CHAPTER 6

ARBITRATION IN THE EMPLOYER WELFARE STATE

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Imagine a political system in which the government selects the physicians who treat you when you're ill and requires you to enroll in a wellness program so you lose weight, stop smoking, exercise more, and eat more nutritious foods. Imagine that without prior notice the government makes you submit to random urine drug screens and periodically requires you to be examined for a variety of medical conditions. Imagine a system in which the government arranges for your childcare and the care of your elderly parents, and takes money out of your bank account to pay for child support and other debts.

Most people would describe such a system as socialistic, a cradle to grave regulation of one's personal life characteristic of the "welfare state." Moreover, most Americans would probably consider such a political system to be antithetical to established American values. Nevertheless, in some respects we are steadily moving toward such a system, but instead of a government directed welfare state we are embracing the employer welfare state, in which employers are assuming these governmental functions.

Some of the expansion of employers' roles in employees' lives is an effort by employers to further their own business interests. For example, shortcomings in public education have required many employers to start remedial educational programs to guarantee an adequate supply of trained workers. Similarly, childcare programs are designed to ensure a labor supply, and wellness programs and managed health care attempt to reduce employers' health care expenditures.

Other types of far-reaching responsibilities are being thrust on employers for reasons unrelated to business performance.

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The Immigration Reform and Control Act[1] provides for substantial penalties against employers who hire undocumented workers. In theory, by making work unavailable to undocumented workers, illegal immigration will be curtailed. The front line troops in fighting this war are not Immigration and Naturalization Service officials, but American companies. Parallel reasoning underlies government-encouraged workplace drug testing. If drug users become unemployable, then the demand for illegal drugs will be reduced. Again, however, this policy is not being implemented by the Drug Enforcement Administration, but by American companies.

Perhaps the best example of the growing employer welfare state involves the attempts by Congress and state legislatures to require employers to provide at least a minimum level of health insurance for all employees. Such legislation is attractive to politicians because it seems to solve a pressing social problem without requiring any governmental expenditures. Yet, there may be substantial indirect social and economic costs from this or any other program that expands the ambit of the employer welfare state.

In my remarks this morning I first will consider the reasons why the employer welfare state has emerged. Next, I will argue why, in my view, the expansion of employer responsibilities in social programs is likely to have negative consequences for employers, employees, and the nation's economy. Finally, I will address some specific ways in which the growth of the employer welfare state will affect labor arbitration.

Emergence of the Employer Welfare State

Since at least the New Deal, the workplace has been used as a vehicle for social policy. For example, in enacting the Fair Labor Standard Act's minimum wage provision,[2] Congress sought to increase consumer spending and stimulate the economy out of the Great Depression. But employment policies, ranging from the Davis-Bacon Act[3] to wage and price controls generally were limited to economic policy. Even Title VII of the Civil Rights Act[4] attempted to promote equal employment opportunity as a

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[1]Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).
[2]29 U.S.C. §§201–219 (1988).
[3]40 U.S.C. §§276a–276a-5 (1988).
[4]42 U.S.C. §2000e (1988).

way to realign income levels and living standards skewed by race. The rise of the employer welfare state in the 1980s has been characterized by efforts to use the workplace as a way of attempting to solve larger, often noneconomic, social problems.

The Immigration Reform and Control Act is an example of legislation attempting to promote a broad public policy through the workplace. As mentioned earlier, the law is premised, at least in part, on the theory that employer sanctions for hiring undocumented workers will decrease the demand for undocumented workers and ultimately stem the flow of illegal immigration. According to Senator Alan Simpson, the Senate sponsor of the law: "The primary incentive for illegal immigration is the availability of U.S. employment. In order to reduce that incentive, the bill makes unlawful the knowing employment . . . of illegal aliens . . . and establishes appropriate penalties for violation."[5] Senator Lloyd Bentsen opposed the law and stated in the Senate debate: "I do not believe it is the responsibility of America's business community to enforce our immigration laws."[6]

