CHAPTER 11

NEW ROLES FOR LABOR ARBITRATORS

PART I. WILL ARBITRATORS' WORK REALLY BE DIFFERENT?

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Tony Sinicropi's presidential address and the ALDR (Alternative Labor Dispute Resolution), "If Any," or Beck Committee report highlight the possible areas of change in the world of employment disputes. Although I will concentrate on non-labor-management employment disputes, I am well aware that we have served as arbitrators in a great variety of commercial disputes, and many of us will probably do more of that type of work in the future.

Will our work really be different because of changes in the employment-dispute field? Looking ahead 10 years, my answer is "yes" for at least half of our membership. While we're still on fast forward, let's go to a meeting of the Membership Committee in 2004. They are considering two candidates. One candidate has completed 45 labor-management cases, during the past five years. The other has completed 45 labor-management cases together with an additional 45 employment cases arising equally under the American Arbitration Association (AAA) Employment Dispute Resolution Rules, the Federal Mediation and Conciliation Service (FMCS) procedure for these cases, and by direct appointment from the parties involved.

The first candidate is not likely to be admitted to membership due to an insufficient caseload. Will the second candidate be admitted? I'll give you my best guess at the end of this paper, but, for the moment, let's look at possible outcomes of the alternatives.

If the second candidate is admitted, there will be less pressure for a separate organization of employment arbitrators. Many active in employment arbitration, in addition to AAA membership, will

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likely be members of the appropriate sector of the Society of Professionals in Dispute Resolution (SPIDR). If that candidate is not admitted, in addition to AAA and/or SPIDR activity, the arbitrator will probably become a member of a new Academy of Employment Arbitrators. The initials AEA may lead to confusion with the American Economic Association, to the possible discomfiture of both groups.

Now, let's look at where our applicant might have received the 45 employment cases, and at some of the factors involved in accepting and hearing these cases. The analysis concentrates on the arena where the case might originate, including individual suits (no written contract), action under a model law, statutory claims based on violations of civil rights, age discrimination, disability, and other legislation; employer-promulgated plans; employment contracts; and representation of unorganized employees by standard unions under the grievance procedure. To the extent that legislation and administrative decision-making results in what has been termed a level playing field, some of the projected changes may be diminished by growth in the traditional labor-management sector. Also, under Heisenberg's uncertainty principle a phenomenon under study is subject to change by the mere fact that it is being studied.

Noncontractual Individual Suits

These suits, frequently by an executive or member of middle management who can afford them, often depend on implied promises in employment conversations or statements in personnel or human resource manuals. The cases have created some erosion of employment at will. However, they are generally limited to the portion of the labor force who can afford to retain counsel or to less financially advantaged individuals who are represented by attorneys willing to take these cases on a contingency basis.

The dramatic success of a few of these suits has led to the belief that management would become interested in protecting itself from high awards by supporting legislation covering dismissals, provided that such laws had built-in limitations as to remedy. Such management support has not occurred on a widespread basis, but uniform/model legislation has emerged and will be discussed below. Some of these cases will be handled under systems like the AAA Employment Dispute Resolution Rules, but direct appointments by the parties on a nonplan, noncontractual basis will

probably take place in a few situations. California has been the exception in that contesting parties there have been willing to take this type of case to arbitration, either directly or as a result of pressure from the judiciary.

Model/Uniform Statute

The National Conference of Commissioners on Uniform State Laws (National Conference), with the able assistance of Ted St. Antoine and the Academy observer participation of Arvid Anderson, drafted a Uniform Employment Termination Act in 1990 and 1991. The Act was subsequently adopted by the National Conference as a Model Act. It provides for arbitration of employment disputes on a "good cause" analysis basis and for arbitrators appointed under a state specified system to determine whether an individual has the right to reinstatement and/or monetary payment. Thus far, the only state that has adopted the statute is Montana.

