

If so, do not such statements deserve careful examination and at least counter argument?

The issue is a large and murky one. I raise it only as an envoy in the hope that the subject might be picked up in the future in this or in some other forum.

III. MY USE OF THE FINAL-OFFER PRINCIPLE

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Preface

The March, 1985 issue of *The Chronicle* (Journal of The National Academy of Arbitrators) stated in its masthead: "No reproduction of any of the comments of this newspaper is authorized without the express written consent of the Editor. . . ." Having strictly complied with that admonition—whatever my thoughts may have been about such a requirement—I quote from a paragraph in the "Milestones" column: "Young is hard at work on a book on the use of 'Final-Offer Principle in Non-Wage Disputes' and would welcome the submission of cases in the area."

With apologies to the Author and/or the Editor, may I offer an important correction. At best, my practice and research on the topic for today have been done with the hope that some of the ideas would be shared with the best arbitration practitioners and scholars in the world—namely with the members of The National Academy of Arbitrators. To be sure, there may be a place for a book about the theory and practice of the final-offer principle, but someone else will have to do it. My schedule is far too busy with other projects.

Having shared some of my findings and thoughts with members of the NAA's Ohio Region in February, 1979, I am now privileged and honored with the opportunity to present this updated report to you as one of the papers in the Academy's first volunteered-papers-for-members-only program.

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The Use of Three-Person Boards

A. Those of us who began our arbitration practice in the 1940s—either with the War Labor Board or immediately after World War II—almost always served as chairmen of tripartite boards. Multiparty boards, in fact, had been commonly used by the parties during the late 19th and the 20th centuries in such industries as Men's and Women's Clothing and in Urban Transit. On December 22, 1906, for example, the privately owned, publicly regulated Cleveland Electric Railway Company entered a four-year agreement with the Amalgamated Association of Street & Electric Railway Employees of America, District 268. Disputes were to be settled by "three disinterested persons." If two of the three selectees were not able to agree upon a third member, such person would be "appointed by the Judge of the U.S. Court of the district in which Cleveland is situated." Their successor organizations turned to three-person boards until 1944, used a sole arbitrator from then until 1968, returned to a tripartite body, and have used three-person boards to date.

In time, some company and union representatives informally modified their systems. Some deemphasized the "disinterested persons" requirement and used persons who were directly related to their organizations. Others waived the three-member wording and gave the responsibility for making a final and binding decision to a single arbitrator. During the 1960s, the use of only one arbitrator became the prevailing practice.

B. Among those of us who have served in arbitral capacities for forty years—plus or minus—you will find strong critics and equally strong defenders of the tripartite system. There are those who contend that three-member boards lacked some of the judicial aspects of the sole arbitrator. Others reject such an argument and point to those multiperson bodies which are still active in parts of our judicial systems. Most will agree that the parties may have seen the boards as unnecessarily expensive and made changes.

Some of you may have had poor results with tripartite boards. My experience was exactly the opposite. I had a very high percentage of unanimous decisions under such a contract—even though it sometimes took hard work and patience to get some unanimity. Furthermore, in the two-to-one decisions, the dissenter, for political or other reasons, made it clear that her or his vote was "for the record only."

C. A review of one of my all-time favorite cases will help to explain my positive impressions of three-person boards. It involved one of the largest and most successful international food processing companies and a mill workers union. "Cotton," his nickname, had been employed for about six years. He had had excellent evaluations by his supervisors. As a production employee, he had worked six-day-per-week, rotating shifts. He had missed only six days during the previous year. In fact, "Cotton" had also been elected president of his local. On August 8, 1947—having celebrated with his brother just home from the service—"Cotton" was arrested for intoxication. He got the jailer to telephone the company and to report that he would be absent. On September 9, he punched in forty-five minutes and out twenty minutes before his shift was to start. Management was told by a fellow worker that "Cotton" had come in under the influence of alcohol, that he had been urged to leave, and that he had done so. When "Cotton" returned to work, he was given a written notice that if he ever came into the plant under the influence, he would be discharged. On October 4, he was scheduled for the 2:00 to 10:00 p.m. shift. At 1:00 p.m., he telephoned the company's office. By coincidence, one of the production employees had been sent over there to tune in on a radio, to learn the score of the World Series baseball game, and to report back to his co-workers. In the absence of any office employees, he answered the phone. By further coincidence, he was the man who operated the same first-shift job which "Cotton" was to work in the afternoon. "Cotton" asked him to tell the supervisor (the Assistant Superintendent) that he was not feeling well, that he was going to the doctor, and that he would be in at midshift if he got to feeling better. The message was delivered, and the Assistant Superintendent gave the messenger permission to work in "Cotton's" place. After 5:00 p.m., the Assistant "Super" stopped for a drink at a nearby tavern. There at the bar sat "Cotton." On the following Monday, "Cotton" was discharged for having violated General Rules and Regulations, No. 1: "No employee except in case of illness shall be absent from work without giving notice to, and being granted permission by, his foreman. Employees who are unable to report for work because of illness or other unavoidable circumstances shall notify the Company immediately." Incidentally, the contract made no provision for paid sick leave.

