CHAPTER 6

LEGALISM IN ARBITRATION

I. LEGALISM—AND SOME COMMENTS ON ILLEGALISMS—IN ARBITRATION

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We arbitrators are presently a protected species. While we may complain from time to time about the law, it is the law that is our savior. This has not always been the case. Historically, the common law did not enforce agreements to arbitrate nor enforce arbitrators' decisions. In 1920, the State of New York passed a modern arbitration law that provided for specific enforcement of arbitration agreements and arbitrators' decisions.

On the federal scene, while limited to commercial arbitrations, the passage of the United States Arbitration Act in 1920 incorporated the elements of a modern statute. It is of some interest to note that this law was sponsored by the then Secretary of Commerce, Herbert Hoover.

On a personal note, my background in labor relations goes back to 1929 when I was an advocate representing unions; and, as an advocate in many arbitration cases, I was dissatisfied when the courts would second-guess the arbitrator's decision, particularly when I had won the case. While some relief from such activities on the part of courts was available through state arbitration statutes, it was the definitive principles of the *Steelworkers* Trilogy that set forth the boundaries of the authority of arbitrators and the courts.

I started acting as an arbitrator in 1949, and it was the 1960 *Steelworkers* Trilogy that assured me the position as a member of a protected species.

In my 1961 appearance before the Academy at its Santa Monica meeting, I summarized the three cases making up the

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Trilogy by pointing out that the Supreme Court said to the Courts that they "may act on the preliminary question of arbitrability if that should arise, and they may act at the conclusion of the arbitration if a problem of enforceability develops. But between the beginning and ending of the arbitration process itself, the Courts have no business to participate or interfere"[1] in such proceedings.

Since the *Trilogy*, most of the cases in which courts review arbitration decisions are limited to the question of whether the arbitrator, in effect, exceeded his or her jurisdiction in the decision because the decision did not draw its "essence" from the collective bargaining agreement.

Thus, it is clear that the Supreme Court did, in effect, give us—the arbitrators—virtually complete control over the arbitration process. And it specifically limited the courts solely to reviewing our decisions only if we exceeded our jurisdiction. It told the courts not to second-guess our decisions. It told the courts not to get into the merits of the case. It told the courts that even if we made mistakes relative to law or facts, the courts were not to substitute their judgment for our judgment. We are expected to base our decisions on the "essence" of the collective bargaining agreement. I am not going to review those cases. They are available to you and are an easy read.

Rather, I want to concentrate on the free charter which the United States Supreme Court gave to the arbitrators. This charter provides far greater protection from outside interference in our function as arbitrators than the lower courts themselves have from their various appeal steps. This fact emphasizes that we are a protected species and carries with it the ultimate responsibility to maintain the integrity of the arbitration process.

It is not then that we have any major threat to our species from without; but there is an ongoing threat to us as a protected species from *within*, namely ourselves.

You will recall that Justice Douglas extolled us (the arbitrators) as experienced experts in the *Warrior & Gulf* case, one of the Trilogy, when he stated:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their

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[1] *Recent Supreme Court Decisions and the Arbitration Process*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 4.

> trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.[2]

I take this passage to mean that we arbitrators, as I have noted, have the ultimate responsibility of protecting the integrity of the arbitration process itself. Thus, parties are to be given a fair and full hearing. All grievants are to know why in any particular case they won or lost. All labor and management participants and the arbitrator are to be protected as to their rights.

But, we as arbitrators have failed to accept these responsibilities. And this is true as to those organizations that purport to support arbitration. It is some of these failures that I identify as "illegalisms" relating to arbitration.

One of these practices which is prevalent in arbitration is the failure of arbitrators to give parties a fair and full hearing because they do not have a transcript of the hearing.

An arbitrator is duty bound to make his or her decision based on the record of the case, and a transcript of the hearing is the only official record of the hearing. Yet, the American Arbitration Association publication "Labor Arbitration—What You Need to Know," states that while transcripts are permitted under the AAA rules, "they should be ordered reluctantly." One reason for the "reluctance" is the statement that, "The arbitrator may then feel obliged to refer to it in preparing the opinion." This is an astounding statement, since it is the obligation of the arbitrator to write his opinion and then make a decision based on the official record of the case—the transcript.

What is the alternative? Note-taking and tapes taken by arbitrators? I know that many of you indulge in that practice.