The use of the workplace to address social problems is not limited to Congress. On January 23, 1991, by a 4–3 vote, the Miami Beach City Commission passed legislation authorizing the police department to send a one-page form letter to the employer of every person arrested on drug charges.[7] The law was proposed by Miami Beach Chief of Police Philip G. Huber who was frustrated by the inability of the criminal justice system to serve as a meaningful deterrent to illicit drug use. "People weren't afraid of going to jail [but they] were afraid of their employers finding out they used drugs, and of losing that thing that was most valuable to them, their employment. . . . We looked for the hammer and what we found were the employers."[8] The law is currently being challenged on constitutional grounds because, among other things, notices are sent out upon arrest rather than upon conviction.

If this approach were applied in other contexts, could employer notices be sent based on DWI arrests, speeding tickets, defaults on student loans, delinquent taxes, unpaid parking

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[5]131 CONG. REC. S11,242 (Sept. 11, 1985) (Sen. Simpson).
[6]132 CONG. REC. S16,879 (Oct. 14, 1986) (Sen. Bentsen).
[7]Treaster, *Miami Beach's New Drug Weapon Will Fire Off Letters to the Employer*, N.Y. TIMES, Feb. 23, 1991.
[8]*Id.*

tickets, or overdue library books? Is it reasonable or efficient to make private sector employers the sanctioning authority for civic indiscretions?

The workplace also is at the center of our country's income transfer system. Individuals who are unable to continue work because of a work-related injury or illness are eligible for Workers' Compensation. Individuals below retirement age who are totally disabled and unable to work are eligible for Social Security Disability. The recently unemployed are eligible for Unemployment Insurance. And retired older workers are eligible for Social Security. These work-based social welfare programs provide relatively more generous and less stigmatized benefits than those available to the chronically unemployed and poor: Aid to Families with Dependent Children, general relief, food stamps, and Medicaid.

Perhaps the greatest impetus for social welfare activity by employers is the inability of government or other institutions to provide essential services. Childcare, eldercare, remedial education, substance-abuse rehabilitation, wellness programs, and health insurance are examples. In some cases the government mandates that employers provide certain programs or benefits. In other cases employers voluntarily step in to fill a void. This employer role is likely to continue to expand. For example, by the year 2000 it is estimated that 52 percent of U.S. employers will provide childcare subsidies, including 35 percent with on-site or near-site care services.[9] About two to three percent of U.S. companies already offer some type of eldercare, and the number is expected to increase greatly as the number of elderly increases.[10] By the year 2000, 85 percent of jobs will require at least a high school education, but the current graduation rate is only 72 percent and many of the graduates lack basic skills.[11] As a result, several large companies have embarked on remedial education programs to pick up where the schools have left off.

Adverse Consequences

It may be that, like public schools and the military, the large numbers of people passing through the employment system

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[9]Smollen, *Corporate Childcare Options*, EMPLOYEE ASSISTANCE, Apr. 1991, at 24.
[10]Walker, *Eldercare*, EMPLOYEE ASSISTANCE, Apr. 1991, at 32.
[11]Labor letter, WALL ST. J., Apr. 16, 1991 at 1, col. 5 (quoting Christine Keen of Society for Human Resource Management).

make it an ideal point to reach large numbers of people and effect social policies. Nevertheless, I would argue that employer interests should be limited to the workplace. When employers extend their sphere of concerns too far (voluntarily or involuntarily), adverse consequences usually result. The two best (or worst) examples are drug testing and health insurance.

