CHAPTER 11

DUTY OF FAIR REPRESENTATION: THE ROLE OF THE ARBITRATOR

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The Problem—How the Arbitrator Knows

I want to discuss the legal doctrine of the duty of fair representation in arbitration proceedings, in terms of the role of the arbitrator. The articles and the court decisions, increasing in number, generally discuss the impact of that duty in terms of the union's responsibility and, to some degree, management's responsibility.[1] Less has been said, however, as to the role of an arbitrator when an employee is challenging, or is threatening to challenge, the quality of his or her union's representation.

Let's begin at the beginning. How do we, as arbitrators, discover that at some point the employee-grievant may claim he has not been fairly represented? Here are a few situations, in arbitrations I have heard in the past few years, when it became clear, at the commencement of the hearing or even earlier, that the grievant questioned whether the union would fairly represent him:

1. The grievant-employee, white male, felt that the affirmative action program of the employer-television station "discriminated" against him and that the union supported the program. On the first day of the hearing, a private attorney, who represented the grievant in a related matter, introduced himself and asked permission to be present.

2. Prior to the hearing, I received copies of covering letters

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[1]An excellent collection of papers on the subject, in terms of the legal history and practical consequences, is McKelvey, Duty of Fair Representation, New York State School of Industrial and Labor Relations, Cornell University, 1977.

sent to the union's counsel by the grievant's private attorney, raising questions about how the arbitration would be handled. When the hearing began, I realized that the private counsel was present. At that point, both employer and union counsel sought the exclusion of private counsel.

3. At the commencement of a hearing involving a black, 20-year employee seeking a promotion at a major defense-industry plant, I noted that the union was represented by at least four business agents. The issue was whether the employee should have been given a promotion to a higher machinist classification.

The Overlook of the Situation From the Arbitrator's Point of View

A legitimate question is whether we, as arbitrators, should have any concern that, at some later time, an award we make (or, more accurately, an award we make against the grievant, because if the grievant is successful, there is little probability of litigation) will some day be challenged in court. Arbitrators are generally a self-righteous group. We believe we are fair. We believe we are open-minded. We believe we have no bias or self-interest that will prevent our reaching a reasonable conclusion, based on the facts and argument presented to us. We cannot conceive that we would be involved, even peripherally, in a hearing about which a court, at a later date, will raise questions of fair representation.

But the fact is that the arbitration we hear—what was said, what evidence was presented, what arguments were made, what we deemed controlling in our written decision—may someday find itself challenged in a judicial or administrative forum. Arbitrators are generally not in a situation in which, either by contract or by stipulation, they are asked to make a finding as to an alleged failure by a union to fairly represent an employee. But if that duty becomes a matter of litigation after an arbitration, the courts may examine the entire arbitration, with the arbitrator, in a sense, a participant in that process. Therefore, the manner in which we conduct a hearing may ultimately be examined by a court in determining whether a union has appropriately met its duty of fair representation.

The Law

The Courts

The two United States Supreme Court decisions in recent years which discussed the obligations of a union to provide "fair representation" to employees covered by collective bargaining agreements are *Vaca* v. *Sipes*[2] and *Hines* v. *Anchor Motor Freight, Inc.*[3]

The *Vaca* decision arose out of the union's refusal to take a grievance to arbitration. The Court stated that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." According to the Court, a union may not arbitrarily ignore a meritorious grievance "or process it in perfunctory fashion." The Court noted, however, that: "We do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."

After reviewing the importance of preserving the union's right to settle grievances short of arbitration, provided it does so in "good faith," the Court concluded that: ". . . a union does not breach its duty of fair representation and thereby open up a suit by the employee for breach of contract merely because it settled the grievance short of arbitration."

The *Hines* decision reviewed the sustaining by a joint employer-union committee of a discharge based on the claimed falsification of expense vouchers presented after the employees' return from over-the-road trucking assignments. Pending the hearing, the employees had suggested to the union that the motel clerk be investigated, but were assured "there was nothing to worry about" and they need not hire their own attorney. The Court held that if both an erroneous discharge and the union's breach of duty "tainting" the decision of the joint committee could be proved, the plaintiffs were entitled to an appropriate remedy against the employer, as well as against the union. The Court appears to be holding that an erroneous arbitration award should not be permitted to stand when the employees'

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[2]386 U.S. 171, 64 LRRM 2369 (1967).
[3]424 U.S. 554, 91 LRRM 2481 (1976).

representation by the union had been "dishonest, in bad faith, or discriminatory."