Yet the AAA, in its publication entitled, "Study Time" of January 1984, with reference to note-taking by arbitrators, stated:

> Note-takers are faced with a seemingly impossible task. They must write down what has just been said, while listening to what is now being said. Consequently, many note-takers feel that they are always lagging behind.

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[2]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 2419 (1960).

The article further said:

> To overcome this difficulty, experts advise them to reduce their writing to the level of an automatic skill. In this way, it will be possible to do two things at one time.[3]

The complete absurdity of suggesting that arbitrators should reduce their note writing to the level of an "automatic skill," so they can do two things at one time, is self-evident. This AAA publication quotes a number of arbitrators, all of whom indicate their trials and tribulations and difficulties and concerns about note-taking.

How can such arbitrators, in good conscience, feel that they have given parties a fair and full hearing absent a transcript when, presumably, the arbitrator's opinion and decision is supposed to be based upon the entire record of the hearing. The record of the hearing is not the notes taken by the arbitrator. All of you have had the experience that something may be testified to during the third hour of the hearing, contrasted with what might have been said during the first hour which could be the turning point in a particular case, and the note-taker may not have that relevant entry made during the first hour of the hearing. There is no way of knowing that the note-taker would have such an entry or be able to recall it accurately without a note.

A grievant is entitled to know why he or she lost or won a case. The union and the employer are entitled to the same right. The arbitrator's opinion must reflect accurately and completely the basis for the decision. This can only be accomplished by the use of a transcript of the hearing. Direct quotations from a transcript could be the conclusive evidence and basis for the decision.

An arbitrator's notes could not serve such a purpose. The losing party would believe, correctly or not, that the arbitrator's notes did not contain material supporting its position.

I do not intend to discuss in detail the writing of opinions by arbitrators. I refer you to the AAA's "Study Time" for January 1985 for horrible examples of what not to do in writing opinions. And, it shouldn't have to be noted that when opinions are written they should be concise, they should deal with the issues, they should not refer to the personal beliefs of the arbitrator, and they need not be law review articles with extensive footnotes.

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[3]January 1984 at 1.

They should be concise and instructive, and it is the transcript that is the foundation for such writing.

In 1982, I was arbitrating a case with the Chicago Bears, and George Halas was present at the arbitration. During a break, he told me that he had never been in an arbitration hearing before and wanted to know why a transcript was being taken. Then he asked what I would do when the hearing was over. I told him that I would take the record, that is, the transcript and the exhibits and the briefs, if counsel were going to file briefs, and I would write an opinion based on that record and make a decision in the case. And I said, in passing, "You know, I always write my opinions from the point of view of the party who lost." He looked at me quizzically, and I said, "You know, Mr. Halas, when you lost a football game, you were only concerned as to why you lost it. But if you won it, you didn't really care how the win came about." He agreed, and said that he always reviewed in detail the pictures of the games he lost. Those pictures were his transcript.

Let us consider the role of transcripts when courts may be reviewing arbitrators' decisions. In this regard, let me note a few pertinent court cases.

In *Swift Independent Packing Co. v. Food Workers Local 1,* the Union sought to have the arbitration award vacated, and one of the grounds was "the arbitrator's refusal to hear certain testimony." The Court stated: "A fair reading of the *transcript* discloses beyond question that the arbitrator did not in any sense 'refuse' to hear plaintiff's evidence."[4] (Emphasis supplied)

In *Wood v. Teamsters Local 406,* footnote 4 reads:

> Some courts allowed arbitrators to be questioned regarding what occurred at the arbitration hearing. See Blinik v. International Harvester Co., 87 F.R.D. 490 (N.D. Ill. 1980). In the instant case, a *transcript* of the hearing exists and it therefore is not necessary to question the arbitrator for this purpose.[5] (Emphasis supplied)

In *Chemical Workers Local 566 v. Mobay Chemical,*[6] the issue was whether the arbitrator could consider matters beyond those contained in a letter of discharge. And, in this case, the court, quoting extensively from the *transcript* of the case, found consent by both parties to the issue and upheld the arbitrator's award.

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[4]115 LRRM 3256, 3261 (N.D. N.Y. 1983).
[5]583 F. Supp. 1471, 117 LRRM 2618, 2620 n. 4 (W.D. Mich. 1984).
[6]118 LRRM 2859 (4th Cir. 1985).

