CHAPTER IV

THE USE AND ABUSE OF ARBITRAL POWER

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The temptation in any discussion about the use and abuse of arbitral power is to dwell upon the abuse of power. Excesses and horror cases make interesting reading and interesting conversation, but they do little to improve the arbitration process. Furthermore, because an abitrator is called upon to exercise his judgment in a conflict situation, what one party to a dispute may consider an abuse of power, the other may consider an interpretation or an application of the agreement in the light of its purpose.

Characterizations like "proper use" and "abuse" are susceptible to the same usages as "daring" and "suicidal," "thrifty" and "stingy," and "taking an interest" in something and being "nosy." Whether you use one term or the other, more often than not, depends upon where you sit. In other words, it is a matter of whose ox is being gored.

Rather than attempt to define what may properly be considered an abuse of power or try to draw a line between an abuse of power and questionable judgment, I would like to enumerate some of the things I believe that parties have a right to expect of an arbitrator in the exercise of the power they have delegated to him. These, of necessity, are generalizations. The enumeration is not intended to be exhaustive. It obviously is limited by time considerations.

First, and perhaps foremost, unless there is an issue of arbitrability or unless they have agreed otherwise, the parties have the right to expect an arbitrator to answer the question presented and to put that question to rest after the arbitration hearing has been concluded. As the *Code of Ethics and Procedural Standards for Labor-Management Arbitration* states: [1]

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[1] See Section 5 (a), Part II of the *Code of Ethics and Procedural Standards for Labor-Management Arbitration,* prepared by the American Arbitration Association and the National Academy of Arbitrators (republished July 1962).

"The arbitrator should render his award promptly and must render his award within the time prescribed, if any. The award should be definitive, certain and final, and should dispose of all matters submitted. It should reserve no future duties to the arbitrator except by agreement of the parties."

There is a school of thought that in some cases an arbitrator should defer issuing a final award, retain jurisdiction over the dispute, and issue an interim award requiring that certain things be done before a final award is issued. It has been suggested, for example, that in a dispute over the size of a crew for some new equipment, an arbitrator might issue an interim award requiring the equipment to be operated for a period of time so that studies can be made to resolve questions in the arbitrator's mind about the claim of an undue work load. It has also been suggested that in a dispute about the ability of an employee to perform a job, it might be appropriate for an arbitrator to issue an interim award requiring the company to give the employee a trial on the job so that his capabilities may be evaluated on the basis of his performance during the trial period. The rationale for issuing interim awards is that they enable an arbitrator to base his decision on evidence more conclusive than that presented at the arbitration hearing, thereby enabling him to issue what he considers a more just decision and to satisfy the purpose of the arbitration process.[2]

While there is no question about the integrity or the sincerity of those who issue interim awards, there is a question about whether they are using their arbitral power for the purpose for which it was granted.

The power to act as arbitrator is granted so that a final and binding award will be issued to resolve a dispute that the parties are themselves unable to resolve. To this end, most labor agreements provide for a hearing before an arbitrator so that the parties can present their versions of the facts and explain why they believe the agreement was or was not violated. The parties must assume the primary responsibility for explaining the factual situation at that hearing. They likewise must assume the responsibility for explaining their contractual arguments at that hearing, unless they elect to file posthearing briefs. If the arbitrator

[2] See Peter Seitz, "Problems of the Finality of Awards, or Functus Officio and All That—Remedies in Arbitration," in *Labor Arbitration—Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 165.

does not understand the factual situation, he is free to ask questions. He also is free to ask the parties for any otherwise undisclosed information they may have if he feels he needs that information in order to help him reach a conclusion. By the same token, he may ask the parties any questions he may have about their contractual positions. However, when the hearing is over and all the contractual arguments are in, the labor agreement contemplates that he will issue a final and binding decision. An interim award, by hypothesis, is not a final decision.

If there are weaknesses or gaps in the proofs, or if one party or the other did less than what the arbitrator feels should have been done under the agreement, then the party responsible for the weakness or the gap in the proofs or the party who failed to do what should have been done must stand the consequences in the final decision. The quality of the evidence and doing or not doing what should be done under the labor agreement are determinants in the exercise of the decisional function. They are not an excuse for failing to exercise the function. The arbitrator's role is to decide disputes on the basis of what has been presented to him.