Why so little interest by the states? My theory is that there is considerable concern on the part of workers regarding arbitrary action by management, particularly in the area of dismissal, but interest in protection has not crystallized as a coherent demand. I believe this is true in part because many workers incorrectly assume such protection is already present. Those among us who have taught courses in industrial relations at the college or university level have probably had the experience early in the semester of a student coming forward and inquiring on behalf of someone who has recently been arbitrarily discharged. The student wants to know how to file a claim under the employment legislation they believe to be in place. After ascertaining that no statutory violation is alleged, the students are usually shocked to learn about the employment-at-will doctrine. I think model or uniform legislation has not received widespread interest by the body politic because they too believe it already exists. As will be seen, employers are increasingly becoming interested in their own plans or individual contractual arrangements. Unions are not opposed to model or uniform legislation, but naturally their primary interest is in organization of the unorganized. Federal legislation has also been proposed but has not won many adherents thus far.

At present, the outlook for great growth in model or uniform state legislation is not high. Should this change, we will have to face

a decision involving our role with regard to legislative designation of a state specified system for administering cases.

As an organization, we have been low key in terms of our public persona. We have limited our intervention in the courts to amicus briefs when an important arbitration principle is involved. However, should interest in state-by-state adoption of a model act grow, I would not be surprised to see retired judges in the state involved lobby vigorously to be named as the arbitrators to hear these disputes. Some judges have become active in hearing employment disputes under the auspices of new appointing agencies, frequently profit making. Difficult decisions are ahead for us in the event model or uniform state plans go into a growth phase.

When it comes to hearing cases under model laws, I have little doubt that most mainstream arbitrators would choose to participate.

Employment Law

The legislative history of the past 30 years in our field has emphasized employment law, that is, protection of the individual from discrimination because of color, sex, age, disability, and so on. We're all familiar with two lead cases. The first of these, *Alexander v. Gardner-Denver Co.*,[1] provided that a union-represented employee with a claim under Title VII of the Civil Rights Act of 1964 was not precluded by arbitration from pursuing a statutory claim. In the other case, *Gilmer v. Interstate/Johnson Lane Corp.*,[2] a nonunion employee signed a registration statement with the New York Stock Exchange calling for arbitration of employment disputes (known as a U-4 agreement). The agreement was held to preempt litigation.

In the 1990s the federal government has moved ahead strongly in the alternative dispute resolution field. The Administrative Dispute Resolution Act (1990) permits agencies to use alternative dispute resolution (ADR) procedures if the parties agree. Two additional acts encourage ADR, including arbitration: the Civil Rights Act of 1991 and the Americans with Disabilities Act (1991).

Pilot programs are growing in government. For example, the Equal Employment Opportunity Commission (EEOC) has a program in Houston, Philadelphia, New Orleans, and Washington,

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[1]415 U.S. 36, 7 FEP Cases 81 (1974).
[2]500 U.S. 20, 55 FEP Cases 1116 (1991).

D.C. which emphasizes mediation. The driving force is the 100,000 cases in the EEOC backlog.[3] The Department of Labor (DOL) has a regional ADR approach in place for civil and criminal cases under the DOL jurisdiction. New York State amended its Human Rights Law in 1991 to permit voluntary arbitration of complaints.

The early emphasis in many of these programs is on mediation. Mediation is perceived, at least by some parties, as less threatening to their interests than arbitration. Will arbitration as an ADR tool grow in connection with statutory cases?

I anticipate that we will see growth, but I expect it to remain largely on a voluntary basis. A limiting factor for management is an individual's opportunity to have two bites of the apple, although some early decisions under the Americans with Disabilities Act suggest a more terminal role for arbitration in these disputes. In any event, the opportunity will be present in the next decade for more of us to become mediators and arbitrators in disputes involving statutory claims, and this will undoubtedly be a growth area for arbitrators. The arbitration work will not be new since we deal with the equivalent of statutory claims under a no-discrimination clause in the labor-management arena. It should be noted that much of the potential traffic in this area may arise under employer-promulgated plans and/or individual agreements or a combination of the two. This topic will be discussed next.