In *Laborers v. United States Postal Service*, the court was concerned with alleged misconduct on the part of the arbitrator, and the court pointed out:

> No verbatim record that might shed clear light on these allegations was kept of the Haber arbitration hearing.[7]

In that case, the district court had held an evidentiary hearing; in effect, reheard the case, at least as it related to the alleged misconduct of the arbitrator. Whether other district courts would go so far is uncertain. It is clearly contrary to the purposes of arbitration to prolong the process and allow the arbitrator to be so "second-guessed."

As you are aware, in *Alexander v. Gardner-Denver*, the Supreme Court stated that it would not defer to arbitration decisions in cases where arbitrators have ruled against grievants claiming discrimination. But, it is significant that the Court in Footnote 21 stated that weight could be accorded arbitration decisions if certain relevant factors were present, among them an *"adequate record."* An arbitrator's notes, or even tapes, would not, in my opinion, be such an "adequate record" so as to satisfy a court. I am familiar with cases where transcripts of arbitrations, when introduced in such court proceedings, have led to the dismissal of actions under *Alexander*. And, at least in such instances, the courts have deferred to the arbitrators' decisions.

And let's take the case where arbitrators act as such in pension or health and welfare cases. They are considered in such cases to be fiduciaries by the Department of Labor. If an attack is made on such an arbitrator's decision, again, only a transcript would be of value in actually reflecting what occurred at the hearing, as well as the arbitrator's conduct, and the basis for the decision. It should be noted that in this kind of case, arbitrators expose themselves to possible monetary damages if they are considered fiduciaries.

A transcript then is essential to aid the arbitrator in making a decision based on the record, and to provide protection against attacks that may be made on his decisions.

What about the value of a transcript when the union and its counsel may be sued on the basis of having breached their duty of fair representation, and the employer is charged with having

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[7]118 LRRM 2216, 2219 (6th Cir. 1985).

wrongfully discharged the grievants? Such a suit followed a decision I had made sustaining the discharge of three grievants.

In deciding that matter, in *Balestreri v. Western Carloading,*[8] the court issued a summary judgment in favor of the defendants. The court made specific reference to the transcript of the hearing as its basis for making key findings in favor of the defendants. Notes of the hearing could not have served such a purpose.

In short, one of the key elements of a fair and full hearing requires, in my opinion, that a transcript of the hearing be made to:

1. protect the process;
2. protect the grievant;
3. protect the employer and the union;
4. protect the arbitrator; and
5. protect whoever is acting as counsel.

Of course, you will tell me that it is the parties who do not want a transcript because of the expense.

With reference to the expense of a transcript, let me emphasize that it is the arbitrator who controls the process. And, there are many *better* ways for an arbitrator to control the expense of the process than by not having a transcript. Arbitrators are responsible for the conduct of their hearing. Cumulative evidence should not be permitted. Irrelevant arguments or discussions should be kept off the record. Parties should be encouraged, if not directed, to agree on the issues and stipulations of facts and records prior to the beginning of the hearing. The arbitrator should control the hearing, not counsel.

But, I emphasize the fact that as a result of the direction of the United States Supreme Court, it is the arbitrator who is the guardian of the arbitration process, and it is the arbitrator, therefore, in my opinion, who must insist that in order for a fair and full hearing to occur, there must be a transcript taken of the hearing. We must educate the parties to an arbitration of the absolute need for a transcript in the interest of all participants.

We have a responsibility to dissuade parties from viewing arbitration as a "basement bargain." It is not such. Promoters of arbitration should not be permitted to sell arbitration on how cheap it can be. Such efforts cheapen the arbitration process

[8]112 LRRM 2628 (N.D. Cal. 1980).

itself. Some of these so-called "expedited" arbitration proposals do so.

The height or depth of such a degraded form of arbitration is sponsored by the American Arbitration Association in San Francisco in one of their expedited arbitration procedures which provides no transcript, the hearing is limited to three hours and the opinion, if made, is limited to two pages. This procedure is to be limited to so-called "minor" grievances with a monetary value of less than $1500. I have had hundreds of cases where the claim is for less than $1500, but the consequence of a decision as to future application of the collective bargaining agreement could result in the payment ultimately of many thousands of dollars.

