CHAPTER 7

REMEDIES IN ARBITRATION

I. Problems of the Finality of Awards, or Functus Officio and All That

PETER SEITZ *

Some years ago, long before the days when Young Blood in arbitration was pulsating and surging, F.P.A., a columnist and wit who was a contemporary of both Chester Arthur and Aaron Horvitz, was asked to identify the most beautiful word in the English language. He chose "cellar door." If "cellar door" is the most mellifluous and melodious, then "functus officio" would seem to be the most dispiriting. It is like telling an arbitrator to drop dead. It suggests the ghoulish and morbid counsel of "See Naples and die." There are several good reasons for seeing Naples; but why one should have to pay the price in such dire consequences, I have never understood.

Consideration, however, should persuade that "functus officio" as applied to arbitration, especially of industrial disputes, is a wise and provident conception. Without it, arbitration would not have those virtues that are loudly extolled by Managements and Unions, even those who, while praising arbitration never miss an opportunity to express a few unflattering phrases concerning some of their best friends who are arbitrators. Indeed, if "functus officio" were not a notion so firmly embedded in the common law of arbitration, we would have had to invent it. It protects the arbitrator from the late evening telephone calls, importunities, and indignant protests of those who, having inadequately and incompetently presented their cases and having lost them, deservedly, demand reconsideration and rehearing. It puts a dispute to bed. It lets sleeping dogs lie and prevents dead horses from being

* Arbitrator and Attorney, New York, N. Y.

whipped. The Seitz family has no hereditary heraldic shield or design on which is inscribed some hoarse battle cry of our ancestors which served to rally them and their feudal retainers to deeds of derring-do in medieval times; but if I had to design such a shield today, I could think of no more fitting slogan or shibboleth to inscribe upon it than those two little words, so comforting and productive of peace and solace: "functus officio." Indeed, if one were permitted to choose the words that would fall from one's lips before taking one's last and ultimate breath in this life, could any more beautiful or appropriate words be used than "functus officio"?

Before proceeding further with this not too learned exegesis, perhaps I should say for the benefit of those who are unfamiliar with the term "functus officio" that it means, in the connection discussed here, that an arbitrator's power, authority, and jurisdiction have been expended and have come to an end. This usually occurs with the rendition and delivery of the award he was appointed to issue. Perhaps the best illustration of functus officio is what happens to the stern and imperious arbitrator when, at the end of the hearing which he has conducted with characteristic majesty and authority, he returns for dinner to the bosom of his everloving wife and family. If he has any lingering officio, he finds it utterly and completely functus.

Like most useful institutions and concepts, however, functus officio has its limiting characteristics and disadvantages. It was developed because there was utility in bringing to an inexorable and definitely final termination and conclusion disputes in arbitration involving commercial transactions such as the quality of grey goods delivered to a purchaser or the building of a house according to specifications. It is good to close the door firmly and finally on such controversies with the rendition of the award. That utility is also present in most disputes in arbitration between parties to a collective labor agreement; but the fact is that there are continuing aspects of the relationship between employee and union and the nature and characteristics of the disputes between them that result in functus officio hindering rather than promoting achievement of the objectives of management-labor arbitration.

Let us consider some of those situations. Let us first assume

that an employer has introduced into the shop new and improved equipment which, it declares, as a result of its industrial engineering studies, justifies the reduction of a crew size from five, on the old machine, to two employees. The union stoutly denies, not only the conclusion reached, but the facts on which it was based. It asserts that the machine has only been used experimentally and sporadically and in a manner which is not representative of the way it will be used in the future; that the operation of the machine represents a speed-up and an unwarranted increase of work-load and burden on the operators; that when used at the speeds at which it is rated by the manufacturer, it presents safety hazards to the operators, and so forth. The union invokes a "status quo" provision in the agreement that provides that working conditions shall not be changed excepting with union consent or under the authority of an arbitrator's award.

