms.

In its broadest sense, Gamesmanship may perhaps be defined as the art of winning games without seeming to indulge in unfair tactics. However, it is important to keep in mind two distinct types of Gamesman maneuvers.

The first, which may be termed Routine Gamesmanship, finds the Gamesman throwing his opponent off balance with tactics (known as "ploys") which are not blatantly or obviously unfair, but which do not purport to be *helpful* to the opponent.

Gamesmanship reaches its finest flower, however, in ploys which on the surface appear to be designed to *help* the opponent. In the hands of the Advanced or Journeyman Gamesman, these ploys will leave the opponent—and it is hoped also the arbitrator—under the impression that the ensuing difficulties which beset the opponent are merely unfortunate coincidences, unintended and even deplored by the Gamesman.

Before turning to an examination of routine ploys and advanced ploys in the arbitration process, I should like to pay tribute at this point to one of the great artists in the field, a man whose brilliant ploy at last year's Academy meeting in California is already enshrined as a classic. Although it was only incidentally connected with the arbitration process, this historic performance should not go unrecorded.

I refer to the extremely advanced ploy executed by Jack O'Connell of Bethlehem Steel Company at the cocktail party

* Luncheon address.

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thrown by the United States Steel Corporation in Los Angeles. This fine affair promised to put U. S. Steel, in the language of Gamesmanship, one-up on Bethlehem, but the U. S. Steel officials had not reckoned with the formidable talents of Gamesman O'Connell, or with his fierce devotion to the interests of his employer.¹

Arriving at the party early to explore the possibilities, O'Connell first addressed himself to the task of removing Warren Shaver, the US Steel host, from the reception area by the door. Affecting his most genial and helpful manner, he introduced Warren to a gentleman whose intellect and character are above reproach, but who is not noted for brevity of expression. Suggesting that this gentleman had a point of view which Warren would find very interesting, O'Connell made a graceful departure and stationed himself at the entrance.

For the next hour or so, while the gentleman's point of view was being unfolded to Shaver in a secluded corner of the room, O'Connell played the role of genial host to the hilt, welcoming all comers with a friendly handshake, identifying himself as "O'Connell of Bethlehem Steel," and urging them to pitch in heartily on the food and drink.

Without actually saying so, he thus created the distinct impression, as many of you eye witnesses will recall, that the party was in fact being given by Bethlehem. By the time Shaver had extricated himself and resumed his role of host, it was too late. The impression of Bethlehem sponsorship was by then firmly implanted; indeed, many of the well-oiled guests were heard to congratulate Shaver on his good sportsmanship in coming to the Bethlehem party.

It would be gilding the lily to attempt any editorial comment on this example of Advanced Gamesmanship at its finest, and I shall now turn to the subject at hand.

As the parties assemble for the hearing, there are numerous opportunities for ploys. Let us review only a handful of the more obvious.

¹ At this point, I must digress for a moment to remark that some similar fierce devotion was displayed only last evening by Warren Shaver of US Steel, who invaded the Bethlehem Steel cocktail party in this hotel wearing a large button inscribed "US STEEL—COMMITTEE."

I cannot take the time here to give this fine performance the full treatment it deserves; I must now return to the Los Angeles affair.

The Geographical Ploy

The first may be called the geographical ploy, often of no great utility but sometimes telling. The alert Gamesman will scout the hearing room carefully in advance, and if there appears to be any advantage to be gained by seating his legions on one side of the table rather than the other, he will of course arrive early for the hearing and occupy the favorable side for his entourage. Such items as the sun shining brightly into the opposition's eyes, or placing them in a draft, or next to hot radiators, may be involved. The opponent may have a superstitious preference for facing the arbitrator from one particular side of the table; if so, the Gamesman will of course arrange things otherwise.

The Greeting-the-Arbitrator Ploy

The arrival of the arbitrator at the hearing is a sensitive moment in some circumstances. If the Gamesman knows the arbitrator from earlier cases (and he will probably have assured himself that he does, in making his selections), he should fashion his greeting carefully.

If he knows his opponent to be a stranger to the arbitrator, and especially if the opponent is the jittery and suspicious type, there is much to be said for the Gamesman greeting the arbitrator casually by his first name.

This should not be overdone, lest the *arbitrator* get the impression that some advantage is being taken of their relationship. All that is needed is to get across to the nervous opponent the impression that the Gamesman and the arbitrator are well acquainted, accustomed to working together amicably.