An arbitrator, especially one in an ad hoc situation, is not empowered to monitor the parties' future activities or to exercise continuing jurisdiction over a matter after it has been submitted to him for decision. Call it *functus officio* or what you will, but the parties have a right to expect an arbitrator to decide the question as they have presented it and then to go his own way unless and until they ask him to resolve another dispute between them. While a permanent arbitrator may have a continuing relationship with the parties, he likewise has the power to act only when the parties call upon him for a decision unless there is some special understanding or some special role the parties recognize or expect him to perform.

Although remanding matters back to the parties is a somewhat different subject, it is related to interim awards to the extent that the arbitrator has not fully exercised the power the parties have conferred upon him. This may occur because the parties have not provided the arbitrator with the information he needs to issue a definite and certain award. For example, the parties seldom spend time at an arbitration hearing detailing the specific wage and hour information necessary to compute a possible back-pay award in a suspension or discharge case, or in a case involving a

layoff out of line of seniority. As a result, instead of computing the exact amount of back pay due a grievant, the arbitrator issues an award stating that the grievant should be made whole for the pay he lost and then leaves the dollars and cents computation to the parties after the award has been issued. However, this is not what people usually have in mind when they discuss the subject of remanding matters back to the parties.

What people usually have in mind when they talk about an arbitrator remanding a matter back to the parties is a situation where he sends the grievance back to a lower step of the grievance procedure for further discussion, either without dealing with the question raised or with a decision dealing with only part of the question. If the grievance is returned to a lower step of the grievance procedure by agreement of both parties, there of course is no problem. The problem arises when an arbitrator remands the grievance to a lower step of the grievance procedure, either on his own motion or at the request of only one of the parties.

The usual reason for referring a matter back to a lower step of the grievance procedure at the request of only one of the parties is a claim that the other party has been sandbagging by withholding evidence or withholding information until the parties arrived at the arbitration hearing. As a general rule, it seems to me, this is a problem that should be handled within the context of the arbitration hearing and not by abdicating the arbitral responsibility for deciding the dispute or by conditioning the decision upon another "go" at one or more of the lower steps of the grievance procedure. Absent any mutually agreed-upon rules of procedure to the contrary, an arbitrator has the inherent power to exclude the evidence altogether, or to recess the hearing to provide the party claiming surprise an opportunity to study the evidence and to decide how to cope with it. In a permanent umpire system, the umpire might choose to deal with the problem differently on the basis of his continuing experience with the parties or on the basis of a well-established procedure in dealing with such matters.

By the same token, the nature of the permanent umpire's relationship to the parties may justify remanding matters back to them without a decision or with a decision dealing with part of the question raised, on his own motion. However, as a general rule, if both parties are satisfied with the handling of a grievance

through the various steps of the grievance procedure and at the arbitration hearing, it would seem incumbent upon the arbitrator to discharge his responsibility to the parties by exercising the power they have conferred to make a final and binding decision in the matter and to leave nothing more for them to do, except perhaps to calculate any monetary award he may have made.

Another thing the parties have the right to expect of an arbitrator is that in exercising his power to answer the question the parties ask him, he will answer only that question. The power delegated to an arbitrator to interpret and/or apply a labor agreement is a narrow one to be exercised within the boundaries of the factual situation in the case before him. It is not a roving commission. It is not a solicitation for industrial relations advice. Nor is it a request for a magic formula for handling all future problems which may arise under the disputed contract provision, notwithstanding the fact that the parties may couch their arguments in the broadest possible terms.

The difficulty with these broad and sweeping arguments about the meaning of a disputed contract provision is that they are made when hopes are the highest and when mutual confidence in the arbitrator's wisdom is at its zenith, namely, before a decision is issued. Then the extravagancies of advocacy can be observed in all their glory, because as far as he can foresee at the time, each advocate is willing to live with his own interpretation of the contract language in any situation that may thereafter arise. Yet, when he gets the decision and turns to the last page and finds out that he lost, the advocate hopes the interpretation of the contract language will be no broader than the facts of the situation require.

Gratuitous observations about what should not have been done or what should be done in the future, or such palliatives as what the arbitrator would have done if the facts were different, have no place in an arbitration decision. However, because of the continuing relationship in a permanent umpireship, it may be appropriate to warn the parties that a decision by a previous umpire can no longer be relied upon before following a different course. For example, the company changed a particular line from a noncontinuous to a continuous operation. This meant the employees had to work until they were relieved for their breaks and lunch periods, and it meant they had to work until the end of the

shift instead of shutting the line down for breaks and lunch periods and shutting the line down 10 minutes early so they could wash up. However, the employees continued to quit 10 minutes early. As a result, the company suspended them for insubordination.