The evidence before the arbitrator, let us assume, satisfies him that, up to the time of grievance or up to the time of hearing, the actual operation of the machine might not have been representative of its future normal operation. Although he has no facts which would support a finding that work-load and hazard will be unduly and inappropriately increased, he has enough before him to persuade that, conceivably, under certain conditions, this *might* be so. The experience in the operation of the machine that would furnish facts as to the truth or falsity of the union's position cannot possibly be available for months until the machine has been operated under conditions attending normal levels of production. On the other hand, there is nothing before him to satisfy him that there is a clear and present safety hazard in continued operation until this experience is achieved.

The process of adjudication in which the arbitrator is engaged involves the administration of justice. Is it fair and just, he asks himself, to issue a final award to either side based on the inconclusive data then available? Would such an award achieve the objectives and fulfill the purposes of arbitration? Does not justice and fair-dealing require that the final decree be held up until all of the facts relevant to normal and characteristic operation are spread on the record? Should he not, in such circumstance, issue a partial or interim award asserting that the company might, indeed, continue its use of the new equipment with the reduced

crew it assigns, pending further experience and report to him thereon, leaving to the future a final disposition of the dispute?

Or let us vary the circumstances of this hypothetical case to some extent. Assume that there *has* been what looks like normal and representative operation of the new equipment but neither side has taken the trouble to have time and motion or other studies made that would tend to give factual support to its florid and extravagant claims; and further, that mere observation of the operation of the machine by the arbitrator does not serve to put his sincerely held doubts to rest. Suppose that in this case he feels that he cannot intelligently perform his duty without an engineering study being made and that this could take several weeks or months.

Let us now take a third possibility. An employee is promoted into a new job of programming operations with the use of recently introduced electronic computers. He passes an aptitude test furnished by the manufacturer of the equipment and successfully completes a probationary period of thirty days and performs some elementary tasks satisfactorily. Then, when he is given a task appropriate to his experience which everyone agrees he should complete in thirty days, he reveals possible mental incapacities which were not evident previously. After five months and many discussions with the union, he is terminated, his task still not completed. The company insists that he just does not have the mental capacity to cope with the job duties, although for years he performed well in a much simpler job. The union claims that his efforts to master the new job were hindered by a frequent change of supervisors, inadequate instruction, and a lack of sympathetic understanding by his last supervisor. The arbitrator reaches the conclusion that, on the presentation made, it is impossible to issue an award making a final disposition of the dispute, and that this can only be done justly and intelligently after carefully planned test operations on the job properly supervised and done under the surveillance of responsible and knowledgeable personnel. This would take the case well beyond the time limits for the rendition of an award as prescribed in the agreement.

Again, consider the case of the runaway shop. The arbitrator finds that express provisions of the agreement prohibit what the employer has done and that the contract has been violated. He

states that conclusion in an interim award. However, although the submission to arbitrate asked for damages, he leaves the assessment of damages to be made after additional hearings inasmuch as the parties in the initial hearings have not presented evidence on that matter, the extent of damage was not yet known at the time of the hearings, and, in any event, it was important to both of the parties that an early disposition of the threshold problem of violation of the agreement be decided. Lest management representatives indulge the thought that interim rulings of this character favor the unions, they might reflect on the situation in which a strike has occurred and the employer, in arbitration, desires an injunction from the arbitrator ordering the union to call off the stoppage. Should the arbitrator, if he decides for the employer on the merits, issue an interim award with injunctive relief leaving it for future hearings to determine damages, if any; or should he, made timorous by the functus officio doctrine, refuse to issue any award until the damages are known and proved? As Chief Justice White so frequently said when he knew what result he wanted but did not want to undertake an elaborate answer to a problem: "To ask the question is to answer it!"

These are only several examples of situations which, in the judgment of the conscientious arbitrator, call for the issuance of rulings or interlocutory or interim decisions requiring certain things to be done presently and certain events to transpire or for additional facts to be reflected by the record of the case before he undertakes its ultimate disposition. A final award before those things were done or those events transpired which would be issued within the time limit would satisfy the superficial procedural requirements but not his sense of justice or the purpose of the arbitration.