Other ploys can drive the point home, always keeping in mind that blatant overtures are likely to backfire. A reference to the weather is innocuous enough, and the Gamesman may follow up with a remark to the arbitrator, in friendly and open fashion, to this effect: "This is almost as nice (or lousy) a day as we had on that case up in Wilkes-Barre; by the way, Jim and the boys on the committee send their regards."

If the opponent's eyes begin to betray signs of panic, the Gamesman may press the point a bit further, with a ploy of this sort to the arbitrator:

"We may have an interesting case coming up for you at the Zilch Metals plant next month; I sent the list back today."

The Additional Cases Ploy

This last example brings to mind a controversial subject among practicing gamesmen in this field. It has to do with what is known as the "Additional Cases Ploy." The tactic is simplicity itself—at the opening of the hearing, the would-be Gamesman loudly proposes the following:

"We have four more cases in this plant ready for arbitration. Why don't we agree right now to have Scotty Crawford here be the arbitrator on those cases too?"

The proponents of this tactic argue that it is a brilliant move to put the opponent squarely on the spot, ruining his day before he even gets started. But the opposite view, which seems to be gaining favor with advanced students of the art, is that the maneuver is ill-advised. It is too blatant and obvious, and stamps the advocate as being woefully short on finesse. The arbitrator is likely to be overcome with a feeling of sympathy for the Gamesman's opponent as he gropes for a diplomatic answer to the proposal. Needless to say, sympathy for the opponent is the last emotion which should be planted in the arbitrator's mind.

Let us proceed then to the conduct of the hearing which sooner or later gets under way.

As the hearing opens, the Gamesman will never be found sitting back silently, waiting for someone else to lead off. He will spring forward at once, eager to proffer friendly cooperation to the arbitrator and—ostensibly—to his opponent.

The Preliminary Statement Ploy

One of the more interesting ploys at this stage is to distribute copies of a statement describing the issue and summarizing the contentions of both parties. Arbitrators are known to be fascinated by neatly-typed documents, and can rarely resist the temptation to look them over. If the opponent registers a loud protest at this unorthodox mode of procedure, so much the better for the Gamesman. He has created the image of a helpful and non-technical chap, eager to place his cards on the table and confident of the result. The protesting opponent looks correspondingly bad, and the Gamesman is clearly one up.

It need hardly be added that the description of the issues and the contentions of the parties will avoid any obvious aroma of unfairness or misrepresentation, but will still manage to convey the impression that the opponent's case is remarkably devoid of merit.

This brings us again to a related subject—one of the most hazardous and exciting endeavors for the arbitration Gamesman. That is the problem of getting across to the arbitrator the notion that the opposition really expects to lose the case. Because of the obvious possibilities of backfiring, this is an operation calling for particular finesse.

The Reluctant Opponent Ploy

One commonly-employed method is to let fly openly at the start of the hearing, with some jovial remark like this:

“This ought to be a quick hearing—Dave over there knows he doesn't have any case—he's just going through the motions.”

This method is all right in its way, but is likely to be ineffective. For one thing, unless the opponent is totally inept, it is almost certain to bring on a jovial rejoinder in the same vein, thus nullifying whatever effect was intended. Aside from that, the arbitrator may get the impression that this is merely good-natured joshing, and fail to get any message at all.

More effective—but also more likely to backfire—are off-the-record remarks to the arbitrator during recesses, when the opponent is not around. The crude and blunt approach—confiding to the arbitrator that the opposition is merely fighting the case to satisfy some pigheaded foreman or steward—is not recommended, though it is frequently tried. (It was especially ineffective in one recent case, when *each* side privately confided to the arbitrator that the other side expected and indeed wanted to lose.)

There is no sure-fire method, but the objective is clear enough—to get the impression across without seeming to be working on it.

A related, and much safer, undertaking is to implant the notion in the arbitrator's mind that whatever your opponent may think of *his* case, *you* are certainly harboring no thought of losing.

Here again, crudity must be ruled out; for example, the deadly earnest confidence, as you are driving the arbitrator to the air-

port or walking back from lunch, that "this is one we have just got to win." This is obviously feeble stuff, not worthy of mention at all except by way of a horrible example. (Indeed, it ranks high in the catalogue of techniques of losing cases, since it sets up a traumatic reaction in the arbitrator's mind in case he was planning to award in your favor anyway.)