The Ninth Circuit, in 1976, had occasion to contemplate the interaction between an arbitrator and the courts, and the handling of a fair-representation dispute, and to respond to an arbitrator's effort to unravel the complexity entangling an employer, a union, and an employee when the employee charged the union and the employer had collusively denied him benefits to which he was entitled under a collective agreement.[4] It would take longer than the entire time allowed me to explain what occurred in this dispute. I can only summarize it by stating that the arbitrator, by the nature of his interim award, caused the parties to obtain a judicial review of the proposition that a grievant claiming unfair representation can be made a party in an arbitration and "shall have all the rights pertaining thereto and shall be bound by the decision of the arbitrator disposing of all his claims and circumstances." The court held that the employee could be made a party and that an ultimate award, even if the grievant charging failure of fair representation refused to participate, would bind the employee, absent exceptional circumstances such as fraud and breach of duty of fair representation.

A more recent Eighth Circuit decision, one already sharply attacked by two distinguished members of the Academy, William Murphy and Benjamin Aaron, is *Smith* v. *Hussmann Refrigerator Co.*[5] The court upheld a district court jury verdict for damages. The case arose out of a claim by displaced junior employees in a seniority dispute in which the issue before the arbitrator was whether the more senior employees were substantially equal in skill and ability to the junior employees. The junior employees, though aware that a hearing had been scheduled, did not ask to be invited and did not attend. The court stated:

> "While we do not suggest that a union must hold internal hearings to investigate the merits of every grievance brought to it, in certain situations it might be inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees."

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[4] *Hotel Employees* v. *Michaelson's Food Services*, 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

[5] 103 LRRM 2321 (8th Cir. 1980).

The court was critical of the failure of the union to notify the displaced junior employees of the initial arbitration hearing or to invite them to attend.

NLRB

It is well-settled law that a union violates Section 8(b)(1)(A) of the LMRA if it breaches the duty of fair representation.[6]

In a detailed, thoughtful policy memorandum in July 1979 to all NLRB regional directors on the subject of Section 8(b)(1)(A) cases involving a union's duty of fair representation, the Board's then General Counsel stated his office's guidelines in determining whether a complaint should issue. He concluded that the following conduct represented actions on which the Board should move:

1. If the union's actions are "attributable to improper motive or fraud," such as refusal to process a grievance because of an employee's efforts to bring in another union.
2. When the union's conduct is "wholly arbitrary," with "no basis" on which it can be explained.
3. When the union's negligence is "so gross as to constitute a reckless disregard of the interests of the unit employee."
4. When a union has chosen to process a grievance for an employee, "then undercuts the position of the employee in the grievance process."

There appears little likelihood, at least based on these guidelines, which are, of course, subject to revision by the Board's new General Counsel, that the Board will be asked to consider a complaint involving a charge of failure to represent fairly in those situations when a grievance proceeded to arbitration before an impartial third party.[7]

Role of the Arbitrator in a Situation Involving Duty of Fair Representation

What, then, is the arbitrator's role when it becomes clear that there is pending, or that there may be filed at a later date, a claim that the union failed in its duty of fair representation?

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[6]*Vaca* v. *Sipes, supra* note 2; *Miranda Fuel Co., Inc.*, 140 NLRB 181, 51 LRRM 1584 (1962).

[7]*See Teamsters Local 542* (Golden Hills Convalescent Hospital), 233 NLRB at 533, for discussion of an NLRB charge in which the matter was arbitrated.

In a sense, we are back to that traditional question as to the role of an arbitrator: Should we be actively involved in the proceedings, or is our role a passive one—that of a finder of fact and an evaluator of the contract, based on the facts and the arguments as presented by the parties? And we are back to the "traditional" answer: the better the quality of representation by union counsel, the less we should become involved.

But it seems to me that in view of this new element—whatever our general reluctance to become an active participant in a hearing—we must now be more willing than we may have been in the past to participate. Are we not doing less than we should, as professionals, if a court can make a finding that a grievant was not given appropriate representation in an arbitration we heard? Are we not closer to the situation than the court, and can't we much more easily become involved when it becomes clear in a hearing that evidence is not being properly presented or that the arguments are not being properly made?

In *Vaca,* the Court questioned whether the NLRB "brings substantially greater expertise to bear" than do the courts on a review of the union's handling of the grievance machinery because such matters "are not normally within the Board's unfair labor practice jurisdiction." The Board may or may not have the "expertise"; others are better qualified than I to make a judgment. But arbitrators do have "expertise," at least in evaluating the manner in which a case is presented before them.

