

CHAPTER VII

A FUNNY THING HAPPENED TO ME ON THE WAY TO MY FORUM

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When invited to make a few remarks at this luncheon (at my usual per diem rate and with a business deduction for expenses incurred to be allowed, hopefully, by the Internal Revenue Service) I was told that I might choose any topic that would fascinate a group of union and labor representatives and impartialists depleted and exhausted by a morning of lectures, gorged with too much rich food, and deeply depressed or highly stimulated, as the case may be, by alcoholic beverages. Nothing whatever was said about my competence (or, as we say in the Arb. Biz., "expertise") to deal with the subject I selected.

My initial thought (which experience has taught me is sure to be right exactly 50 percent of the time) was to release, for the first time to an impatient world, the information, learning, and data I have been collecting so painstakingly on that important subject which so deeply concerns most of you here, namely, the selection of the arbitrator of your choice. Using the accepted and tested sampling techniques of my professional statistician and polling friends, I have made what I regard as an "in depth" study of the factors distinguishing arbitrators and of the methods of selection employed by those persons whom we arbitrators, in order not to run afoul of the laws of slander and libel, call the parties. Thus, I have one sample group which has been carefully polled, consisting of five persons (one of whom will shortly be an adult) living on the north side of West 75th Street between Columbus and Amsterdam Avenues in New York City. A second, eight-person

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group lives in East St. Louis. Three persons live in Dallas; two in Los Angeles; four in Dubuque; and three in Elyria, Ohio. My control group consists of one right-thinking arbitrator in Philadelphia whose last name rhymes with Hill and who is also, as the saying goes, an honorable man; but who will not be otherwise identified. Anyone who questions the truly representative quality of this sample, manifestly, is a mischievous enemy of science and a cynical unbeliever in the highest virtues of our society.

The study revealed to me that the parties put forth unimaginable efforts and go to great expense to ensure that the arbitrators they select from the lists submitted by the AAA and the FMCS meet their exacting standards of qualification and perfection. They have their young men in management personnel offices and in international union offices poring over, reading, digesting, and endlessly analyzing the arbitrators' published awards—even though those awards may be wholly unrepresentative of their productive output. The parties subscribe, at great cost, to private services through which they are supplied with the appraisals of other parties who have run the gauntlet of arbitrators. Those who have benefited from an award of a particular arbitrator, of course, describe him as a veritable Solomon or Ralph Seward; those who have lost their cases show great versatility in their use of opprobrious epithets. I must concede, however, that I have yet to hear of an arbitrator being called a "bag man." (This descriptive phrase, by the way, is one of the few omitted by Judge Hays in his deliriously funny and irresponsible book on arbitration. Adam Clayton Powell's experience with that phrase is reason enough for Paul Hays to avoid its use.)

There are rumors which are rife (some of which I have initiated), and which I have been unable to substantiate, that some employers subject arbitrators to a battery of psychological and other tests before selecting them from a list. I have it from one authority, which I regard as highly "peachable," that one company, in advance of the selection of an arbitrator, insists that he take a polygraph test. The way I get the story, he is the company's choice as arbitrator if he flunks.

What appalls me is not that the parties should go to such great lengths and should take such pains in seeking out the arbitrator

of their hearts' desire, or even that they have so little faith that the laws of chance occasionally might operate fortuitously in their favor, but, rather, that they should have so little discernment as to fail to recognize and use the one infallible test of a good arbitrator. More important than all of the standards and criteria of selection commonly used is this: to what kind of woman is he married.

Show me an arbitrator's wife and I can tell you exactly the kind of arbitrator he is! Behind every arbitrator, I dare say, stands a woman, either pushing or pulling. If I were a management or a labor representative about to select an arbitrator, I would be unconcerned about whether he is a servile and fawning hireling of the capitalists or, on the other hand, a secret chanter of the dialectic materialism dithyrambs of Mao Tse-tung. I would want to know whether he lives a happy family life; whether he has earned respect and admiration in his own living room and other rooms in the house which need no identification here; whether he has extramarital affairs; whether his wife has extramarital affairs, et cetera, et cetera. When a man picks a wife, as is or should be well known, he picks a mother-in-law as well. When a party to an industrial dispute chooses an arbitrator, he also chooses the arbitrator's wife, whether he is aware of it or not. I have estimated that if the parties would put one eighth the amount of effort and expense into a study of arbitrators' wives that they put into inquiries concerning the arbitrators' personal characteristics, they would be better satisfied with their selections.