I would like to address another "illegalism" which affronts the arbitration process, and this concerns the agencies which pose as "the guardians" of the arbitration process, such as the Federal Mediation and Conciliation Service, the American Arbitration Association, and the National Academy of Arbitrators. I am speaking about the rules of these groups that persons who currently represent employers or unions are not acceptable as arbitrators and, that have, in fact, effectively barred many of them from acting as arbitrators.

At the conclusion of the 1934 general strike in San Francisco, the Amalgamated Streetcar Workers Union reorganized the then Market Street Railway in that city, under the pressure of the strike. The parties agreed to arbitrate all of the substantive terms of the first agreement. I represented the union in that case, and when we met with the company's representative for the purpose of selecting an arbitrator, we were told that the company would not agree to anyone as an arbitrator who was a professor, a lawyer, a welfare worker, a Jew, a Catholic, and so on. We ended up by having as an arbitrator a retired Rear Admiral of the United States Navy.

In 1934, the company had an excellent case based upon inability to pay. After extensive days of hearing, the Admiral issued an award which was extremely favorable to the union, not only as to wages but as to conditions of employment which, in a street railway situation, could be even more expensive to the company than the actual wage rate. The next year, when the contract was reopened on an interim basis, I (still representing the union) asked the management representative what portion of the award he wanted to buy back.

What was clear in that case was that management was seeking a person as an arbitrator who it considered was "impartial," but it equated "impartiality" with "ignorance." In some measure this notion of equating impartiality with ignorance is reflective of the attitude of the FMCS, the AAA, and the NAA in barring as arbitrators those persons who are the real experts in labor relations, namely, those who are practicing it.

The AAA, in "Labor Arbitration—What You Need to Know," states, "practicing advocates are not encouraged to apply to the AAA National Panel." Thus, the AAA dams up a large qualified source of labor relations experts from its panels. The FMCS and the Academy bar practicing advocates.

But the AAA has a different standard for the construction industry. In its "Guide for Construction Industry Arbitrators," the AAA says:

> Every year, thousands of busy members of the construction industry put aside their own concerns for a day or two to act as arbitrators of construction controversies. They sit as private judges, selected by parties to the dispute. The awards they render are binding and enforceable.
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> Arbitrators are drawn from many occupations. All have this in common: they are experts in the construction field. . . .

I would point out that in the field of commercial arbitration (a field of arbitration that goes back to at least the 17th century) if, for example, a dispute involves wood, a wood expert is selected as the arbitrator; if it involves patents, a patent expert is selected. And those persons are, in most instances, selected from active participants in those fields. At least they are not barred from such a selection.

As you are aware, the courts now are sponsoring what they call arbitration in many state and federal jurisdictions. And in those cases, the arbitrators are attorneys and they are practicing attorneys for the most part. And in individual cases, they are assigned cases compatible with the practice in which they are experts.

If the parties are told that a particular person is actively engaged in either representing management or labor, then it is entirely up to the parties to decide whether they want that person as the arbitrator. It is not, and should not be, the policy of the FMCS, the AAA, and the NAA to block out such persons who are the real experts in the field of labor relations from acting as arbitrators. They are the persons who, for the most part,

reflect the characteristics that Justice Douglas said arbitrators should have.

At the first dinner meeting of the Academy in 1948 Edwin Witte said:

> Arbitration is an art rather than a body of knowledge. It cannot be learned in college, nor from books and speeches. It is not something that every lawyer can do nor even learn. Nor is every judge a good arbitrator and, much less, every professor or clergyman. . . .
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> There is much about arbitration that can be learned from books, from experience in industry, from personal contacts with aspects of the problems to be decided, and from the experiences of others. A well-rounded education and quite likely also special training in industrial relations and law are valuable. But the best teacher is probably experience.[9]

And it is the advocates of labor and management who are experiencing the collective bargaining process.

Now, let me make it clear that I am not stating that those of you who are now arbitrators are not "experts." In any case, I would "red-circle" you as to that qualification. Your success as arbitrators, one may conclude, notes your acceptability to parties. But that doesn't disprove my point. While you are now accepted as the "experts," the parties, at least through the organizations that I have noted and with their influence, have denied access to the real experts in labor relations—those who are laboring daily in the field of labor relations.