And further, if the duty-of-fair-representation concern is such a threat to the arbitration process, do we have a self-interest in lessening the possibility that our decision will ultimately be reviewed by a court, if we can do so without jeopardizing our impartiality? (This concern that we have exceeded the bounds of impartiality can be a significant one if court enforcement of an award is sought.)

Here are some situations that have occurred, or could occur to an arbitrator in a hearing next week. In considering them, we should keep in mind the "perfunctory processing of grievances" about which the Court was concerned in *Vaca:*

1. If the grievant seeks to have private counsel participate at a hearing, should we insist on such participation, even if one of the parties, or perhaps both of the parties, are opposed?

2. If, in a promotion dispute, the less senior employee who would be displaced from the promotion he received is not at the hearing, should we, as suggested by Ben Aaron, "call the incum-

bent whom the grievant seeks to displace as my own witness, if neither party elects to call the incumbent as its own witness"?[8]

3. If there is clearly a duty-of-fair-representation element and the parties take no steps to have the hearing reported, should we suggest a transcript?

4. If the contract provides that warning notices more than one year old may not be introduced to support subsequent disciplinary action, should we refuse to permit the introduction of such warning notices even if the union representative fails to challenge their introduction?

5. If the union fails to argue a contract provision which supports its position, should we raise the question of the applicability of that contract provision and ask the parties to comment on it?

6. If, at the commencement of a hearing, we note the absence of the grievant and the union representative insists that he wants the matter to proceed, should we insist on a continuance (or, as I did a year or so ago, decide, perhaps erroneously, that the union must have consulted the employee and made a conscious decision not to have him present)?

7. If we believe certain relevant facts are not being developed by the union's representative, should we actively question a witness after examination by the parties?

8. If the union representative in a discharge case is trying his first case and agrees to a submission agreement which "hangs" the grievant, should we suggest a rewording?

9. Assume that, as the hearing is about to begin, the grievant asks to be heard, states that he tried to have a voice in the selection of the arbitrator but was refused, and says that he, the grievant, has no reason to trust an arbitrator whose income is substantially dependent on his being selected by labor and management representatives. He then asks the arbitrator how many arbitrations he has heard involving the same attorneys in the past five years. How should we respond?

10. The record reflects that the union representatives acted in an extremely negligent fashion in processing the grievance. As a result, it missed at least two collective bargaining agreement deadlines. The arbitrator sees no basis for rejecting the company's contention that, because of the union's failure to comply

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[8]Paper delivered at the Labor Law Symposium of 1980, Southern California Labor Law Symposium, p. 80 of program materials.

with the time limitations, the grievance should be dismissed. Should we ask the union why it failed to meet the deadlines?

11. Assume that the collective bargaining agreement of the parties provides that at the discretion of both parties—in certain limited situations—the arbitration will be handled on an expedited basis, with no transcript, no briefs, and limited right to introduce testimony. At the commencement of the hearing, the grievant states that he would like to be heard. He informs the arbitrator that he is objecting to the expedited arbitration and believes he is entitled to a complete hearing, with counsel, a transcript, and briefs. How should we respond?

12. Assume that on the morning of the arbitration union and company counsel negotiate a settlement. At that point, they ask the arbitrator whether he would put the settlement "on the record" and ask the grievant whether he was satisfied and felt the union had fairly represented him. The arbitrator asks the grievant whether he believes the settlement was reasonable. The grievant responds, "Well, I am agreeing to it reluctantly, but I will agree to it." The arbitrator asks the grievant whether he feels the union did a reasonable and fair job in representing him. The grievant responds, "No, I don't." What response, if any, should we make?

I have heard the suggestion that the arbitrator should go so far as to make a finding, in his award, as to fair representation. Though this has obvious appeal for the union's advocate, I now believe this is not appropriate. Absent a clear mandate in a submission agreement, and independent representation of the grievant in connection with that submission agreement, any finding as to fair representation is beyond both the powers and wisdom of the arbitrator. How do we know, for example, the degree of investigation undertaken by the union—investigation required by the court decisions?

Some union counsel have suggested that even if an arbitrator makes no findings as to fair representation, he should, at the conclusion of a hearing, ask the grievant whether he feels he has been fairly represented. But can the grievant really know the legal subtleties involved when he responds to such a question? As one experienced labor practitioner commented to me, "This creates more problems than it solves."

On the other hand, I have no problems in a hearing when the element of fair representation is "in the wings" in asking the grievant at the end of his testimony whether there is anything

else he wants to say, even though the union representative might wince a bit when such a question is asked because it could open the door to an admission damaging to the grievant's case.

Another step we might consider taking, at the beginning of the hearing and as it proceeds, is to explain the procedure and our basis for rulings.