Drug Testing

Large scale, employee drug testing was recommended in the 1986 report of the President's Commission on Organized Crime. It is primarily a law enforcement strategy. Unable to cut the supply of illegal drugs, the Commission theorized that if all drug users became unemployable, demand would be cut. The battlefield of the war on drugs was shifted from the coca fields, illegal laboratories, border crossings, street corners, and prisons to America's workplaces. Among major corporations only 10 percent used drug testing in 1982; by 1985 the figure had reached 25 percent; by 1988 it had reached 48 percent; and by 1990, 81 percent of companies with over 25,000 employees performed at least some drug testing.[12]

From the start, there was an unmistakable political component to drug testing in both the public and private sectors. With a media-conscious "war on drugs," much drug testing was initiated by government entities and private companies because the failure to do so might be perceived as condoning drug use. This sentiment was aptly expressed by President Reagan: "I have heard critics say employers have no business looking for drug abuse in the workplace, but when you pin the critics down, too often they seem to be among the handful who still believe that drug abuse is a victimless crime."[13] This statement, of course, miscasts the issue as simply that a person (or company) either supports drug testing or drug taking. With the issue thus framed, many companies felt compelled to adopt drug-testing programs; they thought that failure to do so could be viewed as being soft on drugs or not supporting the "war on drugs." The need to test was not established. The goal of testing was not clear. The effectiveness of testing was unproven. Nevertheless, drug testing became almost a patriotic duty.

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[12]Data Watch, *Employer Drug Testing Programs*, BUS. & HEALTH, July 1990, at 8 (citing the Conference Board).

[13]*Workplace Next Battleground in Drug Crusade, Reagan Tells Meeting*, 6 EMPL. RELS. WEEKLY 205 (1988).

Many employers who rushed into drug testing without much thought have faced a variety of problems. Employers are not well suited for the law enforcement role they have been given. Only recently have some companies begun to realize that drug testing is a very expensive and often ineffective way of dealing with substance abuse. It may undermine labor-management relations, impede employee recruitment, promote litigation, and divert attention from other substance-abuse problems. For employees there is the invasion of privacy, the air of distrust, and the constant threat that a positive drug test (accurate or inaccurate) will have long-term effects on their future employability.

Drug testing has given rise to a substantial amount of litigation under various theories. Challenges have been brought by applicants and employees based on constitutional law, wrongful discharge, discrimination law, labor law, and collective bargaining agreements. The results have varied widely. Employers have been sued for defamation, invasion of privacy, intentional infliction of emotional distress, negligence, and other alleged torts; in some cases the plaintiffs have won substantial awards.

In addition to these costs, one must consider the actual costs of performing the testing itself. With a cost of $100 per year per employee tested and with positive test rates in the public and private sectors often ranging between 0.1 percent and 1.0 percent, it costs between $10,000 and $100,000 for every positive result. According to a 1991 report by Representative Gerry Sikorski, the federal government's drug-testing program costs $77,000 for each federal employee who tests positive for drugs.[14]

Health Insurance

Health insurance raises slightly different issues. Employer-provided group health insurance became common during World War II because these fringe benefits were not subject to wartime wage and price controls.[15] Thus, employees (often union members bargaining collectively) were given health insurance coverage when increasing wages was not possible. Perhaps the most attractive feature to employees of health insurance as

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[14]*Federal Drug Testing Said to Produce Little Benefit Despite Its High Costs*, 5 Nat'l Rep. on Substance Abuse (BNA), Mar. 27, 1991, at 1.

[15]*See* Rothstein, Medical Screening and the Employee Health Cost Crisis, 195 (Washington: BNA Books, 1989), at 195.

an employer-provided fringe benefit was the tax-favored treatment of benefits. Employer contributions to a group plan were and still are deductible to the employer as a business expense and, more important, are excluded from the taxable income of the employee. Consequently, health insurance provides a greater after-tax gain to employees than comparable (taxable) wage payments.

Today 85 to 90 percent of Americans receiving health benefits are covered under group health insurance with 68 percent under employer-provided plans.[16] Not only does the availability of health insurance through an employer represent a tax saving to employees, but also for many workers it is their sole opportunity to obtain health insurance. Without employer-funded or employer-subsidized group health insurance, many lower paid workers would be unable to afford the premiums on an individual health insurance policy or would be uninsurable because of their medical condition. In the last five years employer health care costs have risen 15–20 percent a year, to over $3,200 per year for each employee.[17] In an effort to reduce expenditures, employers have shifted greater costs to employees and have attempted to hire and retain only individuals who are seen as low cost users of health benefits.