Employer-Promulgated Plans and Individual Employment Contracts

One authority estimates that there are 25,000 cases of alleged wrongful termination pending in state and federal courts.[4] Coupled with six- and seven-figure jury awards in some cases, this caseload provided impetus for decentralized action by individual nonunion employers. We are in the early stage of these experimental approaches, and the one dominant theme is rampant confusion. Confusion exists over procedural and substantive standards for these plans as to who should be the neutral, the role of the neutral, compensation of the neutral, and remedies available.

I will look first at the work of AAA and FMCS in employment disputes. Then, the implications of private plans and contracts will be considered.

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[3]Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 10 Hofstra L.J. 245, 248 (1993).

[4]*Id.* at 249.

FMCS has been in the nonunion employment dispute world since 1978. Given its primary interest in labor-management disputes, it is not surprising that employment dispute activity is a minor focus of the agency. Panels were requested in 22 cases in 1992 and in 33 cases in 1993. A major contribution FMCS has made is to establish standards that must be met before FMCS will provide the parties with a list of arbitrators. These standards include the requirements that an employee must have a voice in the selection of the arbitrator and be able to have an advocate of the employee's choosing.[5]

While there is little reason at present to expect major growth in employment arbitration activity at FMCS, the opposite is true of AAA. In 1991 AAA issued new Employment Dispute Resolution Rules (AAA Rules). These rules fall under the commercial section of AAA activity. Commercial arbitration is AAA's growth area contradistinct to labor cases. All AAA programs other than labor (e.g., general commercial, securities, construction, textile) are labeled commercial. In 1960 there were 820 commercial cases and 3,231 labor cases. Labor cases were up to 17,000 in 1980 while commercial cases rose to 8,000. In 1992 labor cases numbered 16,000 and there were 13,000 commercial cases. The greater sum of money in question on the average in commercial cases vis-à-vis labor cases has led one AAA official to remark that commercial cases are now the "plain vanilla" of AAA work.

The AAA Rules have aroused strong adverse reaction on the part of some neutrals. A key complaint is that the rules do not offer the same protection for a complainant as exists under FMCS procedure. AAA Rules provide:

> Cases may be initiated by joint submission in writing or in accordance with provisions in an employment manual or employment agreement. . . .

An aspect of the rules, which does not appear to have merit, is that they may place an unfair limitation on a complainant's ability to select a neutral or an advocate, because the employer's rules may not offer this protection. However, the AAA Rules, as with commercial cases generally, require that such decisions are to be made by each party.

AAA Rules provide for equal payments by both parties unless other arrangements are made. Frequently an employer-promul-

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[5]Undated form letter from the FMCS, signed by Jewell L. Myers, Director of Arbitration Services.

gated plan provides that the employer pays the full fee of the neutral arbitrator. This has raised a question in the minds of some neutrals about the propriety of these plans. Some newer employer-promulgated plans offer the grievant an opportunity to pay any or all of the grievant's share of the arbitrator's bill.

The first full year of experience under AAA Rules was 1993. An informal count of cases by AAA showed a total of 420 cases administered by AAA nationally. Los Angeles led with 50, followed by New York City 41, Chicago 32, and Detroit 25.[6] There is a possibility of undercounting since, for example, Philadelphia was listed with three cases whereas local officials believe the number is closer to 20. A possible explanation is that some employers used the regular commercial rules for their employment disputes instead of the new AAA Rules, and hence their cases were not counted. In any event, it is clear that employment disputes at AAA are roughly where commercial disputes were 30 years ago, and time will tell if the growth will be parallel.