This occurred once before when another line was involved. My predecessor concluded that the company had the right to change from a noncontinuous to a continuous operation, but the employees were entitled to additional pay because they had to work 10 minutes longer. He also concluded that the employees really were not guilty of insubordination, and he set aside the suspensions and awarded them the pay they lost. I agreed with my predecessor's interpretation of the labor agreement about the company's right to change from a noncontinuous to a continuous operation. I agreed that the employees were entitled to additional pay because they had to work longer. However, I disagreed with his conclusion that the employees were not really insubordinate. Nevertheless, the employees had a right to rely upon the previous decision that what they did was not just cause for disciplinary action. Consequently, I awarded them the pay they lost but put them on notice that they could no longer rely upon the earlier decision insofar as it related to the question of just cause for disciplinary action.

In an ad hoc situation, which by definition is one where an arbitrator is selected only to decide the dispute at hand, he is using his power for a purpose other than that for which it was conferred if he unnecessarily goes beyond the question he was asked and answers an unasked question which the parties have the right to select someone else to decide if and when it arises. However precarious a permanent arbitrator's tenure may be, there is at least a fiction of continuity which cannot be indulged in an ad hoc situation. But even then, unless he relishes the possibility of having to eat his words in a subsequent and unanticipated situation, the permanent arbitrator is well advised to deal with individual problems as they arise.

When parties ask an arbitrator to interpret or apply their labor agreement, be he an ad hoc arbitrator or a permanent umpire, they have the right to expect that he will base his decision upon the contract provisions they have discussed at the arbitration hearing or in their posthearing briefs and not others. The power

to interpret and/or apply the provisions of a labor agreement does not carry with it the right to run barefoot through the contract in chambers, so to speak, or to bolster a decision with provisions which were neither cited nor discussed.

This does not mean an arbitrator is foreclosed from asking the parties about the application of an uncited contract provision if he is familiar with the agreement on the basis of his previous experience with the parties, or if he has had previous experience with other agreements in the same industry. The arbitrator has the power to ask questions about the applicability of uncited provisions. Whether or not he chooses to exercise that power at a particular time is a matter of judgment. The mischief is interpreting or applying a contract provision to bolster a conclusion without affording the parties an opportunity to express their views about it. The danger is not that they will have different minds about its application to the problem at hand. The danger is that they will be of one mind and that is that the provision was never intended to apply to such a situation.

This brings us to the question of what the parties have a right to expect of an arbitrator when he exercises his power to determine what the remedy should be if he finds there has been a breach of the labor agreement. In the basic agreement between Jones & Laughlin Steel Corporation and the Steelworkers, the parties have expressed their expectations in a provision which states that "The decision of the Board will be restricted to whether a violation of the Agreement, as alleged in the written grievance including the grievance record . . . exists and, if a violation is found, to specify the remedy provided in this Agreement." When a labor agreement is silent about an arbitrator's power to formulate a remedy if he finds a violation, he presumably has the power to formulate what he deems a proper remedy "so long as it draws its essence from the collective bargaining agreement," according to what Mr. Justice Douglas said when he spoke for the U.S. Supreme Court in the *Enterprise Wheel & Car Corp.* case.[3]

Can the parties expect an arbitrator to issue a cease-and-desist order if one has been requested? Presumably an arbitrator can issue an order directing the company, the union, or an employee

[3] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

to cease and desist from engaging in conduct the labor agreement prohibits. Certainly an order telling someone to stop doing what Article IX, Section 4 of the agreement prohibits draws its essence from the agreement. The question in my mind is not whether cease-and-desist orders, in and of themselves, constitute the proper use or the abuse of arbitral power. The question in my mind is whether they constitute a waste of power, whether they are more shadow than substance as far as arbitration is concerned.

When a court issues an injunction requiring someone to cease and desist from engaging in a particular course of conduct, it has its contempt power to compel compliance. If an injunction is disobeyed, the court can hold the offender in contempt and impose sanctions in the form of fines and penalties it might otherwise lack the authority to impose in a civil proceeding. Absent anything in the labor agreement to the contrary, an arbitrator's remedy power after someone disobeys his order to cease and desist from violating a particular provision in the agreement is the same as it was when he issued the cease-and-desist order in the first place. Arbitrators have no special contempt powers.