Whatever an arbitrator's ultimate decision in terms of a particular case, whether he decides to play an active or inactive role, there is one basic responsibility he must assume. The arbitrator must so handle the grievant that he is convinced—not by "games" played by an arbitrator or by an arbitrator's gratuitous statements made without substance or conviction—that the arbitrator is really listening, that he is not simply a necessary appendage to the "establishment" represented by management and labor. This is easier said than done. The fact is that arbitrators are selected by the labor and management "establishment." The grievant, in these cases, does not trust the union or the union's representative at the hearing. It is realistic, therefore, to expect the grievant to be just as suspicious of the arbitrator as he is of the union representative. It is our responsibility to overcome this skepticism as to our good faith. Are we courteous? How do we demonstrate that courtesy? Do we, for example, express impatience with a union's efforts to present a great deal of testimony? Are we open-minded? How do we demonstrate that open-mindedness? Do we, for example, explain our basis for ruling on the admissibility of evidence? Are we alert? How do we demonstrate that alertness?

And arbitrators have a significant responsibility in the manner in which we write the opinion. We can meet that responsibility by the way we evaluate the testimony and reach significant findings. We can demonstrate it by the words we choose in describing the conduct of the grievant and fellow employees. We can demonstrate this by making certain we fully consider the arguments raised by the parties and by making it clear our weighing of those arguments contributed to the ultimate result. We can say kind words about the quality of representation if we are convinced the words are merited; we cannot be concerned with protecting union counsel, even though they play such a critical role in our selection as arbitrator.

If we do these things, then the grievant is much more likely to be convinced he had a fair hearing, whatever the outcome.

Where Is It All Going?

First, as I observed earlier in this paper, in a sense we are back to the "traditional answer" in terms of whether an arbitrator should become actively involved in a hearing. When the union representative is competent, the less we become actively involved, the better. As one particularly able labor practitioner expressed his private opinion to me: "From the union's point of view, we would prefer the arbitrator to interfere as little as possible. Call them as he sees them and let the union and its counsel deal with the allegations of failure to represent."

Second, assuming adequate representation and a conscientious arbitrator, I question the appropriateness of any judicial or NLRB review of an arbitration award. Increased judicial or NLRB review, given these assumptions, could lead to the destruction of the arbitration process as a means of settling disputes arising out of an existing bargaining agreement.

And third, by way of defining that "conscientious arbitrator" whose award would not, or at least should not, be challenged by courts or the NLRB, and putting aside the question of an arbitrator's active participation in a hearing, as discussed earlier, the way the arbitrator relates to the grievant and writes his decision is critical.

But there still remain problems—problems directly the concern of the arbitrator. For example:

1. I trust that arbitrators are not beginning to feel that because of the duty of "fair representation," unions are arbitrating claims that are "losers" and, as a result, we are more disposed to ruling against a grievant, even in a case with merit. And how does the presence of independent counsel affect our thinking? (It goes without saying that we should not lean toward a ruling for the union because of any concern we feel that we might become involved in duty-of-fair-representation litigation.)

2. I trust we, as arbitrators, are not moving to make hearings more formal in situations when there is a question of fair representation. The fact is that an informal hearing may be more of a contribution to meeting the duty of fair representation than a formal one, at least in terms of the grievant's reaction to the process and the arbitrator.

My son suggested a different conclusion to this paper than my original one. He speculated that the increasing number of duty-of-fair-representation cases was simply one more manifestation

of the unhappy fact that many in our society today trust no one, and that as a result they seek more "due process." He quoted one of his law school professors who wrote:

> "Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."[9]

As arbitrators, we may become involved with great reluctance in duty-of-fair-representation concerns. But we *are* involved. The question before the house, then, is how we handle the involvement—how we handle the distrust felt by grievants who appear before us.

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[9]G. Gilmore, The Ages of American Law, 110–111 (1977).

Comment—

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Bill Levin has reviewed the general framework of principles governing the doctrine of fair representation from the standpoint of the courts and the National Labor Relations Board, and he has suggested a number of ways in which an arbitrator becomes aware that fair-representation problems may exist in a case which he is commissioned to hear and decide. It goes without saying that we are all concerned for the integrity of the arbitral process for resolution of labor disputes. Moreover, inasmuch as the finality of a particular arbitral award and perhaps the ultimate social acceptability of the labor arbitration process depend in part on the ability of that process to deal effectively with problems raised by the occasional failure of unions to fulfill their duty of fair representation, it is appropriate for us to inquire about the proper role of the arbitrator in situations which present questions concerning a union's breach of that duty.