Contrary to the cries of the AAA, the FMCS and the Academy, there is no shortage of arbitrators. A large existing class of experts have, for the most part, been blocked off from being arbitrators. The so-called "shortage of arbitrators" claim has resulted in persons with some, or in some instances, no experience in labor relations, being put through some kind of a course, and this is to somehow magically create arbitrators to fit into the mold designed by Justice Douglas. This results in a disservice to such persons and to the arbitration process.

Many prior papers given at Academy meetings are concerned with the threat to arbitration from the outside such as the interference of the courts in the arbitration process. In my opinion, the real threat to us as a protected species is not from the outside

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[9]*The Future of Labor Arbitration—A Challenge*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 17.

but from within. We are the ones who permit outside agencies and groups to detract from the integrity of the arbitration process. The AAA, the Federal Mediation Service, the National Academy of Arbitrators are not the arbitrators, they do not conduct the hearings, and they do not make the decisions. Yet, we have permitted them to affect us in providing parties a fair and full hearing and to exclude the largest available class of experts from the arbitration parties.

There have been cries from within the Academy for it to take a stand on quality arbitration. Rolf Valtin in 1960 (who became President in 1975) was a one-year member of the Academy when, at the meeting in 1960, he spoke on "What I Expect of the Academy." Valtin said:

> I think we do have legitimate quarrels with the appointing agencies, but I think they lie elsewhere. In connection with the current emphasis on the reduction of the cost of arbitration, certain proposals have been advanced—some of them endorsed and even "pushed" by one or another of the appointing agencies. For example, there is talk of the elimination of a written opinion; of "bench" rulings; of prohibiting the use of written briefs—mind you, not of the parties themselves relinquishing the use of briefs, but of the arbitrator commanding it. There is talk, in short, of streamlined procedures to be imposed by the arbitrator himself. . . . Proposals of this sort go to the process and quality of arbitration. And so, again, I raise the question of whether we do not have every right and obligation to make ourselves heard on questions of this sort. And again, I ask as a new member, would not maximum influence be produced if the Academy were the spokesman?
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> . . . But I think I speak for most new members when I say that we wonder whether the Academy has not been a bit too passive. For the good of labor arbitration, we wonder, shouldn't the Academy's voice become one that speaks out?[10]

Eli Rock, the Academy President in 1974 said: "we are required, . . . to speak out as an Academy regarding the intimate relationship between *quality standards* and the very survival of the institution of arbitration. . . ."[11] (Emphasis supplied)

The Academy has stood by and permitted arbitration to be gutted by many of these so-called expedited arbitration pro-

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[10]*The National Academy After Twelve Years: A Symposium: What I Expect of the Academy,* in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 19–20.

[11]*The Presidential Address: A "Maintenance of Standards" Clause for Arbitrators,* in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, ed. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 12–13.

cedures. It has stood by and permitted outside agencies and organizations to adversely affect the "process and quality" of arbitration in some of the ways that I have pointed out in this paper. Has the Academy become only a "friendly association" among its members? On this score that purpose set forth in its Constitution has been met.

Finally, whether or not you agree with my conclusions, they are derived from 53 years of experience in the labor relations field, both as an advocate and as an arbitrator. I believe that it is the arbitrator's duty and responsibility to maintain the integrity of that process. This is also the duty of agencies and organizations that purport to support arbitration.

I would conclude with an opinion of a world-traveled observer of the labor scene, Ben Rathbun. Ben gave a paper at your 1975 meeting in Puerto Rico entitled, "Will Success Ruin the Arbitrators?" In his own response to that question, he said, "No, but it might be close." And I presume to add that if it does happen, it is because we have dirtied our own nest.

II. A MANAGEMENT ATTORNEY'S VIEW

J. DAVID ANDREWS*

Introduction

The notions of "legalism" and "arbitration" are not necessarily at odds, as one might believe. The word "legalism" need not strike fear in the hearts of those who wish to keep labor arbitration as a cheap, expeditious alternative to the courts. There is in all arbitration an intrinsic degree of legalism, in that arbitration is an adjudicatory, determinative process which by its nature requires certain formalities. It is helpful to recognize at the outset, then, that by advocating certain legalisms in arbitration today, I am not proposing any sort of fundamental or drastic change from the basic form of arbitration. Proponents of keeping legalism out of arbitration overlook many of the present day realities in the labor field. The idea of developing set rules and procedures in arbitration is one whose time has come, at least

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