CHAPTER 4

PRACTICES AT THE HEARING

I. A FEW MODEST PROPOSALS FOR IMPROVING CONDUCT OF THE HEARING

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Preparing for this presentation brought to mind the wistful observation of the late Alexander King who wrote, "all my life I have been gathering evidence for a generalization I never seem to reach." Like most of you, I have been listening for many years to advocates who alternately criticize and praise how different arbitrators conduct the hearing. Often what some practitioners found most to their liking in the conduct of the hearing was anathema to others.

Like Alexander King, I could reach no confident generalizations from the anecdotal evidence gathered from these past arguments. The practitioners did not divide into neat categories in their conflicting views—no nice distinctions on the basis of employee advocates versus union advocates, for instance, or of lawyers versus nonlawyers.

Aware that I had picked up a hodgepodge of contradictory opinions on the subject, about as randomly as a blue serge suit picks up lint, I decided to survey the opinion landscape a bit more systematically. I proceeded to ask a sample of 100 practitioners, equally divided between employer and union advocates, what they liked and what they did not like about the practices of arbitrators in the conduct of the hearing. The questionnaire also solicited recommendations for improving practices at the hearing. I followed up the written responses with a subsample of face-to-face interviews in order to validate and refine the survey findings.

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Interestingly many of the same inconsistencies in my earlier anecdotal evidence were also manifested in the survey responses of the 30 union and 28 employer representatives who completed the questionnaire—several advocates criticized the very same arbitrator practices that a similar number of advocates praised. Rather than pointing to any confounding contradictions, however, these responses suggest merely that advocates vary in what they prefer in the way of arbitral practices at the hearing. Some advocates want a tightly controlled proceeding while others prefer a fairly unstructured hearing. Undoubtedly these preferences factor into the hundreds of individual decisions on arbitrator selections made every day by the advocates.

The survey did reveal some particularly significant commonalities among the advocates, however, that make up the core of this report. While individual advocates differ over the degree of activism they want in an arbitrator, the responses show a virtual unanimity in rejecting the overly active or overly passive. In short, the parties reject with equal vehemence and fine impartiality both the Offacious Intermeddler and the RCA Victor Dog when choosing arbitrators.

Offacious Intermeddler

I am indebted to our Chairman, Marvin Hill, for the term Offacious Intermeddler. We are aware that the correct dictionary term would be "officious meddler" for one who is excessively forward in offering advice to others whether they want it or not. When Marvin used this term to describe the overly active arbitrator, I asked him for the literary reference (thinking that he must surely be referring to a short story by Ambrose Bierce or Mark Twain). Marvin could not supply the origin of that trenchant title for those arbitrators who—believing that they know better than the parties how their respective cases should be presented—interrupt advocates in the examination of witnesses to pursue their own independent line of inquiry.

Although neither Bierce nor Twain created a story character named The Offacious Intermeddler, they should have. I picture him as a kind of Johnny Appleseed of mischief—leaving every situation he comes upon even more contentious than when he arrived at the scene. The major problem with the overactive arbitrator, of course, is that he or she often prevents the advocates from developing their cases as they see fit. The advocates

certainly should have the right to play out their own strategies without interference.

Let me tell you about an absolutely delicious strategy that I was privileged to watch unfold in a recent case. For reasons which will become obvious, I am unable to provide the names of the parties—suffice to say that the grievant was a laundry worker in a large hospital. The employer had rejected her bid on a posted vacancy for the job of van driver to deliver linen to the various buildings in the hospital complex.

The grievant asserted that the decision to deny her the promotion was tainted by sexual discrimination and sexual harassment. She testified that her supervisor, who chaired the three-person job bid screening committee, had frequently disparaged the abilities of women workers and had sexually harassed her. The transcript at this point in direct examination reads:

Q: How did your supervisor sexually harass you?
A: He mooned me.
Q: Describe the circumstances to the Arbitrator.
A: I was working overtime and as far as I knew we were the only ones left in the laundry. As I was counting the inventory, the door to a broom closet opened and there was this man's bare butt sticking out at me with his pants down around his ankles.