Let's look at sources of confusion involving other portions of the AAA Rules. My understanding is that the Academy's Designating Agency Liaison Committee worked out an arrangement whereby labor-panel arbitrators were automatically placed on the employment dispute section of the commercial roster if requested. New York AAA officials have indicated that, in admitting arbitrators to the employment dispute panel, they look for employment law and human resource experience. To paraphrase Shakespeare, is not a discharge case an employment dispute? Apparently the answer lies in the difference between a discharge raising a statutory question and one that does not. AAA seeks an arbitrator prepared for both types of cases.

I spoke with six AAA regional vice presidents. They were generally supportive of the notion that Academy members were qualified to handle employment dispute cases, but they agreed that they were unaware of any automaticity in assignment to the employment dispute panel. AAA staff split down the middle on the desirability of listing Academy members automatically as arbitrators in employment cases because they had arbitrated in the labor-management arena. Three individuals suggested that a separate biography for employment disputes should say nothing about labor relations because attorneys with nonunion plans did not want to deal with arbitrators applying just cause standards. Others

[6]Data provided by Robert Meade, AAA Vice President (Feb. 1994).

were comfortable with a labor-management listing. I believe these differences reflect varied approaches by partisan attorneys active in the field.

I talked with attorneys involved in assisting employers develop employment dispute plans at nonunion companies and found major divisions among them in their approaches to employer plans. Some say they are not happy with the application of just cause in these plans and recommend to employers that they limit the arbitrator's role to a determination of whether the employee violated a rule. If so, the arbitrator's task is finished and the discipline, whatever it may be, stands. We've all had this type of case, but it is different when the limitation on our authority is negotiated rather than unilaterally determined. Also, this means that the rule, no matter how unreasonable, is not subject to alteration by an arbitrator.

Other advocates want traditional arbitrators to apply just cause. This is true in part because they recognize that many disputes have statutory overtones. If the controversy reaches an administrative agency or a court, they want the record to appear fair and complete. One writer sees an increased role for attorney-arbitrators in these disputes, stating:

> The best answer is often the most obvious—seek out experienced attorneys, knowledgeable with respect to discrimination laws, who will be impartial and fair.[7]

This recommendation also assumes that arbitrators will routinely apply the law to collective bargaining agreements. His approach provides support for those who believe the dispute over the arbitrator and the law has been settled in favor of greater legal involvement by arbitrators.

This same author makes another pertinent point about the use of labor-management arbitrators. He believes that company attorneys should use labor-management arbitrators because we are not accustomed to punitive damages. Our concept of make-whole typically does not extend beyond back pay and benefits, and this may lead some advocates to prefer experienced labor-management arbitrators.

Plaintiffs' attorneys reverse the picture. Some want labor-management arbitrators with their concept of just cause. Others

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[7]Spelfogel, *supra* note 3, at 265.

seeking damages favor an arbitrator not limited by a make-whole remedy. This emphasis on money may mean that our remedies will become more European, that is, cash awards in successful cases but without reinstatement.

Arbitrator fees have raised another point of confusion. Commercial rules provide for the first day to be pro bono, and limit the fee. The maximum is $500 in New York and a few other jurisdictions, and $400 elsewhere. This practice arose because commercial arbitrators were other business professionals and are performing the service on an occasional basis. Fortunately, the new AAA Employment Dispute Resolution Rules do not have the same limitation.

We often make a distinction between employer-promulgated plans and individual employment contracts. This line will blur as employers with these plans require employees to sign an agreement to arbitrate employment disputes, including statutory claims.

Employment dispute cases are also fertile ground for mediation. Under the AAA Rules the parties are afforded an opportunity to make use of this ADR process. A 1993 informal AAA study shows that mediation was used in about 15 percent of the employment cases with considerable success. Those who wish to participate in the mediation end of this activity (a form of grievance mediation) will find that there is no automatic assumption about our mediation skills. Evidence of formal training/experience in this type of mediation will be required before we are assigned to mediation work in employment cases.