I have much more to say on this subject, but the luncheon committee asked me to refrain from a more detailed analysis and exploration of the subject in view of the fact that this is a mixed audience—that is, a mixed audience of employer and union representatives. The sex mix of this group, obviously, is not a matter of concern to me. I must respect the committee's wishes, and the results of my study will have to be given to a palpitating and breathlessly impatient world on some more appropriate occasion.

In these days, when role-playing is regarded as so important both in training and in administering official affairs, it is regrettable that employer and union officials do not have an opportunity, on occasion, to change places with the arbitrator. Only in this way, I think, could they develop any meaningful comprehension of how

they look to the arbitrator and what they are doing to the arbitration process. Indeed, how often at hearings I conduct, I find myself silently wishing I could change places with a company or union representative and subject him to some of the hanky-panky which he inflicts on his client, his adversary, or the arbitrator!

I shall try, as briefly as I can, to bring to you some of the observations of one arbitrator with respect to the goings-on in arbitration. If you do not mind, I shall illustrate these observations with bits of verse I have composed while waiting in air terminals for planes delayed in bad weather or while waiting hours for the parties to determine, now that the arbitrator has arrived in their city, whether they should settle the grievance that has been pending for nine months. Brother Arthur Ross, the Diocesan of the BLS, has estimated that a normal healthy elephant, not ordinarily tardy in parturition, will have at least three separate and distinct periods of parturition during the time it takes for a grievance to proceed from the date of filing to the date of selection of the arbitrator. Then, if the arbitrator cannot hold a hearing within two weeks after he is designated, the parties howl and lament about the delays in arbitration. But that is another story!

First let's take the matter of scheduling the hearing. We all know that any dolt or dullard can write an opinion and award in a hotly contested arbitration case; but it takes a really clever and able man to get the representatives to agree upon a *date* for the hearing. Then, after succeeding in getting agreement on a date, buying his airplane tickets, arranging for a Hertz car, reserving a room at a motel, and kissing his wife a tearful farewell, the arbitrator learns at 4:30 p.m. on Thursday afternoon that his date for a hearing next Monday has been cancelled either because the matter, after months aborning, has been settled or because the vice president of the company or the union, needed as a witness, has to join his wife at the Fountainbloom in Miami, or else. True, there are three full days before the hearing date in which to substitute some other remunerative activity—but two of them are weekend days. In any event, other disputants who have requested an early date in a critical dispute and been turned away, because of the previous commitment, cannot be reached by phone over the weekend. The arbitrator, having some idea of the way the parties

approach the question of the costs of arbitration, sorrowfully absorbs the costs himself. I have expressed this in the following:

SONNET ON SCHEDULING ARBITRATION HEARING

“Please schedule this case with all dispatch,”
 The parties scream. “The very least delay
 Will cause a strike to flare up like a match
 Ignited in a field of autumn hay!”
 The arbiter, desiring to please,
 Disrupts his well-planned program on request—
 A matter that he cannot do with ease.
 And though his other clients are distressed,
 He cancels their appointments in his zeal
 And rides the wild confusions that ensue.
 He’s poised to serve the parties’ private weal
 Until informed in their next billet-doux
 That amicably, they have just resolved
 All issues—and no fee will be involved!

So much for scheduling.