On this elegant note the union representative ended his direct examination. The employer advocate then disregarded the fundamental rule against asking a question on cross-examination for which the advocate does not know the answer. Unable to resist the temptation to cast doubt on the moonee's imperfect identification of the mooner he asked:

Q: Was the area near the broom closet well lighted?
A: No, it was rather dim.
Q: Was the broom closet well lit?
A: No, the light in the closet wasn't even lit.
Q: Was there a mirror, so that you could clearly see the face of the man?
A: No, I never saw his face when it happened. He stepped back into the closet and I went and punched out right away.
Q: (Triumphantly) How then can you be sure that the bare fanny belonged to your supervisor?
A: Because of the tattoo.

Realizing too late that he had blundered into the union's well-laid trap, the employer counsel nonetheless pressed recklessly on with this follow-up:

Q: I've come this far so I might as well ask what is the significance of the tattoo.
A: Well he was always bragging to us women about his tattoo, describing it and offering to show it to us. Of course, none of us ever took him up on it but there it was—just as he had pictured it. (Whereupon the grievant proceeded to describe in some scatological detail the tattoo which had been so prominently displayed.)

The employer's counsel understandably decided to inquire no further at this point, whereupon the union advocate challenged the supervisor to go into a dressing room and in camera, disprove to the arbitrator that he bore the fabled tattoo on his posterior. Declining the challenge the red-faced supervisor mumbled, almost inaudibly, "Don't bother—it was me."

Imagine the smothering effect on the union representative's elegant strategy if the arbitrator were to have interposed with his own questions before the employer counsel could walk into this carefully constructed trap. The Offacious Intermeddler then might have blown the whole scenario and denied the grievant an exquisite riposte against the supervisor who had treated her so shabbily.

At worst super activist arbitrators not only preempt and compromise the advocates, they jeopardize the parties' interests by opening up areas of inquiry which the advocates may have good and sufficient reason to avoid. In short, the parties have every right not to tell an arbitrator where all the bodies are buried. The Offacious Intermeddlers' capacity for mischief is well nigh incalculable when they blithely forge ahead into terra incognita, where the parties alone may know the compass points. The only safe arbitral presumption in this regard is that if the parties wanted the arbitrator to traverse any particular landscape, they would probably have laid out the topography before being asked.

Several survey respondents virtually implored activist arbitrators to be patient because their eager questions would quite probably be answered in due course of the hearing. Some suggested that the arbitrators simply write down whatever questions they might have as the hearing proceeded and then cross off each question in turn as the advocates addressed it on their own. Usually most if not all these will be answered before the close of the hearing.

If, however, significant questions remain unanswered as time runs out at the hearing, arbitrators are well-advised to call an executive session for the purpose of informing the advocates of any remaining informational needs. The advocates may then decide if and how they wish to bring in the additional evidence. Indeed, they may choose not to provide the information and may well prefer to tell the arbitrator so in the confidentiality of an executive session.

RCA Victor Dog

Lest it seem that I am making the case against any initiatives by the arbitrator, let me assure you that the survey respondents were equally critical of the overly passive arbitrator who like the RCA Victor Dog sits mute with ear cocked attentively to "his master's voice." I am indebted to Arbitrator Phil LaPorte of Atlanta, Georgia, for telling me about this analogy used by Academy member Ferrin Mathews in a presentation at a Southeastern Regional Industrial Relations Research Association meeting. Reflect for a moment on the aptness of the RCA Victor Company logo as the penultimate symbol of the passive arbitrator—docile, tractable, and obedient, the dog sits mute although obviously puzzled by the sounds issuing from the bell flower megaphone attached to the wind-up Victrola. I submit that arbitrators have a responsibility not to leave a hearing similarly silent and puzzled as the RCA Victor dog.

At times it may take courage to call the executive session and frankly tell the advocates that they have as yet failed to provide some apparently material information. As arbitrators we do not want to admit that we may have somehow missed the point. Neither do we want to appear to be making the case for either party by raising questions that otherwise might not have occurred to the advocates.

The alternative to asking the pertinent question in executive session, however, may be finding later that the arbitrator lacks information vital to a properly informed award. I submit that the arbitrator remains ultimately responsible for the competency of the hearing record. We are not merely debate judges or referees of word games, but triers of fact and readers of contracts. The arbitration process promises not merely an award but an informed award. Any nitwit can stand out in the parking lot after a hearing tossing an odd/even coin or holding up a wet

finger hoping for Kentucky windage to bring an answer to a complex issue. It takes a perceptive and persistent arbitrator, however, to assist the parties in the creation of a competent hearing record—without preempting or compromising the advocates' rights and responsibilities in the process.