The speed with which this case was heard was memorable. The Director of Industrial Relations and the Iowa C.I.O. Regional Director reached me by conference call on Monday, October 27, 1947. Our hearing was held on Friday and Saturday of that week. Even though there was a 300-page transcript which took time to prepare, the meeting of the board was held, and the unanimous decision was rendered on November 20. "Cotton" was suspended for four weeks.

The sequels to the case were even more memorable. Two years later, I was in touch with the company member. He reported that "Cotton" had quit drinking and was being considered for the Assistant Superintendent position. Seven years later, I met the labor member in Cleveland. He told me that "Cotton" had just been elected Mayor of Centerville. I returned to my office, got the file, and sent "His Honor" a letter of commendation and best wishes. He responded in his own handwriting with several misspelled words: "I was very pleased and honored to get your most welcome letter. I was lucky to have a gentleman with honor and integrity to serve as Impartial Umpire in my case. If I have done a topnotch job, I would not be honest with myself if I did not give all of the credit to a few of my closest friends, in which I take the liberty of including you." Thirty-eight years later, in preparation for this report, I spoke to "Cotton" by telephone. He had served for four terms (14 years) as Mayor and was retired.

Why Not Try The "Final-Offer Principle" in Discharge Cases?

A. Since it was the wish of companies and unions from the 1960s to use sole arbitrators, you may be sure that my appreciation of three-person boards did not result in my refusing to serve. On occasions, quite frankly, I would have preferred to have had board members with whom to share ideas before a decision was made. Nonetheless, my reports and decisions went out without consultation with anyone.

B. In 1976—having read about the use of parties-initiated final offers in the public sector, and particularly in wage and salary disputes; having discussed the experiences with colleagues and practitioners—the thought occurred to me that the principle might be adopted for use by an arbitrator in discharge hearings. Twelve discharges were before me in 1977. Some of

them were clearly based upon just cause, and the discharges were sustained. Others were just as clearly without just cause for discharge or discipline, and the grievants were returned to work with all contract benefits restored and with full retroactive pay. In five cases, some type of final-offer wording was used.

It must be emphasized that my "final-offer principle" was initiated by me and was used only in cases in which the threshold question—"Was there just cause for discharge?"—had been answered in the negative. Let me share with you the wording which is now in use:

Decision. On the basis of all of the evidence and testimony in the subject grievance, this Arbitrator:

1. Finds that the termination of the employment of "X" was without just cause.

2. Holds that, immediately, he shall be returned to the position which he held with the Company.

3. Remands to the Parties the first opportunity to determine the just and proper remedies.

4. Suggests that a small group of persons—including one or more responsible and reasonably objective representatives selected by the Company and the Union—plus the Aggrieved—make conscientious efforts to determine fair and equitable remedies.

5. Reserves jurisdiction—should the above mentioned group be unable or unwilling to reach agreements—to decide from the final offers of the Company and of the Union Representatives which shall prevail.

C. The results? Between December 1976 and December 1984, in every case in which I used the procedure, the parties reached an agreement. Not until January 1985—undoubtedly in cooperation with my upcoming report to you—was I asked to select from the final offers. Here, then, are my Alpha and Omega samples:

1. *Chesterfield Steel Service Co.*¹ Tony had been with the company for fifteen years. He was a Craneman. By agreement of the parties an absentee-point system was used. Accumulations were removed each year. In recent years, Tony had become remarkably adept at using every point. Before the start of his night-shift

¹69 LA 1159 (1977).

job on April 27, 1977, his wife had telephoned the supervisor and told him that: "Tony had an emergency!" When asked whether he was ill, she repeated her words and ended the conversation. Tony was charged with one point for April 27 and three points for each of the next four days which he missed without further contact with management. Although he brought a medical excuse with him, Tony was discharged for having exceeded twenty-five points. The Work Rule stated clearly that no points would be charged for "each absence when a written doctor's excuse is furnished to the Personnel Office."

