Chapter 10

ARBITRATION IN SPECIFIC INDUSTRIES: THE U.S. POSTAL SERVICE AND SOUTHWEST AIRLINES

I. Final or Fast? The Tension Between Precedent and Procedure in Labor Arbitrations

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Introduction

The U.S. Postal Service is the world's largest organized employer, with more than 650,000 union-represented employees. It is also one of the largest, if not the largest, user of arbitrators' services. Although the nearly 2,800 postal arbitration cases handled in 2007 is much lower than the peak of nearly 7,000 cases in 2001, that is still a lot of cases. It represents thousands of underlying disputes and millions of dollars in dispute-resolution costs. Clearly, the Postal Service, like many other employers and unions, has a strong interest in the cost-effective functioning of its arbitration program. But what does "cost-effective functioning" mean when it comes to the issue of whether or not arbitration decisions should carry the weight of binding precedent in future cases? In other words, in fashioning the most efficient system of arbitration that we can, how should the parties to collective agreements use prior decisions to resolve future disputes?

The answer to this question requires an appreciation of the close relationship that exists between the procedures used that culminate in a decision and the parties' willingness to imbue that decision with the authority of binding precedent. The different arbitration processes in the Postal Service provide a clear example of how the precedential nature of arbitration decisions is directly correlated to the procedures upon which the parties have agreed.

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Final or Fast? "Pros and Cons"

The "Pros" for a System of Binding Precedent

There are substantial advantages to having arbitration decisions be controlling in future cases as authoritative precedent (or serve as "jurisprudence," as it is referred to in Canada). Thorny contractual issues that divide the parties can be put to bed quickly and with finality, rather than be allowed to fester from case to case while advocates try on new arguments before different arbitrators. Gamesmanship is reduced, and respect for arbitral decisions is enhanced. When decisions do not serve as binding precedent, parties are encouraged always to hope for a better result next time. Union politics or management's institutional interests may make it very difficult for either party to give up on an issue when their respective constituencies cannot be told that the issue is authoritatively foreclosed.

Having decisions serve as binding precedent is cost-efficient, as it avoids the expense of re-litigating the same issues over and over again. It also may actually reduce grievance numbers, and the associated costs and workplace tensions, by setting firm rules in place by which both parties know they must abide. Allowing arbitration decisions to be binding in future cases fulfills one of the hallmark benefits of arbitration compared with judicial litigation—the prompt and final resolution of disputes.

The "Cons" of Decisions Serving as Binding Precedent

In light of the salutary advantages noted above, is there any downside to having arbitration decisions be binding precedent? The answer is yes. Not having arbitration decisions serve as binding precedent promotes another of the hallmark benefits of arbitration over judicial litigation—informal and cost-effective decisionmaking.

This latter point is rooted in the fact that arbitrators do render important decisions that significantly impact the employer's ability to operate its business. Particularly in the case of a decentralized employer like the Postal Service, accepting an arbitration decision in one location as binding precedent in another greatly increases the scope and, thus, the impact of the decision. No one should be surprised that neither management nor the union is going to be content to allow ongoing operational or policy disputes to be

resolved in a truncated proceeding with limited presentations by lay advocates. For decisions that are going to establish the future rules with which the parties will be obliged to comply, there is likely to be insistence on the full range of procedural protections that go along with making sure that the case is resolved correctly (from that party's point of view)—which may involve a full panoply of witnesses, multiple days of hearing, attorneys, transcripts, post-hearing briefs, and a carefully written arbitration opinion. One cannot afford to "cut corners" with an award that will have broad future application.

There may be other, albeit related, reasons for not wanting decisions to be precedential. One is the ability to correct arbitration decisions, at least in terms of future application, that really should have been decided the other way. After all, issues frequently arise before arbitrators precisely because they present difficult challenges that various reasonable arbitrators will resolve differently. There have been interesting arbitrator and audience participatory exercises at recent Annual Meetings of the Academy that have borne out this unsurprising notion. And sometimes differing results have nothing to do with the arbitrators, but are instead related to the manner and quality of the advocacy. Moreover, various results from different arbitrators are not always a bad thing, as vetting an important issue through more than one arbitrator may help both the parties and the arbitrators better understand the real issues and impacts at stake.

There are a couple of final matters to consider on this point. One may be inclined to downplay the long-term consequences of a precedential award by pointing out that (1) the parties always retain the ultimate authority to alter the result through negotiations and (2) the courts can set aside arbitration awards that stray too far from the contract. As to the first item, although it is certainly true that negotiations present a potential vehicle for making such changes, this possibility is often illusory. The leverage given to one party by the authoritative, binding decision frequently is too great, and the raised expectations of the constituencies of either party for continuation of the result are too strong, so that the attempt to "negotiate out" of such a result is either a complete nonstarter or is only attainable at an impossibly steep price. As to the second item, there really is no "appeal" of an arbitration award to the courts, but only some very limited bases upon which awards can be vacated. The "mere" fact that an award is incorrect

is plainly not a sufficient basis for judicial action.[1] In short, instilling an arbitration decision with the power of establishing binding precedent is no small matter, and it can have a dramatic effect on the procedures and processes that the parties will consider adequate to litigate that case.