Infirm Evidence

The second most common complaint cited by the survey respondents centered on the controversial practice of admitting various forms of infirm evidence into the record "for what it's worth." The problem for both advocates is that neither can know what weight, if any, the arbitrator may ultimately assign to such infirm evidence as uncorroborated hearsay, unauthenticated documents, speculative or conclusionary testimony, inadequate foundation, and sundry irrelevancies.

The opposing advocate faces the dilemma of choosing either to waste time on unnecessary rebuttal or to let the matter pass only to find out when the adverse award arrives that the arbitrator assigned importance to the infirm evidence. The presenting advocate also faces a problem, however, in being led to believe that by admitting the infirm evidence, the arbitrator signals it has probative value when, in fact, it does not. The presenting advocate may thus mistake the need to shore up proofs.

Few respondents suggested abandonment of arbitration's liberal rules on admissibility as a means of dealing with these problems. Several advocates recommended the refreshing idea that arbitrators should simply tell the advocates what any marginal evidence may be worth at the point of its admission. One seasoned practitioner stated this proposition:

> The arbitrator should tell the parties when admitting something like uncorroborated hearsay that it has zero probative value but is being admitted because that's the way we do things in arbitration. If I am making the objection, I know not to bother with rebuttal. If its my witness, I know I need to present better proof.

In like vein several respondents criticized arbitrators who fail to instruct those witnesses who testify in the passive mode. I find this galling tendency most pronounced in education disputes—perhaps because academics so often favor this peculiar form of circumlocution. We have all plodded through research reports

which read "It has been previously reported in prominent journals . . ." or "It is generally recognized . . .."

The following excerpt from a transcript of a teacher grievance arbitration shows this tendency toward obtuseness:

Advocate: How did the School District promulgate its new personal leave policy?
Witness: It was made crystal clear to all the teachers including the Grievant.
Arbitrator: Who made the new policy clear to the Grievant?
Witness: The Administration.
Arbitrator: Who in the Administration?
Witness: An authorized person.
Arbitrator: Can you tell us this person's name?
Witness: Investigation has not yet identified this person.

Controlling the Hearing

This matter of instructing witnesses leads directly to another frequently mentioned complaint, one against arbitrators who seem unwilling or unable to control the hearing. Among the specific criticisms, the respondents mentioned arbitrator failure to curb:

- Gratuitous insults and hostile exchanges between advocates and/or the parties,
- Rambling, nonresponsive, redundant, or conclusionary testimony,
- Frivolous and overly technical objections and motions.

The most common suggestion from the survey respondents calls on the arbitrator to assist witnesses to tell their stories more effectively by advising against conclusionary testimony the moment they give it. For example, "Everybody knew he was high when he wrecked the forklift that morning," or "I won't repeat what she said but her language was obscene." Without waiting for objections, the arbitrator should instruct the witness to limit the testimony only to the specific facts observed. The arbitrator should advise the nonresponsive witness to listen carefully to the question and answer directly. Witnesses who ramble or give redundant testimony need to be told not to volunteer information that goes beyond the question.

The problems of frivolous objections, hypertechnical motions, harassment of witnesses, persistent quarreling, and other contentious behavior needs to be reined at the outset. The parties must be reminded when they so misbehave that if the

dispute could have been settled by face-to-face confrontation, it would not now be in arbitration. Indeed, if the hearing becomes unruly, the parties may lose the very purpose of the arbitration forum, which guarantees the right to a full and fair hearing of all relevant evidence and argument.

In this regard I am reminded of an incident reported to me by my current intern, Tom Ring, who is a full-time police officer at the University of Minnesota while attending law school. Tom recently responded to an emergency dispatch to the University hospitals. The problem—to restore order at an arbitration hearing! Fortunately, we rarely encounter really serious problems of unruliness at the hearing, but it seems appropriate to remind ourselves that as arbitrators we lack the accoutrements of the courts to maintain proper decorum. We have no armed and uniformed bailiffs standing by. Neither do we have the majestic high bench and black robe as furnishings of our profession.