The Surprise Congratulations Ploy

Much more effective is the ploy of expressing approval of some recent decision of the arbitrator in which he ruled *against* your side of the table. His ears will immediately perk up at this welcome variation from the usual routine of getting compliments from the winner.

There are some dangers here. It is risky to register approval of an adverse decision in a case which the *Gamesman himself* has presented—that may suggest that if he was satisfied to lose that one, he will also be satisfied to lose this one. Ideally, it will be a case with the same parties, but *one which the Gamesman did not handle*. If no such case is available, he can pick one from the reporting services involving other parties.

Having thus secured the arbitrator's fascinated attention, the Gamesman can launch into a discourse on why the Company (or Union, depending on which side the Gamesman is representing) would be so stupid as to bring a case like that to arbitration in the first place. A genial and objective discussion of arbitration philosophy and tactics may thus be initiated, with not the slightest reference to the present case. The net result, of course, is that in the arbitrator's subconscious there is firmly planted the impression that *this* guy surely would not be involved in presenting a worthless case.

(Naturally, it always helps to have a reasonably good case. If your case is worthless anyway, the arbitrator may detect that flaw, and all the skillful ploys will have been wasted.)

Let us now get back to the conduct of the hearing. Sooner or later matters will reach the point of putting witnesses on the stand, and here again the Gamesman has many opportunities to practice his craft.

The Clarification Ploy

The true Gamesman will never object to a question as such—indeed he will make it clear that his interruptions are *not* for

the purpose of objecting. He is merely seeking to clarify the question, so as to help his opponent in the search for the truth. A standard and often useful ploy may run something like this:

"I see what you're driving at, Sam, but I don't think your question is clear. Maybe I can help you—why don't you ask him such and such?"

Needless to say, the suggested rephrasing of the question will artfully alert the witness to the booby trap into which the opponent is trying to lead him.

At times it will not be appropriate to seek clarification of the question—the question may be entirely *too* clear—but it is nevertheless imperative that a damaging line of questions be interrupted or stopped. Various ploys are available.

The Note-Taking Ploy

For gaining a few moments of delay to think through the strategy, and also to give the witness time to regain his composure, a virtually sure-fire method is this:

"Just a moment, please—I'm running behind in my notes, and I want to get this down accurately. Let me catch up here, and I'll be ready in just a second."

This request, especially when accompanied by a friendly smile and gesture of helplessness, is one which even the most skilled opponent will find difficult to combat.

But a momentary pause may not be enough. It is often obvious that the Gamesman's witness is about to collapse under a withering cross examination, and what is needed is a chance to get him outside the room and administer some oxygen.

The Stipulation Ploy

At this point the offer to stipulate may be wheeled into action, thusly:

"I don't want to interrupt, but maybe I can be helpful and save some time here. I think we can probably stipulate on some of these facts which Sam is trying to bring out, if I can just have a few minutes recess with my people."

If there seems to be some doubt that this ploy is going over, the Gamesman, thinking fast as always, may throw in a cruncher at the end:

"Anyhow, I need a couple minutes to go to the men's room."

After the recess, as his refreshed and revitalized witness resumes the stand, the Gamesman can offer an innocuous stipulation, or perhaps confess, with a sheepish and disarming smile, that he finds there is not the area of agreement which he hoped for.

The counter-plot to this tactic is quite obvious to the opponent, if he is also a Journeyman Gamesman. He may counter as follows:

"I'm delighted to go along with Joe's suggestion for a recess; I could use a break myself, and if we can stipulate to some of these facts, so much the better. However, I think it would be helpful if I just ask one or two more short questions to clear up this last point, and then by all means let's take a break." (He then, of course, throws his Sunday punch at the witness.)

In the interest of time and Peter Seitz, we must hurry along. A brief word should be said about the luncheon recess ploy, and then we will get on to the end of the hearing.

The Luncheon Recess Ploy

The luncheon recess presents a golden opportunity for the Gamesman. Assuming that he has thrown the opposition off balance throughout the morning session, he can then afford the sporting gesture of suggesting that the arbitrator have lunch *with the opposition*.

This accomplishes four things at one swoop. First and most important, it makes it clear that the Gamesman is thoroughly confident of the case, and unworried about any possible off-the-record lobbying.

