

CHAPTER VII

HOW ARBITRATORS DECIDE CASES: A STUDY IN BLACK MAGIC*

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I have been asked to utter as few words as possible on the subject "How an Arbitrator Decides His Cases." As well ask a chicken how she lays an egg or ask hippopotami how they copulate! The Delphic Oracle never revealed to her clients how she arrived at her decisions. Indeed, had the oracles of classic Greece or the augurs of Rome or the soothsayers of a later day revealed the mysteries of their art, their continued acceptability to their clients might well have been placed in jeopardy. However, Arbitrators today (especially permanent Arbitrators with extremely temporary status) are accustomed to live dangerously—so I shall hazard an answer to the question.

How does an Arbitrator decide? What Arbitrator? David L. Cole, the Magician? Or Horvitz, the Magnificent? Wallen (sometimes called the Pareil)? Stockman, the Agonizer and Groaner? Or Jim Hill, the alienated existentialist who sports a touch of Zen? Arbitrators differ as much as race horses, concert fiddlers, and proctologists. I suppose I could start out by saying, for example, "Take me!"—but I am much too canny to fall into that trap. I know my audience and I am aware that my beloved colleagues could regard the "Take me" invitation as a form of unethical solicitation of custom.

Indeed, the very word "solicitation" and the conception that I might be "taken" suggests the curiously close relationship between the world's oldest profession and labor-management arbitration, its youngest. Both the lady of joy (I hope I do not give offense by overly-blunt characterization) and the Arbitrator are

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paid for "servicing" their clients (no doubt, in the animal husbandry sense). Further, in each case, the rendition of services is initiated by what is called a "submission," both for the lady of easy virtue and for the Arbitrator to whom virtue is a good which is less easily attained. I shall not pursue this comparison further in any public utterances here out of consideration for the youth and tender sensibilities of some Arbitrators present who are identified as "new young blood." This repulsive and disgusting term is used by employer and union representatives who happened to lose a case decided by an Arbitrator with (you should excuse the expression) "old blood." I should be happy to expand my remarks on this subject in more appropriate and intimate circles.

To get back to the theme of this talk: The Arbitration hearing has been concluded and counsel have taken two months or more to furnish the briefs which the Arbitrator probably never needed anyway. It is time for the writing of the opinion and award. When the Arbitrator opens his file he racks his memory, futilely, for some recollection of what the case was about. The erosion of time and the detail in twenty intermediate cases have erased the matter from memory. He can't even remember the faces of the witnesses whose credibility was assailed. His mind, truly, is a *tabula rasa*.

He consults his notes (which are usually quite extensive because experience has taught him to anticipate this situation), or the transcript of the proceedings. It would be an assault on the English language to say that they "refresh" his mind or memory. To the contrary, they depress and fatigue it. Once more he must (in a kind of double jeopardy), relive, as though he hadn't gone through the tedium and the punishment before at the hearing, all the fumbblings, irrelevancies, half-truths, overstatements and debating points of the protagonists. Once more he perceives large gaps in the factual evidence which the losing party will claim, undoubtedly, had been amply filled. At any rate, despite an awareness that his clients take a dim and parsimonious view of that item on an Arbitrator's bill for fees called "Study time and preparation of Opinion and Award," he resolutely chews his cud until further mastication and digestion is impossible; and at long last regards himself as the master of the facts. Finally he is ready to make and to write his decision.

This consists, after marshalling all of the relevant and operative facts and setting them down on paper, in inscribing the word "Decision" in block caps at the top of a new clean page. At this point, all too often, complete and utter mental paralysis sets in. He spends several hours glancing fixedly at the almost blank page, or perhaps, tearing up several sheets on which he had made false starts. In such a situation the Arbitrator feels the desperate need to talk out his problem, so to speak. He cannot do it with himself because that way lies schizophrenia. Besides, he cannot answer the frustrating questions he asks himself. With whom can he consult? On this quandary, fortuitously, I have a little sonnet that I wrote several years ago which seems apropos. It is entitled

"Sonnet Concerning an Arbitrator
In Search of a Listener

The Arbitrator's life is lone and dour!
He agonizes: who is wrong, who's right?
He finds some answers, but he's never sure,
And foolishly he seeks a plebiscite.
He searches out his colleagues in their lairs
As Greeks the Delphic Oracle besought;
Harangues them with his doubts and with his prayers,
And why he's so irresolute, distraught.
He then relates in infinite detail
The boring facts, the applicable phrase—
Nor does he note his auditor's travail,
His most unrap and inattentive gaze,
His restless waiting 'til he can intone
The boring facts in cases of his own."

I suppose that the Arbitrator is the most lonely decision-maker in our society. There is no Dorothy Dix, Mary Haworth, or Rose Franzblau to whom he can write in this vein:

"Dear Miss Dix:

"I am an earnest and conscientious young Arbitrator, aged 56; and I am deeply in love with my status of continued acceptability to employers and unions. My problem is * * *." (and so forth)

In the evening, at the dinner table, the Arbitrator may hesitatingly attempt to interject his problem into the stream of conversation flowing between his wife and offspring, which usually deals with matters of much greater moment than those confided to his tender mercies by employers and unions. This is a grave

mistake. It results in a violent reaction—either a violent and expressive silence (which means, in effect, that this is your problem and you go and solve it yourself; I don't bother you with mine!) or a violent controversy which makes the dinner table sound like a picnic to which the Guelphs and the Ghibellines or the Yorks and the Lancashires have been invited. Decibels the Arbitrator gets plenty; light he does not get! He goes back sadly to his Study Time and Preparation of the Opinion and Award.