Accordingly, arbitrators maintain an orderly hearing by—for want of better words—what I would call force of character. You may well ask where one acquires such force of character to establish the kind of relaxed but dignified atmosphere where the parties treat the process and each other with proper civility and decorum. I doubt that she remembers, but I put essentially the same question to Jean McKelvey when I was a student of hers at Cornell back when the world was yet young.

Jean McKelvey was not then nor is she now your stereotypical Rambo figure who could command obedience by dint of a formidable physical presence. Rather, Jean stands as the model for what I mean by force of character—that combination of intellect, integrity, and bearing which commands respect where mere symbols of authority often fail. Let me share with you what she told the class about controlling the hearing. In her simple eloquence she advised us that "people generally behave about as well or as badly as you expect them to."

I have yet to hear any better advice for establishing a hearing environment characterized by respect for the process and for each other, which virtually obviates the need for any authoritarian actions by the arbitrator. Surely we must all contribute to maintaining a relaxed but dignified ambience at the hearing, not simply because it is tidier and easier on the nerves, but because only in an atmosphere of civility and mutual respect can we preserve the promise of a full and fair hearing of all relevant evidence and argument.

II. A MANAGEMENT VIEWPOINT

STUART COHEN*

What an opportunity this is for a management advocate! A chance to tell an illustrious group of arbitrators what is wrong with their practices at the hearing. However, as much as I hate to admit it, you generally do a very good job in handling situations that arise during a hearing and in making the hearing process comfortable for all those involved. I may not love you, as an earlier panel group member said, but I like you a lot. Of course, this does not mean that there is no room for improvement. There certainly is.

One of the things I do, in order to have some idea of what to expect at the hearing, is select arbitrators carefully. In this regard I am a supporter of the concept of permanent panels. I use them frequently with clients prone to have a significant number of arbitration cases. Knowing the arbitrators and what to expect from them is simply the best way to avoid unpleasant surprises at the hearing.

The subject of this presentation is not one that lends itself to citation of numerous arbitration or court cases. The reason for this is that arbitrators do not generally like to discuss their mistakes in their own decisions. Moreover, most of the disputes surrounding practices at the hearing are not of the type that wind up being litigated in court proceedings.

It is for this reason, and because I simply could not pass up the opportunity, that I have chosen to devote most of my discussion to the following two suggestions for streamlining and standardizing the arbitration hearing process:

1. A set of model rules should be developed and offered to the parties in advance of the hearing as an alternative to the individually set and inconsistent procedural rulings advocates must now deal with.
2. A standardized prehearing form should be developed which would request the parties to meet in advance of the hearing and attempt to agree on the issues and a stipulation of facts, as well as to clear up any problems with respect to exhibits or expected procedural difficulties.

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Model Procedural Rules

I can almost hear some of you whispering to each other that this is just another attempt by some lawyer promoting what others have decried as "galloping legalism" in arbitration. I do not agree with this assertion. First, I believe that laymen, at least as much as lawyers, want to know what the rules of the game are before they get to the hearing so that they can prepare accordingly. Every other forum has such procedural rules readily available to the participants. It is time that this be done for those of us who have to deal with all of you very independent, obstinate, and "we'll do it my way" type of people.

What better group to accomplish this task than the National Academy. In preparing this presentation, I have discussed this suggestion with many members of your organization. Several of you indicated that, while you thought it was a good idea, the membership of the Academy would have considerable difficulty agreeing on any such model rules. This admitted difficulty is the very reason they are needed. The parties to any proceeding are entitled to have some idea of what to expect when matters such as the following arise:

1. Sequestration of Witnesses

In *Hoteles Condado Beach v. Union de Tronquistas de Puerto Rico Local 901*,[1] the Court of Appeals for the First Circuit affirmed a lower court's decision vacating an arbitrator's award reinstating an employee who had been discharged for engaging in a sex act and exposing his genitals in front of a female guest at the hotel. The arbitrator sequestered the guest's husband at the request of the union on the basis that overhearing her testimony would taint his. The arbitrator did this even though the wife would not testify without the husband's presence and his testimony was not that of a witness to the event, but was to be used only to establish his wife's state of mind after it occurred. The district court vacated the arbitrator's award, partially on the basis of the sequestration of the husband. However, the Court of Appeals found this particular action of the arbitrator to be appropriate but invalidated the award on other grounds.[2]

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[1]763 F.2d 34, 119 LRRM 2659 (1st Cir. 1985), *aff'g* 588 F. Supp. 679, 116 LRRM 2900 (D.P.R. 1984).