Second, it shows that he has high confidence in the integrity and savvy of the arbitrator.

Third, it leaves the Gamesman free to devote the lunch period to planning the afternoon strategy with his own people.

And fourth, it guarantees that the opposition will *not* be able to use the lunch period for similar strategic purposes.

At the end of the hearing, one final maneuver should be considered. A show of confidence is naturally in order, and the Gamesman may wind up with a suggestion of this sort:

The Waiver-of-Argument Ploy

"This seems to be a perfectly clear-cut case, and I'm sure the arbitrator has it well in hand. He doesn't need any rehashing from us—why don't we skip any closing argument and waive briefs."

This is particularly apropos if the Gamesman knows the arbitrator is anxious to catch a train or plane. It will go over big if the opponent falls into the trap and insists on delivering a lengthy closing harangue. The Gamesman will slouch back and listen with indifference, occasionally glancing at his watch. He will then accentuate the matter by giving only a very brief reply, interlarded with suggestions that he certainly doesn't need to spell out these obvious points for an arbitrator as experienced as this one.

And so to conclude. In the course of my research for this paper, I came across a document which may provide a fitting finale, by way of a reverse twist. The art of the Gamesman may perhaps be illuminated by a quick look at the techniques of the practitioner at the other extreme—the non-Gamesman.

This document is entitled "How to Alienate Arbitrators and Lose Cases." Ten years ago I would not have felt safe in exposing it to public view, lest many of those in the audience would recognize their own follies in it and be uncomfortable and even resentful. But in this gathering of sophisticated and skillful practitioners, there is surely no such danger.

Let us then run quickly through these rules of conduct for the non-Gamesman, happy in the knowledge that they are no longer to be found on the industrial relations scene:

There are ten rules listed here, described as "sound and tested methods for becoming a truly inept advocate."

1. Always be late for the hearing.

The best plan is to stroll in at least 35 minutes late. Do not offer any explanation.

2. Start off with a few ill-founded technical objections.

Claim that the demand for arbitration is in imperfect form, or that Step Three in the grievance procedure was bypassed, or demand that the other side have the burden of presenting its case first.

Be persistent—continue arguing the point even though the arbitrator indicates impatience to get on with the hearing.

3. Make it clear that you distrust the arbitrator.

An occasional hostile or suspicious glance is effective, along with a sigh of resignation whenever he questions some point you are making.

4. Object to the introduction of most of your opponent's evidence.

Cite the law of evidence at length, preferably incorrectly. If the arbitrator overrules you, glare balefully and reserve your rights of appeal to the courts.

5. Interrupt your opponent frequently in mid-sentence.

Complain angrily to the arbitrator if your opponent does the same to you.

6. When cross-examining your opponent's witness, use a sneering tone.

Demand "yes or no" answers. Imagine you are on television—put on a great dramatic show.

7. Never admit that anything the opposition says is true.

Make no concessions, even on minor points.

8. Cover the same ground several times.

Develop irrelevant points at length. Demand recesses to send to the plant for additional witnesses to corroborate these points further.

9. When presenting exhibits, have them in as inconvenient form as possible.

Don't prepare summaries of bulky records—just dump them in raw form into the arbitrator's lap.

Provide no copies for the other side.

10. Be sure not to state a clear theory of your case.

Do not analyze the issue at the beginning or end of the hearing—spend the time on a denunciation of the motives of your opponent.

So much for the rules of conduct for the Non-Gamesman—or

at least that is the extent to which they were listed in this ancient document.

I close with apologies for the limited manner in which this subject has been treated. It has been restricted to ploys of the parties, directed at each other and at the arbitrator. Huge areas have been left uncovered. One concerns ploys of the Gamesman directed *at his own client*; for example, how to persuade the client that no matter how the case comes out, he has been saved from a far worse fate only by the Gamesman's skill.

There is also a vast area for research into the techniques of outplying the opposition in *selecting* an arbitrator. (I have skipped that subject largely because my knowledge of that dark and sinister process is very sketchy—but someone should undertake it.)

And finally, there is the inviting field of gamesmanship tactics *by the arbitrator himself*. I have carefully avoided that subject, partly for Fifth Amendment reasons, but mainly because you are about to observe a first-hand demonstration.

Your next speaker, Peter Seitz, is an arbitrator whose place is already assured in the Gamesmanship Hall of Fame.