Both Bill's paper and the Fair Representation Syllabus describe a number of archetypal situations which arbitrators encounter from time to time in which fair representation inquiries may be pertinent. I wish to discuss a number of those factual situations and offer you my firm guidance on how they should be disposed of by the arbitrator, and why.

Before turning to these factual situations, however, I believe it is helpful to review several "fundamental principles" of labor arbitration and the law governing the union's duty of fair representation.

First, the labor arbitrator's jurisdiction is conferred (and may be rescinded) by agreement between the employer and the union. Thus, although the arbitrator may look to " 'the law' for help in determining the sense of a particular agreement,"[1] he may not do so for the purpose of overriding their joint direction.

Second, under our federal statutory scheme, the union is the *exclusive* representative of employees in bargaining units covered by its labor agreements (National Labor Relations Act, as amended, Section 9(a)). Indeed, it is out of the exclusive nature

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

of this representative status that the duty of fair representation arises.[2]

Third, the employer is not absolved of responsibility for the consequences of its breach of a collective bargaining agreement, simply because the union has failed to meet its duty fairly to represent a grieving employee.[3] Accordingly, in situations where the union has conducted itself arbitrarily, discriminatorily, or in bad faith toward a member of its bargaining unit, or processed the member's grievance "perfunctorily," the employer may still be required to make good the harm suffered by the grieving employee(s) as a result of its breach of the agreement.

Fourth, the arbitrator may (and should) look to all three of the above principles for assistance in determining hearing procedures, ascertaining the sense of the agreement, and fashioning appropriate remedies.

And finally, the arbitrator should be sensitive to the mediative role he can often play (either at the parties' request or upon their agreement at his cajoling), in which he may be able to assist them in finding practical solutions to disputes which are literally fraught with problems arising out of possible lack of fair representation.

Bill Levin suggests, and I concur, that arbitrators "must now be more willing than [they] may have been in the past" to take a more active role than a mere finder of fact and evaluator of the contract. As with most generalizations, however, it is appropriate to add "within limits."

The Grievant Brings "His Own" Attorney—Party Status

One archetypal situation which presents "fair representation" issues is where the grievant shows up with "his own" attorney who seeks to participate in the hearing. Obviously, if both the union and the employer consent to the participation of private counsel for the grievant, the arbitrator should have no difficulty accommodating the grievant's wishes. Likewise, the arbitrator should find no difficulty in refusing to permit the participation of private counsel if both the employer and the union object

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[2]*Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967) and cases cited therein.

[3]*Vaca* v. *Sipes, supra* note 2; *Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 91 LRRM 2451 (1976).

thereto, although he might properly first probe the strength of their convictions in his mediative role.[4]

Less immediately apparent is the proper decision when the employer and the union do not agree concerning the participation of the grievant's counsel. In such a case, the union's wishes should normally be followed.

The union is statutorily privileged under Section 9(a) of the National Labor Relations Act, as amended, to function as the grievant's "exclusive representative." Accordingly it should be able to do so to the exclusion of any other employee representative, such as the grievant's private counsel, even if it thereby increases its exposure to potential litigation over the adequacy of its representation. The arbitrator's judgment as to the union's wisdom in exercising this privilege is irrelevant, except perhaps in his mediative role.

If only the employer objects to the participation of the grievant's private counsel, then the arbitrator should allow such participation absent a clear showing of substantial prejudice. The union's authority to designate its representatives may suffice in most cases to require that participation by the grievant's counsel be permitted. Even where the union reserves the right to take positions in the hearing which are at variance with positions advanced by the grievant (either as to the facts or the proper contract interpretation), the employer will rarely, if ever, suffer any prejudice, and many questions concerning fair representation at the hearing will be effectively precluded.

For example, if the grievant's private counsel has had a full opportunity to call and examine witnesses, it is difficult to see how the grievant may later claim that he had been denied a fair hearing or that the union had failed to present a complete case. Moreover, and perhaps more importantly, the grievant will in all likelihood believe that he had a fair hearing and will voluntarily acquiesce in the result or accept it as "binding."

The question arises as to the proper status of the grievant and his counsel under such circumstances. Is the grievant a "party"

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[4]A recent case comes to mind in which an arbitrator overruled the joint objection of counsel for the union and the employer to the participation of a grievant's "private counsel" in a discharge hearing. Thereupon counsel for the union and the employer requested a brief recess and, upon their return, thanked the arbitrator for his efforts and requested that he bill them for his services to that point. They thereafter selected another arbitrator to hear the matter who ordered the grievant's "private counsel" excluded from the hearing.

to the proceeding? Should he be made a party? How should the arbitrator rule on a motion by the grievant's attorney to "intervene" in the proceedings?