[2]*See also Northern States Power Co.*, 86 LA 1088 (Boyer, 1986).

2. The Grievant Being Called as an Adverse Witness in a Discharge or Disciplinary Case

Arbitrators certainly do not agree on whether and under what circumstances, if permissible at all, an employer may call the grievant in a disciplinary case. In *Rohm & Haas Texas, Inc.*,[3] the employer terminated the grievant for excessive absenteeism and tardiness. The arbitrator decided that, since the union intended to call the grievant anyway and the employer had the burden of proof, he would not permit the employer to call the grievant as the first witness. In reaching his conclusion, the arbitrator referred specifically to prior Proceedings of the National Academy where this subject was discussed. He also summarized the different positions of arbitrators with respect to this matter as follows:

a. Any person present at the arbitration hearing may be called.
b. Neither side may call as a witness a person from the other side.
c. Persons may be called as witnesses for the other side, except grievants in disciplinary cases.
d. Under certain limited circumstances the grievant in a disciplinary case may be called by the employer, but there must be a clear basis for such.[4]

I personally subscribe to the a. position.

3. Court Reporter and Transcript Matters

Not infrequently, disputes develop between the parties at the hearing over whether an official transcript should be taken and, if so, who should pay for it. These matters have frequently been a subject of dispute in hearings where I have been a participant. I have found a singular lack of consistency among arbitrators and how they deal with such matters. A good discussion of this subject may be found in *How Arbitration Works* by Elkouri and Elkouri.[5]

4. Questioning of Witnesses by the Arbitrator

Personally, I have no objection to an arbitrator asking questions of witnesses after the representatives of the parties have

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[3]91 LA 339 (McDermott, 1988).
[4]*Id.* at 343.
[5]Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985), 258–260.

finished their examinations. I do, however, believe that it is improper for arbitrators to take over the examination of witnesses and interrupt questioning by the advocates.

5. Briefs

Some arbitrators, although not very many, put limitations on the length of briefs. I do not believe that this should be necessary or that such a rule serves any useful purpose. Occasionally, another issue arises when one party submits a brief and the other has indicated it was going to but does not do so within the time agreed upon. I have had some circumstances where arbitrators have waited for months for phantom briefs to appear before finally rendering their decisions. Absent extremely unusual circumstances, I believe that arbitrators should not engage in this practice. Certainly, it would not be too difficult to devise rules to deal with these matters.

6. Visits by the Arbitrator to Dispute Locations

In most cases where site visits have value, I have not experienced difficulty in getting the arbitrator's cooperation. However, there have been a few occasions when arbitrators have been reluctant to participate in this procedure for reasons which were not altogether clear to the parties. Unless there is some danger or terrible inconvenience to the arbitrator, I believe there should be a rule which requires the arbitrator to make such a visit if either or both of the parties request it.

7. Grant of Continuances During the Hearing

Circumstances sometimes arise during a hearing where one party or the other requests a continuance because of the unavailability of witnesses, surprise, or some other reason. I have found that arbitrators in most instances tend to be lenient and grant such requests. In my opinion a rule should be developed which would require the arbitrator to weigh all the competing factors before deciding this issue, including the cost and inconvenience to the parties as well as the reasons for the continuance.[6]

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[6]For a lengthy discussion of the issues involved in this matter, *see Michigan Dep't of Transp.*, 89 LA 551 (Borland, 1987).

8. Right of Grievant to Individual as Opposed to Union Counsel

In *Rivera v. Pueblo International*,[7] the grievant challenged the fairness of the arbitration proceeding and the union's performance of its duty of fair representation on the basis that the parties did not permit private counsel to participate. However, the district court disposed of this by noting:

> that the duty to represent belongs to the Union; that the district court's grant [to the employee of the right to have private counsel present] did not include the right to representation during the proceedings; and that he [private counsel] could participate *only* if the bargaining parties specifically and voluntarily permit it. Counsel had no right to participate.[8]

Obviously all of you could think of other procedural issues that could and should be covered if model rules were in fact developed. I urge the National Academy to consider undertaking such a very difficult but very important project.