The *Philadelphia Inquirer* contained a story about a woman named Janice Bone, a payroll clerk at Ford Meter Box Company in Wabash, Indiana, who was fired because a urine test was positive for cotinine, the metabolite of nicotine.[18] She had been terminated because she smoked cigarettes at home! This violated a company policy against smoking on or off the job. Why have such a policy? Nonsmokers have lower health insurance costs. Some six to ten percent of companies will not employ cigarette smokers. Other companies monitor their employees' weight, blood pressure, cholesterol levels, blood sugar, drinking, diet, and hobbies. Still others screen out employees on the basis of the health status of dependents. According to one consultant: "As health care costs go up, what's justifiable goes up."[19]

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[16]Office of Technology Assessment, U.S. Congress, Medical Testing and Health Insurance, 3 (1988); S. Rep. No. 360, 100th Cong., 1st Sess. 20 (1988) parallel cite.

[17]Kelly Communications, *Medical Benefits*, Feb. 28, 1991, at 4 (citing Foster Higgins & Co.).

[18]Sipress, *Private Lives Becoming Employers' Business*, PHILA. INQUIRER, Mar. 31, 1991, at A1, col. 1.

[19]*Id.* at A8, col. 1.

Increasingly detailed medical screening and consumption-based cost containment strategies place great strains on employers, employees, and society. *For employers*: Health care costs continue to rise, but the law prohibits discrimination against otherwise qualified individuals with disabilities. Employers offering health insurance are subsidizing employers that do not offer health insurance by covering spouses working for those other companies; by paying higher provider charges (to offset more uncompensated care); and by paying higher taxes (to support the medically indigent). *For employees*: There is more medical screening and potential for employer intrusion into personal health and lifestyle. At the same time, health benefits provide less coverage, less freedom of choice, higher co-payments, and higher deductibles. *For society*: People who are the worst health risks and the lowest paid tend to be uninsured and require government assistance. The total number of uninsured continues to rise.

One proposal to deal with the problem of access to health care would require all employers to provide their employees with health insurance. Some congressional supporters of universal health insurance are apparently convinced that the only politically feasible way of extending coverage to the 24 million workers now without it (and eventually to the additional 13 million uninsured who are unemployed) is to mandate employer health benefits. This legislative legerdemain, health insurance without government involvement or expenditure, reflects a probably accurate but nonetheless cynical view of the American public: Only a social program offering something for nothing (i.e., no new taxes or increases in the budget deficit) has a chance of gaining sufficient public support.

Despite their public rhetoric, both proponents and opponents of mandated benefits know that "there is no free lunch." The costs of mandated benefits ultimately will be borne by consumers, shareholders, and employees—if not taxpayers as well. Some opponents assert that mandated benefits constitute an indirect health insurance tax on employers and undermine the competitiveness of American companies. Apart from the economic consequences of mandated benefits, there could be pernicious civil rights consequences. Requiring reluctant employers to provide health insurance for employees could trigger an unprecedented wave of medical screening and risk-based exclu-

sions from employment. One possible consequence could be the creation of an underclass of medically unemployable individuals requiring increased government transfer payments for income support.

Our national policies have put employers in a "no-win" situation on the issue of health insurance. Mandated benefits at the state and federal levels and escalating health costs are an increasing burden on companies. Yet, state and federal discrimination laws, such as the Americans with Disabilities Act, prohibit employers from refusing to hire people with disabilities, including people at risk for health problems. The simple answer is that we need to get employers out of the health insurance business.

Effect on Arbitration

What does all this have to do with arbitration? In short, as the scope of employer responsibilities expands, the scope of labor-management disputes expands, and the range of issues for arbitration expands. A sample of recent arbitration cases in the categories of unilateral changes, contract interpretation, application of external law, and technical issues illustrates the expanding topics to be addressed in the employer welfare state. I have chosen to focus on two of these topics: drug testing and health insurance.