The idea of issuing cease-and-desist orders in arbitration is probably borrowed from administrative agencies, which likewise issue such orders and lack the contempt power to enforce them. However, administrative agencies are the first steps in the procedure for enforcing the public laws they administer. Presumably the theory behind the issuance of cease-and-desist orders by administrative agencies is that the agencies provide the expertise the courts lack in specialized fields. Consequently, they prepare injunctions which courts may adopt and enforce if it becomes necessary to carry out what the agencies determine the law requires for compliance. Although parties to labor agreements sometimes resort to courts, grievance procedures are not ordinarily designed as steps to the courthouse door. Arbitration is supposed to be the terminal point in the grievance procedure.

Furthermore, before he can issue a cease-and-desist order, an arbitrator must find that the conduct in question violates the labor agreement. If he lacks the power to do anything about the violation, any relief must of necessity be declaratory. Issuing a cease-and-desist order in these circumstances makes him no less a paper tiger if the offender insists upon following the same course of conduct after the decision is issued. On the other hand, if the

arbitrator has the power to redress the violations he finds, is it not a better course to do so then and there instead of issuing a cease-and-desist order?

There conceivably may be situations where an arbitrator finds the agreement has been violated but no affirmative relief is warranted because, for example, for many years the complaining party had acquiesced in the conduct that gave rise to the grievance. At the same time, the arbitrator may want to forewarn the parties that any repetition will result in affirmative relief. In a permanent umpire system, the arbitrator can withhold affirmative relief, explain why he is doing so, and tell the parties they may expect different treatment in the future if the same situation occurs again. A cease-and-desist order is unnecessary. In an ad hoc situation, such a warning from an arbitrator could very well resolve any question about whether he would be the mutual choice of the parties if the same thing happens again. Besides, he has no assurance that the arbitrator the parties may subsequently choose would arrive at the same conclusion. Consequently, a cease-and-desist order would be no more effective than the other relief the first arbitrator could have granted.

One of the problems with a cease-and-desist order is that it is no more self-enforcing than any other award an arbitrator issues. Even if a cease-and-desist order is used as the basis for an injunction issued by a court, the party charged with disobeying it has the right to a hearing on the question of whether or not he actually violated the injunction. A party charged with violating an arbitrator's cease-and-desist order is entitled to no less. As we all know, circumstances alter cases so that a change in some of the operative facts may change the result in what superficially may seem like the same situation. Also, I am sure that most of us have had some experience with what might loosely be called a self-imposed injunction in the form of a "last chance" agreement. This is a situation where a habitual absentee agrees his attendance record warrants discharge and that he may be discharged if his unexcused absences continue, and the union agrees it will not process a grievance if he continues to be absent without a justifiable excuse. Then, when the employee is discharged, a grievance is filed alleging that the absences relied upon do not constitute the course of conduct the employee promised to discontinue.

Turning now to some other aspects of an arbitrator's remedy

power, it seems to me that the parties have a right to expect that an arbitrator will not encroach upon their contractual or other rights in formulating a remedy for what he finds to be a violation of the labor agreement. For example, however obstreperous a union steward may be and whatever disciplinary action may be imposed against him as an employee, an arbitrator would be intruding upon the internal affairs of the union if he dealt with the right of that employee to hold union office. By the same token, in a dispute about whether a particular operation is safe or not, it is not up to the arbitrator to decide what the company must do in order to make the operation safe. The company should not be limited by an arbitrator's imagination or his limited knowledge of the available technology to correct the unsafe condition.

The question of how far an arbitrator should go in fashioning a remedy within the confines of a labor agreement is a matter of judgment, and what one party may consider innovative or resourceful, the other may consider an abuse of power. What I said at the outset still holds true. It all depends on whose ox is being gored.

In conclusion, while we as arbitrators sit in judgment of the evidence and arguments the parties present, the parties in turn sit in judgment of us as arbitrators. In appraising us as individuals, the parties appraise the arbitration process as well. It therefore is incumbent upon each of us to use wisely and well the power that has been conferred upon us. While there are many court decisions dealing with the question of what arbitrators can or cannot do, relatively few of the thousands of cases arbitrated each year end up in court. The percentage of decisions taken to court is not a reliable index of the parties' satisfaction with the way arbitral power has been exercised. Furthermore, it is doubtful whether someone's feelings about an arbitrator, his decision, or the arbitration process will be changed significantly because a court upheld the use of an arbitrator's power in a given case. The court's ruling determines only that the arbitrator's decision is enforceable. It does not insure a permanent arbitrator's tenure, an ad hoc arbitrator's acceptability for future cases, or the continued use of the arbitration process.