CHAPTER 8

THE ARBITRATOR'S RESPONSIBILITY TO THE PARTIES

I. THE DUTY TO DISCLOSE

JOHN F. CARAWAY*

Four years ago I was hired as special counsel to the Feed Um Fast restaurant chain to investigate and advise the company as to its liability under a Title VII class action suit. I was paid a retainer and fixed my fees on an hourly basis. The company had a bargaining relationship with the Better Serve You Union. The union was not involved in this assignment. I rendered an advisory opinion to the company after six months. This concluded my relationship with the company. I was not hired by it for any further work assignments. A month ago this company and union requested that I serve as arbitrator in a discharge proceeding involving one of the employees.

This is a hypothetical situation which serves to bring out the questions underlying this paper. What is the arbitrator's obligation to disclose to the parties any past or current relationship between the company and the union? To determine what these responsibilities are, the arbitrator should first go to the Code of Professional Responsibility. Section 2.B covers the subject. Subsection 1 states:

> Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.

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*Member, National Academy of Arbitrators, New Orleans, Louisiana. This paper was presented at the Academy's Continuing Education Conference in Indianapolis, Indiana, on October 28, 1989.

The section goes on to provide rules governing other relationships which may require disclosure, such as membership on a board of directors, consultation work, or service as a trustee. The basic premise is that the arbitrator must disclose any past or current relationship with the parties before accepting an appointment to serve as arbitrator.

School District of Spooner v. Northwest United Educators[1] is a case in point on the subject of disclosure. There the Wisconsin Supreme Court reviewed the decision of the Court of Appeals on a motion to vacate the arbitrator's award on the basis of failure to disclose an "evident partiality." The grievant was an industrial arts teacher who had been discharged for theft. A grievance was filed and the matter went to arbitration. The Wisconsin Employment Relations Commission assigned an arbitrator to hear the dispute. After hearing the case, the arbitrator directed that the teacher be reinstated with back pay.

The school district filed suit to vacate the arbitrator's award on the basis of evident partiality[2] and a failure to disclose that the arbitrator had worked for the Wisconsin Education Association Council prior to his appointment with the Wisconsin Employment Relations Commission. The facts disclosed that the arbitrator had been employed by the council as a part-time law clerk while he was in law school, some four years prior to the case. He was employed for about 18 months. While he did not work directly for the union's attorney, he had prepared one memorandum for the attorney. He had attended a social gathering that the attorney gave. The arbitrator did not disclose this past relationship to the school district prior to accepting the arbitration assignment.

The Wisconsin Circuit Court ordered the award vacated on the basis of evident partiality because of the arbitrator's failure to disclose his prior employment with the union. However, on review the Court of Appeals reversed, holding that there was no evidence that would cause a reasonable person to doubt the arbitrator's impartiality and that the contacts by the arbitrator with the union were so remote as not to constitute evident partiality.

The Wisconsin Supreme Court vacated the award on the ground of evident partiality. The court said:

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[1]136 Wis.2d 263 (1987).
[2]Wisconsin Stat. §788.10(1).

> The test for evident partiality was laid out by this court in *Richo Structures v. Parkside Village, Inc.* . . . An arbitrator's award must be vacated on the ground of evident partiality if "the reasonable person, as a party to the arbitration proceeding, upon being advised of the undisclosed matters, should have such doubts regarding the prospective arbitrator's impartiality that he or she would investigate further, would demand that the arbitration be conducted on terms which would provide checks on the arbitrator's exercise of discretion, or would take other protective measures to assure an impartial arbitration and award."[3]

The court then went on to modify this test, assuring that, "This is not to say that an arbitrator's past employment with a party demonstrates that the arbitrator is partial." The court stated:

> We emphasize that the phrase "evidence [sic] partiality," should be broadly construed to mean "evidence of possible partiality", rather than narrowly construed to mean "partiality is self-evident". Past employment with a party is only evidence of possible partiality; once the other party has ascertained the time, nature, and duration of the past employment, it may well conclude that the arbitrator is able to decide the dispute impartially. Disclosure is necessary, however, in order to afford the other party the opportunity to make the relevant inquiries and decide for itself after investigation whether the arbitrator selected is impartial and disinterested.[4]

The court reasoned that disclosure was necessary because the parties are the ones who select the arbitrator. Further, there is limited judicial review of the arbitrator's decision, which makes the arbitrator's decision particularly important.

The court found that there was clear and convincing evidence that the arbitrator was previously employed by the union which supplied counsel for the teachers union in this particular case. He failed to disclose this fact before hearing the dispute. This failure to disclose constituted "evident partiality." The court ordered that the arbitrator's award be vacated.

A well-reasoned dissent points out that the court substituted the words "evidence of possible partiality" for the words "evident partiality," as found in the statute and adopted a per se rule for failure to disclose prior employment which was

> remote in time, casual, superficial, isolated and inconsequential in terms of the present arbitration dispute. The arbitrator has no financial interest in the dispute, the parties or their counsel and has

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[3]*Supra* note 2, 136 Wis.2d at 269.
[4]*Id.* at 271.