Ted Jones recently found it appropriate, with subsequent judicial approval, to make the grievant a "party" to the proceeding and to give him all the "rights pertaining thereto" so that he would be "bound by the decision of the arbitrator disposing of all of his claims." The Ninth Circuit approved the order making the grievant a party and held that the ultimate award would bind him, even if he declined to participate in the proceeding, absent exceptional circumstances such as fraud and breach of the duty of fair representation.[5]

It is difficult for me to see just how much light was shed on the basic problem by the *Michaelson* litigation. After all, the standard prescribed by the Supreme Court for review of an arbitral award, without regard to the "party" status of the grievant, is that he is bound by the award, absent unusual circumstances such as fraud or breach of the duty of fair representation.[6] Accordingly, I suggest that extended discussion of the value of the grievant's being awarded "party" status is unwarranted, except for the practical and psychological considerations which I have suggested attach when the grievant's private counsel is given full opportunity to call and examine witnesses and present argument in support of his cause.

My own practice as union counsel is to welcome the participation of a grievant's attorney at the earliest possible stage of the grievance procedure and to seek the attorney's assistance in the investigation of the facts, analysis of the contract, research for helpful precedent, and even arbitrator selection. As a result of this approach, I have found in every case that the grievant's attorney has acquired such confidence in the adequacy of the union's representation that he has withdrawn from the case, even though the union has often determined not to proceed with the grievance to arbitration. It is this experience which causes me to conclude that the union is wisest which takes care that each grievant (or the grievant's attorney, who usually is retained for a contingent fee) perceive that the union has fairly investigated the grievance, evaluated it rationally on the merits,

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[5]*Hotel Employees* v. *Michaelson's Food Services*, 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

[6]*See, e.g., Hines* v. *Anchor Motor Freight, supra* note 3.

made a principled decision as to whether it should be pursued, and, if so, made reasonable efforts to prevail.

The Overlooked Contract Provision

Another archetypal situation is when the union fails to argue the applicability of a contract provision which appears to support its position—for example, if the contract provides that disciplinary warnings more than one year old are to be disregarded, and the union representative fails to object to the introduction of such notices.

The arbitrator should be somewhat cautious about intervening in the presentation of such evidence. After all, the union may be saving its objections until a later time with the intention of arguing that the employer improperly considered the outdated warnings in determining to impose discipline on the grievant. Unless the facts surrounding the outdated warnings are being hotly litigated (a good sign that the provision has been ignored), the best approach would seem to be to wait until the hearing is about to close and then to inquire whether the parties wish to offer their views concerning the applicability of the provision.

Incomplete Development of the Facts

An arbitrator may believe that certain relevant facts are not being adequately developed by the union's representative and ask himself to what extent, if any, he should actively question a witness after the parties have completed their examination.

I am reminded of Ted Jones's description of his feelings as an arbitrator under such circumstances, likening his position to a visitor sitting in the middle of a large unlighted warehouse; as each question is posed and answered, it is as if someone were shining a flashlight with a pinpoint beam on some particular object in the darkened structure, and no participant seems to want to turn on the lights. The "traditional" conclusion concerning the arbitrator's proper degree of involvement seems correct: it is an inverse function of the capability of union counsel.

The fact is that employer and union representatives often agree to present issues to an arbitrator for decision on less than a complete factual basis, and the degree of incompleteness may be both carefully negotiated and for good purpose. I am familiar with cases, for example, in which the parties essentially agreed

to limit their testimony concerning the bargaining history of disputed contractual provisions, so as to avoid potentially embarrassing disclosure of inconsistent positions taken with respect to other contracts with identical language involving different employers with whom the union also deals.

I suggest that this type of "negotiated" record is most likely to occur in connection with a dispute over the proper interpretation of contract language governing working conditions for union employees generally, however, and not as to facts concerning an individual grievant's work performance or the existence of "just cause." In the latter type of inquiry, an arbitrator may have the urge to "turn on the lights" by asking those one or two questions which seem so obvious but which appear carefully to have been avoided by the union's counsel, such as "Why do you believe the employer treated you so unfairly?" or "Is there anything else you want to say?"

Bill Levin comments that he has no problems with an arbitrator's asking such questions in hearings in which fair-representation questions may be present, "even though the union representative might wince a bit when such a question is asked, because it could open the door to an admission damaging to the grievant's case," and I suppose that I concur. There is nothing inherently wrong with a result adverse to the grievant under such circumstances.