Prehearing Form

A prehearing form would not have to be made mandatory by arbitrators to be effective. Most parties want to please their selected arbitrators and would likely make a good-faith attempt at compliance. Just think of the time that could be saved at the hearing itself, to say nothing of the settlements that would surely result in some cases. I am confident that most of you would like to avoid the wrangling that often occurs at arbitration hearings over matters the parties themselves could have resolved before the hearing. Despite what seems to me the obvious value of such a procedure, I have seen very few examples of its use.

Things Arbitrators Do at Hearings That Are Not Popular With Me

Before I close, I cannot resist the opportunity to indicate some of my pet gripes with the way arbitrators handle themselves at hearings. First and foremost are arbitrators who claim at the hearing that they understand the facts, issues, and positions of the parties and see no reason why a brief should be filed. This

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[7]120 LRRM 3379 (D.P.R. 1985). *See also Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 118 LRRM 2717 (9th Cir. 1985).
[8]120 LRRM at 3381.

may come as a surprise to many of you, but my clients want me to file a brief in almost every case. Their reason is the same reason as mine; that is, arbitrators may think they know what they need to know, but they are not always right. Most advocates will admit surprise on occasion when briefs have not been filed and when there has been some misunderstanding on the arbitrator's part with respect to a matter of importance to the outcome of the cases.

I cannot resist commenting on one other pet peeve. Most parties or participants in hearings are not interested in listening to 50 years of reminiscences from arbitrators about where they have been, what cases they have heard, or whom they know. They are there to try the cases and go on about their business.

Conclusion

I considered it a singular honor to be asked to speak to this group on the occasion of your Annual Meeting. Frankly, despite my criticisms and suggestions, I think you perform a very important service and perform it generally very well. Obviously I believe that the suggestions I have made would be beneficial to the process and, if anything, would make our jobs easier.

III. A Union Viewpoint

CHARLES A. WERNER*

Recently an arbitrator concluded a hearing involving a discharge by unexpectedly asking the grievant on the record if he was satisfied with the union's presentation of the case, and if he had anything to say or add. The grievant, taken by surprise, did not know what to do and just mumbled a few words. The arbitrator then turned to the union and company representatives and inquired about whether or not they wanted to file posthearing briefs.

Later the arbitrator told me that he had asked the grievant the question to protect the union in case the grievant filed a duty-of-fair-representation (DFR) lawsuit. I informed the arbitrator that I was not worried about a DFR suit. What did concern me was

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that the grievant and other union members at the hearing might conclude that the arbitrator's inquiry was prompted by a belief that the union had not properly represented the grievant or that the union was holding back some evidence.

From the union's viewpoint the arbitrator's action was improper. The union and the company are the parties to the contract and the arbitration procedure, not the grievant. Questions, if any, as to the issue or the evidence should be addressed to the parties. Perhaps in the arbitration of securities disputes, or terminations in a nonunion setting in lieu of a wrongful discharge lawsuit, the arbitrator might address the individual grievant as to form and procedures.

Union attorneys and business representatives have told me that other arbitrators have made similar inquiries, and for the same reason—concern about DFR suits. First of all, fear of DFR suits is not, and should not be, an overriding concern of unions; and, if anything, DFR suits are rarely filed when the union proceeds to arbitration. Most DFR suits involve situations where the union has not processed a grievance to arbitration.

Second, contrary to the belief of some arbitrators, neligence is not a standard in DFR cases. In fact, just two weeks ago, in the case of *Steelworkers v. Rawson*,[1] the Supreme Court resolved the negligence issue by stating:

> The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today.[2]

Third, most unions know that if the union investigates a grievance, makes a decision as to whether the grievance does or does not have merit, and then communicates that decision to the grievant, the union has no realistic concern for breaching its duty of fair representation to the grievant. Frankly, the union attorneys with whom I have discussed this issue are convinced that the belief that unions are processing unmeritorious or frivolous cases to arbitration for fear of DFR suits is just a sales pitch that management representatives have used whenever they have an audience in order to sway arbitrators as to the soundness of their case.

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[1]58 USLW 4556, 134 LRRM 2153 (1990).
[2]*Id.*, 134 LRRM at 2157.