Let us now proceed to the hearing. It is an ill-kept secret that even the most able union counsel are frequently frightfully underpaid considering the skills that they are obliged to bring to the arbitration table and the importance of the matters to be litigated. Too frequently, they simply cannot afford, on the paltry and inadequate fees they receive, to spend a day or two in preparation of the case. (This is a plug.) Accordingly, not uncommonly, union counsel rushes into the room as innocent of the details of the case as a new-born babe or the arbitrator. His first act, typically, is to ask for a 10-minute recess to caucus with his clients and learn what it is all about. In a case I heard a few years ago, a well-known labor lawyer showed up at the end of the luncheon hour to present the second grievance. His associate, who had presented the first grievance in the morning, had been called to court. The attorney was only mildly embarrassed when, noting that the union people had not yet returned from lunch, he said to me, “Peter! Tell me quickly. What union is in this case?” He was in the right place for the hearing; his unpreparedness did not faze him at all; but he was not sure what client he was representing. The consequences of lack of preparation are expressed in this little verse entitled

ATTORNEY FOR THE UNION

One day, when he prepared, he won his case;
 But he avoided preparation since!
 The facts are the expressions on his face:
 Assumptions, scowls, and smiles; suggestive hints.
 The grievant's case has merit, it is plain—
 I seek it in my record—but in vain.

I hasten to add that some of my best friends are union lawyers. The criticism, if there is any to be found in these gentle verses, should be regarded as directed against the client who creates the condition and not against the attorney.

And what of that fine, earnest, and clean-looking fellow with the Brooks Bros. suit and the button-down collar, the company's attorney?

ATTORNEY FOR THE COMPANY

His most suspicious glance at me conveys
 This stupid oaf will need a lengthy brief
 To comprehend. He struggles to appraise
 The arbitrator as a saint or thief.
 The grievance granted, he then roars "J'accuse!"
 Denied, he says I'm like Chief Justice Hughes.

Again, some of my best friends are company attorneys. As for briefs, I am grateful for many of them. Some briefs I could well do without. Sometimes I wonder why company attorneys so frequently reffrain from asking the arbitrator (as though he had something to do with the matter!) whether *he* feels a brief is necessary. Or desirable. If I were asked, I would tell him the truth, conscientiously. But someone in the front office has said he should *always* file briefs, and file them he does, regardless of the need.

But it is not always the unprepared union lawyer who is surprised by what comes out of the mouths of his witnesses. One of the worst moments in the world for the harassed attorney or other representative of either party is when a witness tells an unexpected story. I have two verses on this. The first is entitled

THE FOREMAN
 (Witness for the Company)

"Revenge is sweet!" he tells us with his smile.
 "The union witness told a pack of lies!"
 He oozes rancor and the juice of bile;

His facts are switched in order to surprise
The union lawyer and but him alone!
But oh! the grief! when he surprised his own!

Now:

THE GRIEVANT

Such innocence has never been perceived
In new-born babe or guileless cherubim!
He hopes to perish if he's not believed!
Misstate a fact? Ridiculous! Not him!
He's clothed in virtue, shining like the sun—
At least 'til cross-examination is begun.

Then there are two other important personages at the hearing who should not go unnoticed. First, there is the president of the local union (or the international representative, as the case may be; whichever is the greater) whose objective, clearly, is to achieve truth and justice and nothing else!

"Just let the chips fall where they may," he'll state;
"Just call 'em as you see 'em like an ump.
"We want a gutsy guy to arbitrate.
"Just stand your ground when you're inclined to jump."
He meant it most sincerely, but he sobbed
On learning that he lost, "Guy's, we wuz robbed!"

Then there is the vice president in charge of labor relations, who frequently makes no noises concerning a search for justice, truth, and such glittering abstractions. He has a more earthy and humble objective. He wants to win. Why? Because he is right! It is as simple as that.

Statistics are his passion, it would seem:
It's "one for us, and one for them, at last."
Should they get two it's time for him to scream.
Should they get three, in shock he stands aghast.
He tallies on his scoreboard each award,
So I'll know when to fall upon my sword.