In fact, the union might well prefer in some circumstances that the case be blown, although it has sincerely attempted to present the grievant's case in its best light by failing to elicit certain testimony. Perhaps it is best to let the grievant blow his own case, so that when the matter is viewed with the hindsight of a plaintiff's fair-representation attorney, he can't blame the union for having done it through inadequate representation.

The Missing Preferred Junior Employee

Another of the emerging archetypal factual hypotheses for discussion of fair-representation issues resembles the circumstances which brought about the litigation in *Smith* v. *Hussmann Refrigerator Co.*,[7] a decision which, in my judgment, displays an almost perfect lack of understanding of collective bargaining and the arbitration process. There the union grieved on behalf

[7]619 F.2d 1229, 103 LRRM 2321 (8th Cir. 1980).

of senior employees who were denied promotions under contract language which favored seniority among employees of equal skill and ability.

The preferred junior employees were not called as witnesses by either the employer or the union at the arbitration hearing, nor were they invited to attend, although they were aware that the hearing had been scheduled and had not asked to be invited. The Court of Appeals for the Eighth Circuit held that the union had breached its duty fairly to represent the preferred junior employees, through "blind adherence to a policy favoring seniority" and "discriminated against employees receiving promotions on the basis of merit."

Time and space do not permit a full discussion of the errors of the majority in *Hussmann.* I think the absurdity of the result is clear, however, by its logical implication that a junior employee may grieve the promotion of a senior employee under such contract language, and the union must fairly investigate and, if substantiated, litigate the junior employee's claim of superior merit and ability. Every promotion (as well as other personnel actions, such as layoff, which are governed by the same standard) then becomes the subject of a potential grievance, and the arbitrator must become the plant boss.

Place these principles into a bargaining unit such as was involved in *Hussmann* and pure chaos must surely result:

As the court noted, "[Hussmann] processes approximately 35,000 bids annually. From these bids, about 2,000 jobs are awarded. The Company's practice is to waive skill and ability with respect to most jobs." Instead of having a handful of grievances which arise when a junior employee is preferred, in which the employer must demonstrate that it properly disregarded seniority, each employee who bids unsuccessfully may now grieve the employer's failure to promote him or her, and the union is placed under a "fiduciary" obligation to investigate and fairly evaluate each grievant's relative skill and ability.

The truth is that the union always wants seniority to govern, and the employer always wants to be able to choose based on its perceptions of relative skill and ability. They have found the accommodation with which each "can live" by permitting seniority to be bypassed when the employer is able and chooses to demonstrate the superior skill and ability of a junior employee.

The union's "blind adherence" to the principle of seniority is rationally related to its goal, in negotiations for and in the ad-

ministration of the contract, to make seniority the sole effective determinant in promotional bids. The dissenting opinion in *Hussmann* quoted appropriately from Chamberlain,[8] as follows:

> "It is difficult to overstate the importance attached by the workers to union controls of this nature. The feeling of independence, the relief from insecurity attendant upon the rationalization of personnel policies can be appreciated only when contrasted with the feeling of subservience and the despised need for bootlicking of previous days. Nowhere is this truer than in the large corporation.
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> "To eliminate such favoritism and willfulness, the unions have sought and obtained a sharing of authority in the areas of concern. The seniority principle is its answer to situations such as that described above. To charges that seniority gives no heed to a man's ability or even his need, a union man will reply that at least it is objective. He knows where he stands. There is a rule and a union to enforce it on his behalf." (Dissenting opinion, fn. 3.)

We should have no doubt that a union may honestly, rationally, and nondiscriminatorily pursue a policy of fostering personnel actions in accordance with strict seniority, even though it may compromise its position in contract negotiations for any number of relevant considerations.

Hopefully *Hussmann* will quickly perish as precedent either through outright disapproval, or by being distinguished on the basis of one of its peculiar characteristics: While seeking the union's recognition of their allegedly superior skills and ability, two of the preferred junior employees (later plaintiffs) sought unsuccessfully to be able to speak on the issue at a local union membership meeting. This colorable denial of their opportunity to speak to the membership concerning the proper policy for the union to pursue tends to undermine the union's position that the policy it followed favoring seniority was rationally adopted.

The Uncooperative Grievant

Several situations have been suggested in which the grievant appears not to be cooperating with the union in the presentation of his case. For example, the grievant fails to appear at the arbitration hearing, although union counsel states on the record that he was notified of the time and place of the hearing and instructed to attend. Or the grievant refuses to consult with

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[8]Chamberlain, The Union Challenge to Management Control 93–94 (1948).

union counsel, or perhaps even participate in the hearing, on the advice of "his own" attorney. Representatives for the union and the employer state that they wish to proceed with the presentation of the evidence.