A recent decision of the Court of Appeals for the Tenth Circuit, *Food & Commercial Workers Local 7R v. Safeway Stores*,[3] is an example where the arbitrator should have said something at the hearing, but did not. The result, from the union's viewpoint, is a terrible remedy and an injustice to the arbitration process. An employee was laid off by Safeway and filed a grievance. The union investigated the grievance and requested arbitration. Later the union informed the grievant that after further investigation the grievance lacked merit and would not be processed to arbitration, but that she could appeal to the executive board. She did, and they agreed with her, and the case was arbitrated. The company and the union framed the issue as follows: "'Did the Company violate the Labor Agreement when it failed to recall Grievant Sandra Cortez from layoff on May 20, 1984? If so, to what relief is Grievant entitled?'"

The arbitrator found that Safeway had violated the collective bargaining agreement by failing to recall Cortez, and held that she should be reinstated with full back pay. But, in assessing the damages of back pay, minus interim earnings, the arbitrator held that Safeway should not be held responsible for what he believed was the indifference and inattention of the union to the prompt resolution of the grievance. Accordingly, he ordered that the union pay $25,261.07 and the company pay $8,081.77 of the back pay.

As you would expect, a lawsuit was filed, and the case reached the Tenth Circuit, which affirmed the arbitrator's award in a 2 to 1 decision. The Court of Appeals held that the award drew its essence from the language of the contract and the submission agreement. The court said that Safeway was the only party mentioned in the first question dealing with breaching the agreement: "'Did the Company violate the Labor Agreement when it failed to recall Sandra Cortez from layoff on May 20, 1984?'"

However, the Court noted that the question as to remedy was not so limited: "If so, to what relief is Grievant entitled?" The Court of Appeals said that while Safeway's violation of the agreement was a prerequisite to the employee's right to any remedy, because the submitted issue failed to expressly restrict the party from whom relief would be available, the arbitrator could inter-

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[3]889 F.2d 940, 132 LRRM 3090 (10th Cir. 1989).
[4]*Id.*, 132 LRRM at 3094.

pret it as encompassing whatever remedy was necessary under the contract to compensate the employee for any damages arising out of the breach.

While I have problems with the Court of Appeals' convoluted way in finding that the award drew its essence from the contract, the union's real concern is with the arbitrator who ended up costing everybody (except him) tens of thousands of dollars in unnecessary expenses. The submission in that case was the run-of-the-mill submission: "Did the Company have just cause to discharge John Smith? If not, what is the appropriate remedy?" Must unions now, in order to protect themselves against such surprises, revise the standard submission to say: "If not, what is the appropriate remedy *from the Company*?"

I submit that not only was this arbitrator wrong, but he hurt the arbitration process by his actions. He used his power of remediation to correct what he perceived to be a wrong on the part of the union when (1) there was no grievance or claim filed against the union, and (2) the union was not put on notice at the arbitration hearing that the timeliness of processing the grievance was an issue before the arbitrator.

Last week I attended a national meeting of attorneys in the public sector, and three weeks ago I was in New Orleans attending the annual meeting of attorneys representing AFL-CIO unions. Knowing that I would be here today, I discussed practices at the arbitration hearing with a number of union attorneys who do a lot of arbitration work. As Jack and Stu have discussed, they had some comments about the involvement of arbitrators at the hearing, about types of questions that are asked, and the format for admitting evidence.

However, the overriding concern of every union attorney I talked to was the escalating cost of the arbitration process. More lawyers, more court reporters, more court challenges—a veering away from the inexpensive and expeditious handling of a dispute between a company and a union who have an ongoing relationship. I can guess that your immediate response is: (1) the added costs are what the parties dictate, not me—they hire attorneys and court reporters, not me; or (2) if the process is so expensive, why am I so busy?

Unions are concerned with the overall arbitral process, whose basic purpose is as an alternative dispute-resolution procedure instead of strikes and court litigation. You are the leaders of this profession and it is to be hoped that you will play a leadership

role, not a passive role, in reversing the escalating increase in costs in the overall process, which unions believe is a major factor in the downward trend nationwide in labor arbitration cases.