In some recent cases arbitrators have had to rule on whether employers breached collective bargaining agreements by unilaterally requiring blood sugar and cholesterol testing as part of a mandatory health risk appraisal,[20] by switching health insurance from an indemnity plan to a Health Maintenance Organization,[21] by becoming self-insured for medical insurance and limiting coverage,[22] by raising deductibles and co-payments,[23] and by raising the deductible on a prescription drug plan.[24]

In the area of contract interpretation, arbitrators have had to rule on whether an employer was required to pay for the health insurance of an early retiree's spouse,[25] whether maternity leave includes breast-feeding leave,[26] whether an employer could

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[20]Southern Champion Tray Co., 89-1 ARB. ¶8246 (Williams 1988).
[21]Serv-A-Portion, Inc., 88-2 ARB. ¶8615 (Darrow 1988).
[22]Battle Creek Gas Co., 88-2 ARB. ¶8489 (McDonald 1988).
[23]Central Soya Co., 89-2 ARB. ¶8560 (Donnelly 1989).
[24]Village of Itasca, 88-2 ARB. ¶8547 (Cox 1988).
[25]Abbott Ball Co., 89-1 ARB. ¶8258 (Blum 1988).
[26]County of Monroe, 94 LA 845 (Knott 1990).

deny enrollment in a benefit plan on the basis of obesity,[27] and whether a vacuum cleaner for someone with allergies is a "medical appliance."[28]

When one thinks of external law and policy regarding drugs in the workplace, one thinks of the Supreme Court's decision in *Misco*.[29] But, there are other comparable drug issues in arbitration. For example, arbitrators have had to rule on whether random drug testing runs counter to the Fourth Amendment,[30] whether drug testing was mandated by Department of Transportation regulations,[31] and whether Nuclear Regulatory Commission drug-testing policies required the drug testing of office and clerical employees.[32]

Drug testing also raises technical issues needing arbitral resolution. For example, arbitrators have had to decide whether a positive marijuana test justified discharge under a contract provision prohibiting employees from being "under the influence,"[33] whether the proper chain of custody was established for a urine specimen,[34] what to do when two testing laboratories produced conflicting reports,[35] whether urine tests to measure blood alcohol levels were reliable,[36] and whether to accept a grievant's assertion that his positive test result for cocaine metabolite was due to kissing his girlfriend ten days before the test.[37]

Viewed individually, any one of these cases could be considered simply as the usual grist for the mill of arbitration. Taken together, they suggest a pattern of the broadening of arbitral subjects. When one adds the prospects of new legislation or collective bargaining initiatives in family and medical leave, childcare, mandated health benefits, and other areas, then the effects of the employer welfare state do indeed extend to arbitration. I have no doubt that arbitrators have the expertise to resolve these kinds of disputes. The broader question, however,

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[27]District 1199P, National Union of Hospital Health Care Employees, 90-1 ARB. ¶8010 (Talarico 1989).
[28]Crown Cork & Seal Co., 88-1 ARB. ¶8161 (Kapsch 1987).
[29]United Paperworkers v. Misco, 484 U.S. 29, 126 LRRM 3113 (1987).
[30]Southern Cal. Rapid Transit Dist., 89-1 ARB. ¶8117 (Jones 1988).
[31]International Union of Operating Engineers, Local Union No. 351, 88-2 ARB. ¶8318 (Williams 1988).
[32]Utility Workers Union of Am., Local No. 387, 89-2 ARB. ¶8406 (Fraser 1989).
[33]Roadway Express, 87 LA 224 (Cooper 1986).
[34]Amalgamated Transit Union, Local 1433, 87-2 ARB. ¶8510 (Speroff 1987).
[35]Pabco Gypsum Co., 90-1 ARB. ¶8054 (Weiss 1989).
[36]Chase Bag Co., 88 LA 441 (Strasshofer 1986).
[37]GLI Holding Co., 90-1 ARB. ¶8157 (Heinsz 1989).

that we need to consider is what are the societal consequences of ever expanding employer responsibilities.