In situations like this, the arbitrator should proceed to hear the case, after having made the circumstances clear on the record. I believe a grievant has an obligation to cooperate reasonably with his statutory representative or face the consequences either of default or, if the union so elects, a trial of his case in his absence or without otherwise adequate preparation. By analogy, this is essentially the policy followed by the General Counsel of the NLRB in dealing with uncooperative charging parties in unfair labor practice cases.

Arbitral Findings Concerning Adequate Representation

The last area I wish to discuss involves situations in which the arbitrator is called on, expressly or by implication, to make a finding as to the adequacy of the union's representation of a particular grievant. In most cases, I agree with Bill Levin that such findings are improper, absent a clear mandate in the submission agreement and independent representation of the grievant in connection with the submission agreement.

There are situations, however, in which I believe an arbitrator can and should deal squarely with the issue of the adequacy of the union's representation and, if necessary, make an appropriate finding. The situation which most readily comes to mind is where the union has negligently allowed the time limits to expire before filing a grievance over the wrongful discharge of a member of the bargaining unit.

I find it odd that 13 years after the Supreme Court decided *Vaca* v. *Sipes,* and four years after its decision in *Hines* v. *Anchor Motor Freight,* arbitrators have not found it necessary to make findings as to the inadequacy of a union's representation so that they may excuse compliance with the time limits or other procedural impediment as to the grievant and apportion liability between the employer, based on its breach of the agreement, and the union, based on its failure to comply with the procedural requirements.

Under *Vaca* and *Hines,* an employee may bring suit against both the employer and the union together for the employer's breach of the contract and the union's failure adequately to represent. In such cases the Supreme Court has made it abso-

lutely clear that the employer must not be relieved of the liability for its breach of contract. Rather, liability must be apportioned according to the circumstances of the case. I know of no valid reason why arbitrators should be unable to understand and apply the principles established in those cases.

The Court in *Vaca* stated:[9]

> "The damages sought by [the grievant] were primarily those suffered by [him] because of the employer's breach of contract. Assuming for the moment that [he] had been wrongfully discharged, [the employer's] only defense to a direct action would have been the Union's failure to resort to arbitration . . . , and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay.
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> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the union had breached its duty [by refusing to process the grievance over the grievant's discharge], all or almost all of [the grievant's] damages would still be attributable to his allegedly wrongful discharge [by the employer]."

The Court in *Vaca* also made it clear that an order compelling arbitration, one of the available remedies when a breach of the union's duty is proved, and equitable relief of other sorts, as well as damages, may be appropriate. Nor is the employer's lack of implication in the union's malfeasance exculpatory for the consequences of its breach of the agreement.

For in *Hines* the Court determined that an arbitration award, based on an erroneous factual finding, which sustained an employee's discharge, must be set aside and the employer held liable for its breach of the agreement if the employee was able to prove a breach by the union of its duty of fair representation affecting the decision. The Court stated: "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union."[10]

If a grievance, otherwise meritorious, is dismissed for the

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[9] *Supra* note 2.
[10] *Supra* note 3.

union's failure timely to have filed it, then the courts are open to the grievant to remedy the employer's breach of contract and the union's breach of duty. There appears to be no reason why an arbitrator should not be able to deal with these issues in the first instance.

I believe that in cases in which a union has failed to meet the procedural requirements of the grievance procedure and the employer urges that such a failure is a bar to the arbitrability of the grievance, the arbitrator should examine the circumstances and make a finding as to whether the union failed to represent the grievant adequately. If the circumstances so warrant, the arbitrator should proceed to determine the grievance on its merits, apportion liability as between the union and the employer, and issue an appropriate order.

In a typical wrongful discharge case, the proper order against the employer should be reinstatement with full back pay and without loss of seniority or other benefits. A proper award against the union (if the contract or submission agreement permits liability to be assessed against the union) might include the grievant's additional reasonable expenses in the arbitration proceeding. The fact that the arbitrator may lack jurisdiction under a particular submission agreement or labor contract to assess liability against the union should not prevent him from determining the correct liability of the employer and the appropriate remedy for such liability. Presumably the grievant will be able to pursue his cause of action, if any, against the union independently, without prejudice to any of the parties.

Bill Levin states, and I agree, that, as arbitrators, you may become involved with great reluctance in duty-of-fair-representation concerns, but that you *are* involved and that the question before the house is how you should handle that involvement. I hope I have provided you with some assistance in developing a proper approach to that involvement.