One other member of the cast of characters deserves brief notice: my good friend the reporter. Don't get me wrong! Some of my very best friends are reporters. Sometimes when I find a reporter at the hearing I silently offer up thanks—depending, of course, on the nature of the case and the method of presentation. Sometimes (and clearly he bears no responsibility for this) his presence means that instead of enlightening me, the arbitrator, the parties will be

speaking for the written imperishable record, hoping that their deathless words will ring endlessly down the corridors of time and impress the brass in the front office. Also, his presence means that nothing happens, after the hearing, until the typewritten transcript is received two weeks hence. Then the parties take another month to get their briefs in. By this time the facts in 10 or 20 other cases have completely erased the proceedings from memory, the witnesses no longer have faces to which I can associate their testimony, and the case is decided on the basis of a written transcript without that directness and immediacy of impact which one gets at a hearing. At any rate, my comment on the reporter (or at least some reporters—and I certainly do not refer to Sybil Sills) is as follows:

He interrupts proceedings with his "Please!
 No questions till I paper my machine!"
 He chews his gum while fingering the keys.
 He cares not what the case or issues mean.
 "Just cause" have I for being saturnine,
 His compensation, far exceeding mine.

The limitations of time and the demands of good taste to which an arbitrator must conform, particularly when standing before such an audience as this, counsel me to draw a discreet and prudent curtain over the events which frequently occur at the hearings. Suffice it to say that the arbitrator is given to wonder, on occasion, whether it is the objective of the parties to enlighten him as to the substance of the dispute or to confuse him. Unless he exercises his authority in a stern and imperious manner, the proceeding can easily degenerate into a kind of Open End program such as Susskind conducts on TV—or an opera in which there are no solo arias but all the voices blend contrapuntally into a single kind of noise. After a few hours of this

The arbitrator calls a lunch recess;
 And bliss and joy suffuse each tired face.
 Forthwith into the coffee shop they press
 In threes and fours, relaxing from the case.
 With tragic mien and forlorn anguished groan,
 The arbitrator goes to lunch alone!

By four-thirty in the afternoon the *ad hoc* arbitrator (whom Ralph Seward has perceptively called the odd hack arbitrator) has finally despaired of making any contribution to the quasi-judicial

proceeding he is conducting and is inspired with the following thoughts which might be entitled

WHO'S QUASI AROUND HERE ANYWAY?

Behold the arbitrator! He
Is in a slough of Misery!
The parties stridently declare
He is not Just! He is not Fair!
And curse the most malignant Fate
That brought this jerk to arbitrate!

* * *

One party bares the tooth and claw
Of actions at the Common Law.
Pecksniffian, he apes the style
Of lawyers at a jury trial,
With Wigmore's "Evidence" on call
For protests casuistical;
And Perry Mason-like he'll breed
Objections, hoping to mislead,
Entrap, ensnare, surprise, embog
The hearing with his Pettifog.
The Court of King's Bench never heard
Of legal practice so absurd!
The Court of Terminer and Oyer
Never saw so stern a lawyer!
With bristling "Wherefores" and "Thereunders"
"Judicial" is the word he thunders!

* * *

The other party, white with rage,
Assails his birth and parentage.
He screams: "We have no crime or tort
For trial here in a County Court!
These technicalities offend;
Informal hearings, we intend,
Both evidence and argument
In one mixed torrent, confluent!
No, witnesses, they just confuse!
We're here to win and not to lose!
Why all this fuss with finding facts?
And testimony just distracts!
Our story's true! We're right, we know—
It's quite enough we tell you so!"

L'ENVOI

What's "judicial"? What is "quasi"?
Small wonder some of us go crazy!

The gory and sordid details of what happens when the arbitrator finally sits down to write his opinion I have already told in detail in the song that I sang at the Annual Meeting of the National Academy of Arbitrators in January 1966. Some of you have heard it, and, accordingly, I shall not burden you with it here. There are some aspects of his agony, however, that merit further exploration in verse. I have written this "Sonnet Concerning an Arbitrator in Search of a Listener" to describe the difficulties he has in talking out his problems. After all, a judge has a law clerk or other judges of the court on whom he can try out his ideas for size. The arbitrator has no one. He hardly ever sees another arbitrator if he is a busy, full-time practitioner. At the dinner table nothing in the world could interest his family less than whether the incentive rate should be increased to give reasonably equitable earnings in relation to what employees previously received before the equipment was changed. In desperation, if only to clarify his thinking by hearing himself talk and not to be committed to an insane asylum, he searches out another arbitrator.

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.