If the arbitrator in any such case obtains the express consent of the parties to continue the hearings and to reconvene them until such time as the record might be completed, he has no problem. Umpires in the basic steel industry and in other industries commonly require the parties to make further studies or to acquire additional experience with an operation in order to enable them to complete, at some later date, a currently unsatisfactory record. Not infrequently, moreover, they do what *ad hoc* arbitrators, so far as my knowledge goes, would not attempt to do; namely, to

remand the case to the parties for further canvass in the grievance steps of matters which were either never previously explored or inadequately explored at grievance meetings and only came to light, at long last, at the arbitration hearing. In so acting, it would seem, umpires ensure that all aspects of the dispute will truly be before the parties, affording them an opportunity to adjust it by the methods of bargaining; and, should this be unavailing, that all of the necessary facts will be before the arbitrator and in the record when he makes his final decision. This avoids the making of bad decisions based on inadequate records.

As an arbitrator serving in what we euphemistically call permanent arbitratorships or umpireships, I have issued many interim or partial awards or remanded cases for further consideration in the grievance steps. As an *ad hoc* arbitrator I shared with many of my colleagues a reluctance to do this, lacking the express or implied consent of the parties to this course. This reluctance is based upon a widespread belief that there is a body of judicial precedent which makes it imperative that an arbitrator exhaust his authority when, by award, he exercises any part of it in a form that is recognizable as an award. There are indeed judicial precedents which hold that awards in commercial arbitration shall be final and conclusive; but I read them as doing no more than applying the rule of functus officio in the usual context—that is, that what an arbitrator has decided he may not reopen for relitigation. This is an entirely different thing than taking one bite of an apple and then, when the occasion is appropriate, taking another bite on the other side of the apple. I have searched with moderate diligence but I have been unable to find any labor cases in arbitration in which the courts have struck down as beyond the authority of an arbitrator an award that did not dispose of all of the aspects of a controversy in an interim or interlocutory award. To the contrary, there are recent cases which suggest, if they do not hold with authority, that such an award, when based on good cause, will be upheld.[1]

The new Section 7511 (b) of the New York Civil Practice Act states that:

> The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of

[1] *Sportswear* v. *Evans,* 318 F.2d 428.

> intention to arbitrate if the court finds that the rights of that party were prejudiced by * * *
> (iii) an arbitrator, or agency or person making the award exceeded his power or *so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.* (Italics supplied)

This is the only provision in the New York statute which bows in the direction of the functus officio doctrine or alludes, however indirectly, to the problem of interim awards. It is to be observed, however, that the statute requires a finding by the court that an award that may not have disposed of all of the aspects of a controversy *has prejudiced the rights of the party.* The superseded Section 1462 did not ground the motion to vacate on prejudice to a party. The new provision is salutary because clearly, where such prejudice might ensue, no arbitrator should issue an interim award. Further, the statute says that the arbitrator must have "so imperfectly executed it [his power] that a final and definite award upon the subject matter submitted was not made." This provision, as I stated before, is qualified by the important overriding provision that prejudice to the rights of a party must have been found. Further, I do not read this language as barring all interim awards as a technical matter regardless of the circumstances under which they were issued. A careful reading of the words suggests to me that the award must be complete, final, and ultimately dispositive of those specific matters on which such an award can be made at the time. Thus, if a party is not prejudiced and there are several facets to or aspects of a dispute which are separable for the purposes of arbitral treatment, and some of these are ready, ripe, and matured for decision and others are not, I do not consider the statute to be a bar to the issuance of an award on some matters and to a reservation of authority by the arbitrator to deal with the remaining matters in good time.

Everyone in the course of a lifetime has done things, which, when remembered in old age, despite the remedial effects of time, inflict twinges of acute embarrassment. Hot and cold flashes attend the recollection of a clumsy or a cruel remark made in adolescence or the stupid behavior in relation to that lovely young thing invited to the junior prom which demonstrated that one was less cultivated and understanding than one thought. In my case, I suffer from remembrance of final awards issued in cases in which

I felt obliged to issue awards within narrow time limitations despite an abiding conviction that the evidence on which they were based left much to be desired. I am not talking now of the level of advocacy in arbitration presentations which is one of the reasons for less than sterling awards. That is another subject. I refer, rather, to a need for additional facts in the record of the case without regard to whether counsel is at fault for not presenting them through exhibits or witness testimony.