Throughout the hearing I was left with the feeling that there was important information which neither the company nor the union had developed. So, I remanded to them the first opportunity for determining the remedy. In time, Tony was returned to his position with \$1,000 in retroactive pay. Six months later, he was discharged for alcohol-related absenteeism and for the accumulation of more than 25 points.

Without doubt, my remedy would have been far more generous than that reached by the conferees—including Tony. He was given another chance, and he blew it.

2. Discharge for Theft (unpublished). This case involved an employee who was also president of his local union. My January 8, 1985 conclusions were:

Without hesitation or reservation, this Arbitrator concludes that there was just cause for the imposition of an extended disciplinary penalty upon Mr. Y. The words of the subject grievance suggest that Y was in agreement. He wrote that the discipline was "too severe." His actions on August 27, indeed, showed that he was carrying out a theft of company property. Nonetheless, discharge was too severe a penalty.

The decision which follows is made in the belief that responsible persons in management and the union will be able to turn what were basically negative developments into those which should better their relationships.

Because the Parties have information and data which were not available to this Arbitrator—such as whether the Aggrieved received or was denied unemployment compensation; whether he has had other types of income assistance; and whether he has taken employment elsewhere—he believes that the determination of the specific remedies can best be done by representatives of the Company and the Union. They, therefore, should have the first opportunity to reach consensus on whether retroactive pay and benefits should be made retroactive to September 27; October 27; November 27; December 27; or some other date. If, by chance, the persons who

represent the Parties are unable to reach such agreements, this Arbitrator will remain available for selecting their respective final offers of settlement.

The final offers were: The company would modify its records to show a 90-calendar-day suspension for theft of property; would reinstate him with full insurance benefits and pick up all of his family's medical bills to help mitigate his family's financial situation; and would treat the remaining 34 work days as a personal leave. The Union would suspend him for 60 days, but with contract benefits restored; and would deduct from his back pay the \$1,920 which he earned on another job.

On January 22, I ruled that "the final offers of the Company shall prevail."

Some Questions and Afterthoughts

A. Are you evading your responsibility? My wife—who carefully reads and comments about my reports and decisions *after they have been sent to the parties*—suggested with conviction, that I had evaded my responsibility to the parties. Though worded more diplomatically, one of the follow-up critics offered the same suggestion.

My response was that the parties had been given a decision on the threshold issue and that remedy was of secondary importance. Their first and most difficult question—was the discharge for just cause—had been answered. With that resolved, their perspectives might now be different. Furthermore, in all probability, they were in the best position to determine remedy. Why should they not be given that opportunity?

B. Should the arbitrator who may use this process so advise the parties during the hearing? Even though nothing requires mention of alternative "tools" which may be used, is there any greater responsibility because of what may be a new procedure? Might such a statement hint that a decision has already been formed in the mind of the arbitrator? Even if it were so—and every true professional knows that an objective decision must await careful study of the transcript (or notes) and the evidence—why should one tip a hand?

C. Why include the grievant as a conferee? My first reaction to the thought of including the aggrieved was slightly negative. On further reflection, however, the positives clearly prevailed. From the arbitrator's perspective, it protected the right of the

grievant to be kept aware of developments. If the parties chose to do otherwise, they would be expected to have good and sufficient reasons. What, if any, impact the process would have on administrative agencies and the courts cannot be resolved at this stage. Probably related, but important nevertheless, it should result in some self-evaluation by the aggrieved which could be extremely helpful to the parties in their future relationships. When the grievant is involved in setting the conditions for her or his continued employment, it would probably be much easier for the parties to resolve further violations of the same work rule.

D. When should the parties be billed? Realizing that lawyers would be unconcerned about such mundane questions as when and how much to charge the parties, these remarks are directed to nonlawyers. To date—having included my charges with my decision on the threshold question—I have been stuck with the billing. Whether or not the inclusion of a statement—that they would be charged additionally should the case be returned to me for a determination of remedy would contribute toward their solution—has not been determined.

E. Is this a judicial process? Practitioners and students of labor arbitration will remember the extended debates about whether arbitration should be an important part of the collective-bargaining or the judicial process. Some purists may still be debating the question. The clearly prevailing opinion would appear to be that ours is not an “either-or” practice. It should be abundantly clear that “remanding” blends into the collective-bargaining process; that, preceded by additional probability testings, final offers are a continuation thereof; and that making the decision on the threshold question, and, if necessary, selecting from the final offers are judicial services.