What can, in fact, must, we all do to reverse these trends? Let me express some proposals from the unions' viewpoint:

1. *Reduce the use of transcripts.* They are expensive, delay the process, add to the cost of writing briefs and decisions, and are unnecessary in 90 to 95 percent of all cases. Post trial briefs and proposed findings of fact and conclusions of law are filed in federal and state courts without the use of transcripts; why do we need them in arbitrations?

The National Academy of Arbitrators should urge its members and the parties to discourage the use of transcripts. To avoid the "one-upmanship" by a party ordering a transcript, the arbitrator should permit the other party to "read" the transcript and take notes either at the office of the arbitrator or at a neutral site, such as the office of a fellow member of the Academy.

And, I am tired of court reporters saying that they are busy and will not get the transcript out for three or four weeks because the person making the arrangements did not require the transcript to be available in one week for a one-day hearing. Arbitrators can resolve this delay problem very simply. Just set the time for filing posthearing briefs from the date of the hearing, and I am confident that the transcript will be completed in a week, and prior arrangements will be made for similar delivery in future cases.

2. *Encourage oral summations in lieu of lengthy briefs.* Briefs add to the cost of arbitration. I have heard arbitrators justify their bills by saying that they had to read the 50- or 70-page briefs of the parties, and to check all of the citations. If there is a particular point or two that the arbitrator wants briefed, fine; tell the parties, let them address the specific items of concern, and forget the 30 pages of fact summation with citations to the transcript.

Briefs should be the icing on the cake, but they have become an end unto themselves. All of the parties—unions, employers, and arbitrators—need to address this issue of escalating costs and stop pointing the finger at the other party or the arbitrator. Employers should also be concerned. At this very moment, one of our clients is at an impasse in negotiations because the company wants to eliminate the arbitration clause in the contract and permit strikes because it was saddled with a large fee from a management law firm in a recent arbitration. Last fall negotia-

tions in a multiemployer unit became almost impossible because every other word from the employer's chief negotiator was the $175,000 he had spent in a recent arbitration proceeding.

3. *Arbitrators should reduce the length of their decisions.* The Supreme Court in *Steelworkers v. Enterprise Wheel & Car Corp.*[5] held that unless the parties require a written decision, the arbitrator need only sustain or deny the grievance, without any supporting opinion. Most of us want some explanation as to how the arbitrator came to the conclusion, but we do not need an extensive review of the facts, discussion of all of the cases, and so forth. Basically, all that is needed is a brief summary of the positions of parties, followed by the opinion, perhaps all in a 10-page decision. As to publication, most decisions are not submitted for publication. Of those that are submitted, perhaps 25 percent are published. Those that are published are generally based on length or novel issue, not on the quality of the work.

4. *Arbitrators, whether asked or not, should retain jurisdiction of the case for at least 60 days, plus such additional time as is necessary, to resolve questions concerning the remedy.* The doctrine of *functus officio* prevents an arbitrator from retaining jurisdiction over a case, absent mutual agreement, unless the arbitrator has expressly retained jurisdiction in order to arrive at a definite dollar amount in back-pay cases, or in order to resolve other questions concerning the application of the remedy. There is nothing worse, and particularly deadly to the arbitration process, than for the parties to have to spend thousands of dollars in district court and courts of appeal concerning questions of finality of awards or refusal to submit back-pay issues to the same arbitrator. An example of the waste of time and money is the recent case of *American Standard v. Electrical Workers (UE) Local 610*,[6] decided by the Third Circuit on March 27, 1990. The case had everything—district court opinion, motion for remand, court of appeals opinion.

There are other factors which will reduce the cost of arbitration:

a. Schedule a full day for the hearing—9:00 a.m. to 5:30 p.m.
b. The arbitrator should maintain control of the hearing, keeping out irrelevant and cumulative evidence.

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[5]363 U.S. 503, 46 LRRM 2423 (1960).
[6]133 LRRM 2985 (3d Cir. 1990).

c. Explore the use of pretrial material, such as: (1) proposed submission agreement, (2) list of documents to be offered by each party in the case-in-chief, and (3) list of witnesses to be presented by each party in the case-in-chief.

In summary, while all of us earn some or all of our income from labor arbitration, it is a profession, not a business. We have an obligation to our clients and the public in general as the leaders and foot soldiers in achieving what I believe is the objective of the labor arbitration process—an inexpensive, expeditious method of resolving disputes that arise during the term of a contract between two parties who have an ongoing relationship.