Arbitrators, like management officials and international officers of unions or local officers, frequently make mistakes. Any arbitrator who would undertake, on reconsideration, to defend every award he has ever written is a fool. Some of the complaints against the best arbitrators in the country, based upon what they decided in particular cases are justified—but if one inquired into the reasons why such highly respected persons could fall into such manifest error, I believe that it would be concluded that it is the consequence, frequently, of yielding to the pressure and necessity of divesting themselves, finally and conclusively, of jurisdiction by the issuance of an ultimate award when the record might not fully justify such action with respect to one or to all of the possible facets of the case.

This takes some explanation. A considerable amount of the business of a labor-management arbitrator involves the performance of functions which are not purely judicial in the conventional sense. The parties may delegate to the arbitrator the power to determine a crew size for a new or changed operation or equipment; or to determine a rate for a new classification; or to determine whether it is safe to operate certain printing presses at a given speed; or to determine what safety measures or devices shall be used; or to determine whether an individual has the mental capacity to perform a job efficiently, or the physical capacity to perform it without injury to himself or danger to others. This is not the kind of decision conventionally made by judges in courts of law. It differs radically in kind from another kind of decision as to whether the words in a document mean what one party claims them to mean; or whether one was a reasonably prudent man in his conduct leading up to an alleged tort; or whether one has breached a standard of behavior. The decision-maker is not asked, in the kind of cases we are discussing, to interpret and apply stand-

ards, but in effect, to legislate them; and he is asked to do so on a presentation and record which each party considers adequate for the purposes of its own position.

The arbitrator, in such a situation, may feel that however satisfactory the record may be to the advocates before him for their own particular purposes, it fails to supply him with what he needs to perform his awesome act of justice, from which, he is all too aware, there is no appeal. Should he ask for additional facts, he sometimes does so at considerable risk. For one thing, he is delaying a prompt and expeditious conclusion of the controversy which is one of the objectives of arbitration. For another, he may be adding materially to the cost of the arbitration: a consideration, frequently of considerable weight, particularly if he is from distant parts. Further, counsel have been known to resent the arbitrator's request for facts which they had not regarded as necessary to present, some even feeling that it suggests to their clients that the presentation was not as brilliant as it was hopefully represented to be. Finally (although arbitrators, as much as the next man, like to be loved), it is sad to relate that the asking of questions which go beyond the mere comprehension of what is being placed in front of him and the request that additional data be furnished by one of the parties, frequently does not facilitate or promote affection. Such requests by an arbitrator may be resented on the ground that he is engaged in making a case for the other side. Sometimes it is difficult for advocates, in the heat of battle, to appreciate the fact that the arbitrator has to perform an act of justice—a matter which is not the special responsibility of the parties.

All of these considerations weigh heavily on the mind of the arbitrator; and, if I may coin a phrase, he then seduces himself into expending his authority in a final award in a case not, perhaps, ripe for such ultimate action. In his opinion he justifies his conclusions only with reference to the inadequate facts in the record. The losing party, unsatisfied by the weight given to those facts, regards the arbitrator, not only as being wrong, but, in the argot of the trade, an indubitable jerk. And a jerk he very well may be.

I speak with some authority on this matter because I think that some of my most unsatisfactory awards have been due to this (if

you will excuse the expression) self-seduction and unwillingness to bear the odium of retaining jurisdiction, asking the parties to obtain additional data or garner additional experience with their problem, or remanding a dispute to the grievance procedure, and then, at some future time, to hold an additional hearing if it is needed. My conversations with fellow-arbitrators convinces me that my experience is not unique.

All of these considerations lead me to make the following observations with regard to the operation of the doctrine of functus officio and the interest of all of us that the arbitration process be strengthened and improved:

(1) Ad hoc arbitrators should not hesitate to retain jurisdiction, delay the closing of hearings, and, if necessary, reopen hearings if they are of the opinion that their adjudicatory function cannot be responsibly discharged on the kind of presentation made by the parties on the record of the case. If additional facts are needed or additional experience with a process or operation is required, the award should not issue until the record is perfected. While speed and economy are laudable objectives, one should not sacrifice justice to these goals.