And even *if* my fellow arbitrators *should* deign to listen to my troubles, the results are likely to be as follows

However I decide, I can be sure,
My colleagues will be prompted to declare,
"His motives are unquestionably pure;

His attitude indubitably fair;
 He's knowledgeable; we'll admit he *tries*;
 But *we* would have decided otherwise!"

You who present cases to us arbitrators, of course, see only one side of us. You see sitting at the head of the arbitration table that magnificent representation and incarnation of justice, a man of heroic mold, wise in his rulings, stern in his demeanor, possessing all the admirable attributes of the judge in the TV show called "The Defenders." There are two sides to the picture, however, and you should see both of them lest you harbor the Walter Mitty-like dream that some day you may want to play arbitrator yourselves. I have entitled this verse "Haec Est Rerum Humanarum Condicio" which, literally translated, means "Thus is the Human Condition of Things." A more sensible translation would be "This is How the Cookie Crumbles."

Observe the arbitrator! Grace
 And Majesty are on his face!
 His regal bearing, haughty glance,
 Bespeak his Pomp and Circumstance!
 His sympathy is hotly wooed;
 The parties pander to his mood;
 Should he essay a feeble jest,
 They roar as though with pain distressed;
 A phrase or word he might emit
 Assumes the weight of Holy Writ;
 They treat each wheeze that he provides
 As though King Solomon presides!
 A frown strikes terror; smiles delight!
 They see, in him, the Prince of Light!
 Their fawning's vulgar and profuse.
 Small wonder that he thinks he's Zeus!

* * *

Then, finally, at hearing's close
 He seeks familial repose
 Within the bosom of his flock.
 It's then that he sustains his shock!
 How dulled and tarnished, now, his gloss!
 What once was golden, now is dross!
 His virtues no one can perceive;
 His offspring think that Dad's naive
 And mushy in the heart and head!
 His pearls of wisdom go unsaid;
 No interest is shown at all

In his affairs juridical!
 In fact it is suspected he
 Shows traces of senility.
 His stories bore and are ill-paced,
 Devoid of cultivated taste;
 His tentatively offered word
 If uttered, scarcely can be heard.
 His family regard the man
 A platitudinarian!

* * *

The moral of this tale, I fear
 Is neither plain nor very clear!
 It teaches: those who genuflect
 May not extend sincere respect;
 And those who love a fellow best
 May leave him gloomy and depressed.
 Experience instructs and humbles:
 But that's the way the cookie crumbles!

It does not go without saying that in the pictures I have painted here of union and company representatives at arbitration hearings, I have not portrayed anyone within the sound of my voice. I am referring to some who are not present; and if anyone stops me on the street and demands to know if I mean him, I shall deny it indignantly. Nor do I mean to refer to all arbitrators, lest I be brought up on charges that I have breached security by exposing the arbitrator's thinking and emotions.

In conclusion, however, I want to impress upon you that most arbitrators, despite the flippancy of these remarks, regard their office with high seriousness. We are engaged in a profession; and most of us wish to serve under its most exacting standards. We know even better than you do how prone we are to human error. All we can do is do our best with the help of the services, such as the AAA and the FMCS, which administer arbitration. My concluding sonnet is written in the first person—but you can substitute "We" for "I." It is entitled

THE ARBITRATOR: ON HIS BLINDNESS
 (With some help from John Milton)

When I consider how my nights are spent
 In anguished search for what is just and true;
 Assessing facts presented, by their hue,
 Their size and weight; and even by their scent;

Determining just *what* the parties meant
By words, sometimes too many, or too few;
Then tearing up my drafts to start anew;
Then making what I wrote mellifluent.

The toilsome task, then finally complete,
My heart is troubled with a vague unease.
I ask why I have tempted evil Fates?
The loser's bound to whine that I'm a cheat;
The winner hails me as Diogenes!
He also serves who only arbitrates.

* * *

(Mild, but not discouraging, expressions of acclaim were heard at the conclusion of these stirring remarks; whereupon Mr. Seitz was heard to declaim the following):

I feel a gnawing doubt that this applause,
This approbation, this faint burst of mirth,
Can be related to the phrase "just cause."
I'll take it, friends, "for what it may be worth"!