Another aspect of commercial cases applicable to employment disputes is the assumption that there will be an award without an accompanying opinion. While the AAA Rules are silent about study time, my understanding (based on commercial rules) is that, if you want the luxury of study time and/or the issuance of an opinion, this must be negotiated through a tribunal administrator on a case-by-case basis.

It seems clear that, to the extent we handle employment dispute cases under AAA or other appointing agency auspices, there will be a substantial period before the process becomes regularized, and employment dispute cases will provide significant change in the way we do things. It is reasonable to believe that employment cases will grow under AAA and other neutral provider auspices.

Union Representation in Nonunion Procedures

I have elsewhere suggested that unions might consider seeking legislation permitting a new form of unionization, limited to representing employees in the grievance procedure.[8] I recognize that there are strong pros and cons to this approach, and I do not propose to support the desirability of this legislation here. Rather, I emphasize that many of the new employer-promulgated plans include the provision that a discharged employee may select an advocate in arbitration. Use of a union representative or an attorney as the discharged employee's advocate has already occurred under the provisions of some plans. At times the representation has been associated with an organizing drive. There is, I believe, a strong market for a so-called associate union membership for individuals who do not desire collective bargaining but who want protection from arbitrary discharge. A union involved in active organizing where an employer-promulgated plan exists might waive fees in a discharge case because the good will achieved by union representation could help it win a forthcoming election. A union may face a situation where there is little chance of winning an election, but employees may be interested in union representation in the event of discharge. Unions could charge a periodic fee for associate membership status and discharge-representation coverage. They could charge a greater flat fee when the request for coverage comes postdischarge. From the union point of view, this approach could improve access to employees and increase chances for unionization, if only on an associate membership basis.

Nonunion employers are not likely to be pleased at having discharged employees represented by union personnel. At the same time management will generally be aware that the absence of true voice in the selection of an advocate by a discharged employee is an important element of fairness. My expectation is that most plans will provide for employee selection of an advocate.

The appearance of unions as employee representatives under employer-promulgated plans may change the attitude of neutrals who are presently hostile to participation in these plans. When an employer and a standard union both request an arbitrator's services in a discharge arbitration, whether or not the plant is organized,

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[8]Gershenfeld, "A Labor Law Reform Proposal: Grievance Representation in Unorganized Firms," presented at Industrial Relations Research Association Annual Meeting in Boston, Mass., January 1994.

I suspect that most arbitrators will take these cases. Union representation in employment dispute cases could well be among the fastest growing segments in the employment dispute world.

Conclusions

The probability of growth in nonunion mediation and arbitration activity involving employment disputes is strong. The approaches may involve model dispute resolution laws, statutory-based cases, employer-promulgated plans, and employment contracts. The greatest growth will likely involve statutory claims and employer-promulgated plans inclusive of employment contracts. Much confusion exists about the role of the parties, neutrals, and appointing agencies in these plans, but some of this may shake down over the next few years. Our continuing education sessions will be helpful as we seek consensus on minimum standards in these plans for arbitrators who elect to take these cases.

My expectation is that such cases will be a significant part of the workload for at least half of our membership. Some members will choose not to take them, however. Those who accept them will probably be arrayed along a continuum of minimum standards under which they will serve as arbitrators. Our discussions of the issues involved are likely to attract a number of officials from nonunion employers to our meetings. On the surface, much of what we do will look very much like what we have been doing in the past. Closer scrutiny suggests that significant differences both of degree and kind will be present.

Finally, to answer the membership problem I raised at the beginning, I anticipate that one of our new members will be the arbitrator with 45 labor-management and 45 employment cases. That applicant will probably be admitted when we meet at the refurbished Del Coronado Hotel in San Diego in 2004. I look forward to seeing you there.

PART II. JUSTICE AND THE WRONGFULLY TERMINATED

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In the last 20 years at least a half dozen members of this Academy have strongly argued that all employees, whether organized or not,

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