(2) This can frequently be done merely by adjourning and continuing the hearings without issuing any award whatever which, conceivably, might run afoul of the functus officio doctrine. The arbitrator, in such a case, as a mere procedural matter, rules or directs what remains to be done. Those agreements which place time limitations on the arbitrator usually do so by requiring that the award be issued a stated number of days after the hearings have been had. If the hearings have not been closed in any realistic sense and are being continued at some later date, it is difficult to conceive how dire legal consequences should be encountered.

(3) If the logic of the circumstances calls for an interim ruling, the arbitrator should not be hesitant, despite his *ad hoc* status, to issue such a ruling. Where the parties both have an interest in partial awards, no difficulty need be encountered. Their consent to the interim award can be requested. Further, there is no problem when there is a series or a number of unrelated grievances in a single demand for arbitration before the arbitrator. He might, with justification, treat each grievance as a separable dispute in a

separate award issued on the same or separate dates. Finally, if a single grievance has two or more distinct aspects, he could conceivably deal with them in separate awards issued on different occasions, depending on the circumstances presented. Thus, for example, if the assessment of damages for an alleged violation requires protracted hearings or delay until the damages have occurred and are known, there would seem to be ample justification for issuing the award declaring the violation and leaving the question of remedy for later hearing and adjudication.

In any event, however, arbitrators issuing interim awards or retaining jurisdiction might be well advised if they label their awards as interim or partial and in their accompanying opinion set forth the circumstances which justify a piecemeal approach to fulfillment of their duty. A court might be interested in knowing why the arbitrator did what he did even though Cutler-Hammer is dead and the Steelworker Trilogy has wrapped the arbitrator in a judicial mantle.

Apprehension that interim awards would meet the disfavor of the American Arbitration Association, acting under its Rules, I have been advised, is groundless. The Association takes the position, as I understand it, that the Arbitrator operating under those Rules has the power to determine his own authority in the arbitration of the case before him; and, while the Association, as administrator, might call his attention to legal pitfalls and elephant traps in his rulings and awards, the responsibility for issuing them is his, and not the Association's. This is as it should be.

In conclusion, I have the temerity to suggest that observance of these suggestions could result in some arbitrators avoiding the mistake of issuing final awards on inadequate records and evidence. It takes courage, sometimes, to delay the day when functus officio overtakes the arbitrator; and the parties, if they are genuinely interested in strengthening the process and improving the quality of awards, might give thought to ways of encouraging the arbitrators along the suggested lines. Instead of regarding every demand by the neutral for further facts as an arrant arrogation of power, an unwarranted retention of authority, and a snide attempt to make a case for the other party, if they appreciated it as an effort to complete and perfect the record, they would do much to im-

prove his performance, in his award, and to promote their own self-interest.

II. The Power of the Arbitrator to Make Monetary Awards

SIDNEY A. WOLFF *

The power of the arbitrator to make monetary awards is unquestioned, provided in so doing he acts within the terms of the submission. This, as we all know, is basic in the arbitration process. However, assuming authority to render a monetary award, questions do arise as to the extent of the award and how far the arbitrator may go in fixing damages and the method of computing damages.

Damages within the purview of this paper fall into three groupings—compensatory, punitive, and liquidated; I shall consider them in that order.

Obviously, an award of compensatory damages is the most common type of remedy that comes within the arbitrator's jurisdiction. This is the type of award that will issue when a breach of contract has been established resulting in a monetary loss. In the great majority of cases these involve the reinstatement of an employee found to have been unjustly disciplined, failure to grant overtime, layoff out of seniority, and similar violations of the labor contract. However, I must point out that the arbitrator does not have the power to award damages in every case of a breach. Here, too, the arbitrator is governed by the authority given him by the parties.

In the well-known *Marchant* [1] case of 1929, although the arbitrators found a breach had occurred, the New York court set aside an award of damages on the ground that the arbitration clause was not sufficiently broad to constitute a general arbitration clause so as to permit an award of consequential damages flowing from the breach. There the clause read:

> If for any reason any controversy or difference of opinion should arise as to the construction of the terms and conditions of this Contract, or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration * * *

* Attorney and Arbitrator, New York, N. Y.

1 *Marchant* v. *Mead Morrison Mfg. Co.*, 252 N.Y. 284.