Comment—

George H. Cohen*

Introduction

It is always a pleasure to address the members of the National Academy. However, I can't help but recollect that the last time I did so—six years ago at your Annual Meeting in Seattle—I was hoodwinked into volunteering to make a presentation captioned: "The Professional Responsibility of Advocates in Arbitration." It would be impossible at this late date to try to recapture the emotional pain and suffering I experienced in preparing for that esoteric event. But this much rings clear even today: I ended my talk with this declaration: "One final note, if you ever invite me to address the Academy again, please let it be on a subject of some substantive significance."[1] My frame of reference on that occasion was the fact that my then partner and colleague, Michael Gottesman, had just completed a masterful presentation on a meaty, most worthy subject entitled, "How the Courts and the NLRB View Arbitrators' Awards."[2]

So when my phone rang some six months ago and one of your charmers from the nefarious Program Committee said something like, "George, at the Academy meeting in late May we'd appreciate your being a discussant following a paper on OSHA and arbitration," I was instantly taken in. I have had 20 years of extensive practice before the appellate courts and the Supreme Court on a variety of challenging legal issues of profound practical significance to employees seeking the maximum protection against a never ending list of serious safety and health hazards they are exposed to at their workplaces. To be afforded the opportunity to speak on the interrelationship between OSHA and arbitration inevitably would entail dabbling at the cutting

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[1]Cohen, *The Professional Responsibility of Advocates in Arbitration*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1986), at 111.

[2]Gottesman, *How the Courts and the NLRB View Arbitrators' Awards*, in Arbitration 1985: Law and Practice, *supra* note 1, at 168.

edge of the law, something to really sink your teeth into. So I quickly told your charmer, "Yes, I'd be pleased to participate at this meeting." In retrospect, I can't remember to whom I had spoken—certainly some Washington-based creature, perhaps a Joe Sharnoff, a Herb Fishgold, or a Rich Bloch (they're all so fungible)—I just can't recall! In any event, I became somewhat queasy when I noted a few months ago that a draft program listed me as a discussant with respect to "Arbitration in the Employer Welfare State." There must be some kind of a printing error—that's what I thought. After having just lived through two terms of Reagan deregulation, why in the world would any red-blooded union lawyer accept the notion that there is any such thing as an "Employer Welfare State," let alone accept an invitation to publicly speak about it?

So I panicked and telephoned Mark Rothstein. He blithely assured me that, as advertised, that is his topic. In an obvious effort to encourage me onward, Mark made a commitment unprecedented in the annals of the Academy: You'll have my paper on your desk on or before May 1st! Thus, there was no turning back.

And, in fact, that paper was delivered in that time frame. Over the course of the ensuing several evenings, I skimmed it . . . then I perused it . . . then I read it . . . and read it again. Please accept this disclaimer: I am not a philosopher or a political commentator. Nor could I purport to qualify in those disciplines even as a journeyman discussant on this panel. But my assigned task is to make comments. So here goes.

First, I have been participating, on behalf of the Brotherhood of Locomotive Engineers, in collective bargaining with a multi-employer unit embracing the nation's largest carriers. In those negotiations the carriers adamantly have insisted that unless and until the parties negotiated over and reached agreement on a variety of health care cost containment issues, including the unions' agreement to have employees contribute to the payment of the carriers' insurance premiums, there would be no bargaining about any other term or condition of employment, including wages. In this real world setting the notion that employee health care is the product of an "employer welfare state" is one that I have great difficulty in comprehending!

Second, I do agree with Mark's subthesis that if health care costs continue to rise, there is an increased likelihood that at least some employers may feel constrained to screen out applicants on

the basis of various health and/or safety considerations and/or to monitor the health of workers once they are employed. My reaction is that those initiatives are so fraught with public policy considerations that in the long run threshold questions concerning whether a civilized society will tolerate such initiatives will be the subject of Congress' attention.