> no current or recent relationship with the parties or their counsel. The arbitrator is not a one-time or part-time arbitrator. He has been employed for several years as a full-time professional arbitrator with the Wisconsin Employment Relations Commission. Arbitration is his career. He is trained in the necessity of impartiality.[5]

The subject of disclosure has been of concern to arbitrators. The Academy's Committee on Professional Responsibility and Grievances[6] has dealt with this problem. In one case, the facts were as follows: A long-time management attorney left a law firm and embarked on a career in labor arbitration. For three years this arbitrator advised parties selecting him of this prior management relationship. He also informed the parties of representation by his former firm. After three years he decided to cease this notification on cases and limited his notice of firm representation to only those cases where he was personally involved.

The Committee suggested that the arbitrator should disclose this prior representation for five years from the date he left the firm. The Committee stated that the arbitrator should disclose to the parties only those firm cases of which he was personally aware.

Judicial Review of Disclosure Cases

The courts have reviewed cases involving charges of "evident partiality," and have not hesitated to set aside arbitration awards where bias was shown.

The United States Supreme Court set forth the basic rule on disclosure by saying:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.[7]

This principle was followed in *Albion Public Schools*,[8] where an award was set aside because the arbitrator in a case between the teachers union and the school district failed to disclose that he had previously served as chairman of the union's committee, provided consulting services, and received substantial pay from the union.

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[5]*Id.* at 277.
[6]Opinions of the Committee appear in 93 LA 1307–1320.
[7]*Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).
[8]344 N.W.2d 255 (Mich. 1983).

Partiality of an arbitrator constitutes well-recognized grounds for reversal of an award.[9] The relationship of the arbitrator to one of the parties can make it appear unlikely that the arbitration was a fair and impartial tribunal. A general review of the law shows that disclosure of any personal or business relationship is essential for an arbitrator. Failure to disclose a business or social relationship with one of the parties required vacating an award.[10]

However, an arbitrator's statement at a social gathering to one of the parties, "You guys don't have a chance," was not ground for vacating the award since it was not complained of at the arbitration hearing and constituted a waiver of the right to object.[11] A California court held that a personal relationship between a party and the arbitrator, both of whom belonged to the same professional organization, was not ground for setting aside an award, because bias could not be established.[12]

The United States Arbitration Act[13] deals with this subject. It states that the courts may make an order vacating the award "Where there was evident partiality or corruption in the arbitrators, or either of them."

A court set aside an award where a father-son relationship existed between the arbitrator and an officer of the international union as "evident partiality" under U.S.C.A. Section 10(b).[14] An arbitrator owned stock in a corporation, one of whose subsidiaries in turn owned 7.6 percent of the stock in the corporation which was a party to the arbitration. The court ruled that this did not show bias or financial interest.[15] Where an arbitrator mentioned nine times his past relationship with one of the parties to the arbitration, the court held that the parties had full knowledge of his past affiliation.[16]

A court held that it was error to set aside the award of an arbitrator because the arbitrator had not disclosed a prior business relationship with the principal of one of the parties where

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[9]5. Am. Jur. 2d §181.
[10]*Richo Structures v. Parkside Village*, 263 N.W.2d 204 (Wis. 1978).
[11]*Alaska State Hous. Auth. v. Riley Pleas, Inc.*, 586 P.2d 1244 (Alaska 1978).
[12]*Ray Wilson Co. v. Anaheim Memorial Hosp. Ass'n*, 166 Cal.App.3d 108 (1985).
[13]9 U.S.C. §10.
[14]*Marelite Constr. Corp. v. Carpenters Dist. Council of New York City Benefit Funds*, 748 F.2d 79 (2d Cir. 1984).
[15]*Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F. Supp. 1346 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 1117 (2d Cir. 1988).
[16]*UCO Terminals v. Apex Oil Co.*, 583 F. Supp. 1213 (S.D.N.Y.), *aff'd*, 751 F.2d 371 (2d Cir. 1984).

that relationship had ended over 14 years prior to the arbitration.[17] Where, in a lease dispute, an arbitrator failed to disclose that he had represented a company that owned 50 percent of the stock in a company that was represented by a law firm representing the lessor, there was insufficient evidence of partiality where the arbitrator was not financially involved with either the lessor or lessee.[18]

The legal principle of waiver has been applied where a timely objection was not made to the alleged partiality.[19] Union counsel had been informed that the arbitrator had previously rendered legal services in labor matters to a graphic arts firm but did not object to the integrity of the arbitrator prior to the award. The court did not reverse the award, because the union's failure to raise the issue of impartiality during the arbitration constituted a waiver of that objection.

The duty to disclose to the parties any current or past relationship before accepting an appointment is strong and positive. Any doubts should be resolved in favor of disclosure. Doing so assures the integrity of the arbitral process and the impartiality of the arbitrator.

II. CRIMINAL JUSTICE SYSTEM IN THE WORKPLACE

ELLIOTT H. GOLDSTEIN*

Searches in the Workplace

The first issue to be discussed is the question of employment searches. These searches can be logically divided into (1) private employer searches, and (2) public employer searches. The topic may be divided further into:

1. Searches conducted by the police or policelike employees (e.g., postal inspectors) or other law-enforcement representatives.
2. Searches of workers entering or leaving employer premises.

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[17]*Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983).
[18]*Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982).
[19]*Graphic Arts Local 97-B v. Haddon Craftsmen*, 489 F. Supp. 1088 (M.D. Pa. 1979).
*Member, National Academy of Arbitrators, Chicago, Illinois. This paper was presented at the Academy's Continuing Education Conference in Indianapolis, Indiana, on October 28, 1989.