I feel the need of observing briefly, at this point, that some Arbitrators, whose first names I would not think of mentioning, are married to rather determined and opinionated women. Employers and unions would be better advised to make a searching investigation of the personalities of the wives of Arbitrators they are considering for selection, than to research their past associations with management or labor. As it was said in Genesis XXVII, 22: "The voice is Jacob's voice, but the hands are the hands of Esau." The Ford Foundation might well finance a study of the participation of wives of Arbitrators in the decision of cases.

The truth is that there is nobody, really, to whom he can turn to try on his ideas for size, as a judge, for example, may turn to his law clerk or his colleagues on the bench. He is left to his own resources, whatever they may be. Parenthetically, it would be interesting to know whether those of my colleagues and brethren who are in psychotherapy discuss their cases with their psychiatrists and psychoanalysts; and if so, just what kind of help they get from them with respect to their Awards. If any Arbitrators are involved in this kind of interdisciplinary approach, I think the customers ought to know about it and the Academy should collect some dues from the psychiatrists.

If the Arbitrator is still in doubt (and he frequently is) he lets it alone for a while. He goes about the performance of other duties. But do not doubt for a moment that that magnificent cerebral cortex (for whose use he is so inadequately compensated) is continuing, unknown to his conscious being, to mesh its delicate and intricate gears and is working all the while, however silently. Several days later while turning around in bed in the small hours of the morning, or while shaving the left side of his face, with the suddenness of the dawn coming up like thunder out of China 'cross the Bay—it comes to him! Just as

it came to Paul on the road to Damascus, to Newton, to Beethoven, to Shelley, to Einstein—it comes to him! Whence? or Why? At that time he does not know, but a white, lucent, and lambent radiance sheds itself all over the murky and stygian darkness. Behold! he understands the case in all of its nuances and subtleties. He rushes for pen and paper, finishes his duties to the case, and sends out his Opinion and Award with an accompanying bill in which he scales down his actual working time on the theory that the parties should not be charged with his own slowness or dullness of intellect.

All is well, then, of course, until the blast of the losing party is heard, loud, clear, and in exciting tremolo—like the sound of Roland's horn in the narrow passes of the Pyrenees. That losing party finds it inconceivable—"absolutely inconceivable," it screams—how the arbitrator could have ignored the significance of this or that fact which frequently was not proved by evidence in the record at all. The Arbitrator has no recourse but to breathe slowly and heavily and to reflect upon the vagaries of life in our society.

This tragic tale of the sufferings of an Arbitrator is not at all autobiographical, any more than my remarks concerning the fumbling and frequently incompetent and unprepared presentation by the representatives of the parties applies to any of the respected and competent guests who are present. However, the characterizations are sufficiently typical for note to be taken of them.

I should observe, of course, that there are still other ways for Arbitrators to decide hard cases. For example, what does the Arbitrator do when he finds himself leaning way over backwards (as the expression goes) because the representative of one of the parties is an old friend; and leaning way forward because the representative of the other party has made himself thoroughly obnoxious and detestable at the hearing? His sense of integrity and probity makes him reluctant to decide for his friend; his sense of duty and decency makes him reluctant to decide against his adversary. In such a case, the essential and indispensable equilibrium of an Arbitrator can only be obtained by leaning—not backwards, not forwards—but *sideways*. This is not always easy to do. It requires the equipment of sound Eustachian tubes. The substitution of Fallopian tubes alone is enough to presage

disaster. But I shall not expose fully the mysteries of the craft and art in these remarks. Suffice to say, expertise in the maneuver of leaning sideways comes only with years of experience.

In the last analysis, however (and is there any analysis but the last which concerns us?), an Arbitrator decides cases exactly in the way my dear Grandma (on my Mother's side, that is) bought mushmelons at the fruit store. This was in the days before all those fancy cantaloupes, honeydews, Persian melons, and Casaba melons. What ever happened to the mushmelon, anyway? At any rate, she would ask the clerk to select some good melons for her. Then she would regard and inspect them with a fishy, skeptical, and cynical expression; and she would proceed to reject them out of hand on the sound theory that anything he tried to palm off on her as a good melon must be a bad one, *ipso facto*. She would then stretch to reach for melons, high in the fruit bin, and dig for others at the bottom of the pile. After subjecting them to rigorous visual inspection ("quality control," they now call it in our electronics plants), she would pick one out for color. This mushmelon she would then heft, musingly, in her hands for weight and volume. Then she would gently press the ends with her thumb, with just enough pressure to ascertain the ripeness and maturity of the fruit. Then, she would raise the mushmelon to her nose and delicately sniff its fragrance. And finally, she would draw upon a rich and varied lifetime of experience in selecting mushmelons—an experience marked by some few outstanding successes and by many disastrous and unexplicable goofs and bobbles. At this stage, all of the objective standards and tests would be abandoned as inadequate or transcended. She would turn her back on the evidence of her senses and choose to rely upon the ineffable and completely subjective criteria for judgment that are acquired only with living and coping with a problem for a long time.

My Grandma's procedures for choosing a good mushmelon, it occurs to me, may well have relevance in the problems involved in the choice of a mistress or even a wife. The more one thinks about it, the more one gets persuaded. But if you should ask me (and I have a right to assume that you would) how an arbitrator makes his decisions, I should answer you—exactly as my Grandma chose mushmelons!