Let me add another nuance. You should know that several fire departments recently have adopted a policy of refusing to hire any firefighter who is a smoker on a stated ground that is both safety and health related, namely, experience has demonstrated that, over time, firefighters who smoke are less likely than nonsmokers to be able to run up five flights of stairs and then carry a person out of a burning building in the very short time frame available in such emergencies.

I have endeavored to present my brief formal responses to Professor Rothstein's presentation in a format with which some of you may have a passing familiarity:

The Issues

I would like to offer this stipulation of issues: Question No. 1: Is Mark Rothstein truly a member in good standing of the Academy? Question No. 2: If so, should he remain so in the wake of the heresy he has just perpetrated?

Opening Statement

When I look out into the sea of 500 or so faces, my immediate reaction is that there sit en masse the nation's most prestigious arbitrators. But that first impression quickly fades when I ask myself, what do these people do anyway? For any student of arbitral decisional law, the answer is evident: In the scholarly words of Professor Theodore St. Antoine, quoting from a recent award issued under the Major League Baseball Players Association's Regulations Governing Player Agents: You are simply the parties' designated contract reader.[3] The definitive authority for that profound proposition is three law review articles cited by Ted, two of which were authored by, you guessed it, the arbitrator himself.

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[3]Major League Baseball Players' Association—Major League Baseball Arbitration Award (GR No. 89-1).

Against this backdrop let me turn to Mark's main theme. Mark has stood in front of his peers and referred to a seemingly endless stream of contract interpretation questions such as whether, with respect to an allergy patient, a vacuum cleaner constitutes a "medical appliance" within the meaning of the health and welfare plan; and whether an employer is required to pay for the health insurance of an early retiree's spouse.

Also, Mark seems to be put off by the very notion that arbitrators will have to deal with what he characterizes as technical issues, such as whether to accept a grievant's assertion that his positive test for cocaine was proximately caused by kissing his girlfriend 10 days prior to the test being administered. And I always believed that arbitrators were adept at resolving—or finessing—credibility issues!

After whetting your appetites for these fascinating arbitral issues, Professor Rothstein had the audacity to suggest that this audience should view this spate of activity as a troubling development. My friends, there must be some self-destructive tendency at work here. My countertheme is that to the die-hard, full-service arbitrator it matters not how or why the disputed provisions found their way into the collective bargaining agreement.

In any event, let me allay your fears as to what awaits you were you to be selected to serve as the contract reader in any such dispute. I have dutifully reviewed each of the awards that Mark has cited. I am pleased to report that, in general, the cases call for precisely the kind of analytical skills in resolving procedural and substantive disputes that you possess.

As a threshold matter, the cases present procedural questions such as the timeliness of the grievance and whether a party is bound by the stipulated statement of issues or, instead, should be allowed to amend that stipulation.[4]

Insofar as the merits are concerned, once again we are in familiar territory in many respects. The focus of those awards is on issues such as: (1) how broadly should the particular management rights clause be read; (2) what meaning should be attributed to a companion clause in which management preserves the right to change its existing health and welfare program, provided that no employee suffers a reduction in benefits; and (3) what significance should be attached to the particular "zipper" clause negotiated by the parties.

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[4]Central Soya Co., 89-2 ARB ¶8560 (Donnelly 1989).

Closing Statement

Accepting Professor Rothstein's thesis at face value and assuming that all these issues have been spawned by a sound heralding an emerging new employer welfare state, the bottom line is that a finely tuned arbitral system should have the wherewithal to cope. Lest anyone forget, when Peter Seitz read the Major League Baseball contract to contemplate a player's right to declare "free agency" after satisfying certain contractual conditions, he paved the way for a revolution in baseball salaries. Some skeptics might have thought that society had been irreparably injured or that the great American pastime could not survive. But this audience knows it was just another day in the humdrum life of a permanent umpire about to be summarily discharged. Friends, this is not a profession for the fainthearted! That is precisely why you are so well equipped to deal with the challenges that lie ahead.

One final note—if you ever again invite me to address the Academy, I beseech you to let it be on a subject of some substantive significance.