Preliminary Conclusions

There is a strong correlation between the formality of arbitration proceedings and the degree to which the parties will be willing to accept the decision as binding precedent in future cases. This relationship logically flows from competing interests shared by the parties that are inherent in dispute resolution processes—namely, the desire to resolve disputes cheaply and expeditiously versus the desire to have procedures in place that ensure high-quality, "correct" decisionmaking. A principle occasionally spoken of in arbitral circles is that it is sometimes more important for an issue to be resolved quickly and finally than absolutely correctly. Although this principle no doubt holds some force, it is also true that sometimes it is more important to get the best decision possible no matter how long it takes. To think otherwise is really to diminish the impact that arbitration decisions have.

Accordingly, if an arbitral decision is going to have binding future consequences, it is reasonable to expect that the proceedings will be conducted in a manner more toward the formal end of the hearings spectrum. Conversely, the parties can be expected to be much more willing to streamline the arbitration process for decisions that bring finality to the pending matter but will not impact future cases.

But, how does an appreciation for this tension of competing interests play out in the real world? Does this correlation between precedent and procedure actually exist? As discussed below, a review of the arbitration processes in the Postal Service provides a striking illustration of the direct linkage between the procedures that the parties have agreed to follow and the extent to which the decisions may be used to affect future cases.

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[1] *E.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("a court should not reject an award on the ground that the arbitrator misread the contract…, that a court is convinced he committed serious error does not suffice to overturn his decision").

Procedure and Precedent in the Postal Service

Arbitration Structure in the Postal Service

Fundamentally, there are three basic arbitration processes in the Postal Service, denominated as "expedited," "regular," and "national." (To some extent, this is an oversimplification of the postal arbitration structure, but it is an ample description for illustrating the points being made here.) True to its name, expedited arbitration places a priority on speed over process. Hearings are expressly designated as "informal," with no briefs, transcripts, or formal rules of evidence. Hearings should take no longer than one day, and arbitrators must issue decisions within 48 hours of the close of the hearing. Only a "brief, written explanation" of the result by the arbitrator is expected. Such decisions are final and binding in the pending case, but the parties have expressly agreed that they do not serve as precedent of any kind. In fact, they cannot even be cited in any future proceeding. Lesser discipline and certain individual contract claims may be heard in expedited arbitration.

Regular arbitration involves a higher level of procedure. There is no statement in the contract about their being "informal" or how long the hearings should be. Post-hearing briefs and transcripts are not "normally" the case, but they may be used in certain circumstances. Arbitrators are given 30 days to issue their awards, and they are expected to write a cogent decision. Even so, these decisions do not serve as precedent that binds future arbitrators. However, they may and routinely are cited in subsequent cases for their persuasive value. As such, a body of decisions is established that serves an important role in guiding, but not binding, arbitrators in future cases. Terminations, other serious disciplinary actions, and general contract application disputes are heard in this process.

The authority of binding precedent is limited to those decisions issued in national-level arbitration. There, transcripts and post-hearing briefs are utilized without exception. All cases are litigated at Postal Service national headquarters. Only "interpretive issues of general application" are heard at this level. Intervention by other postal unions is not uncommon and rarely opposed. When a choice has to be made, time-efficiency may be sacrificed in favor of ensuring a full presentation of issues and arguments. National arbitrators are given more time to issue their awards,

are paid more, and carefully written, well-reasoned decisions are expected. Consistent with the primary purpose of national arbitration, the parties' attention in these cases generally is more focused on the future impact of the decisions than on pending remedial actions.

Rationale and Application

As can be seen from the discussion above, the structure of the arbitration program in the Postal Service reflects the "sliding scale" in which the formality of the hearing procedures increases with the degree to which the parties are willing to invest the decision with future application. National arbitration establishes firmly applicable, binding precedent and is conducted with the most complete set of litigation attributes. Regular arbitration, which really serves as the "default" arbitration mechanism, has flexible procedures to accommodate a variety of cases. Those decisions may be cited in later proceedings, but are not binding. Expedited arbitration has minimal procedures, and the parties affirmatively preclude those decisions from even being mentioned in future proceedings.

Given that this "sliding scale" between procedure and precedent exists, the next question is, does it make sense? I think it does. Especially in the context of an employer with a large number of workplace disputes, arbitration must help serve the twin purposes of (1) interpreting contract terms to clarify the obligations negotiated by the parties, and (2) getting individual disputes resolved and over with. Every arbitration, however, does not have to be structured to equally fulfill both needs. Thus, national-level arbitration has the most careful and deliberative of processes because those decisions have far-reaching consequences. At the other end of the scale, expedited arbitration is geared to resolve large numbers of disputes quickly and efficiently, and the parties have designed faster, cheaper procedures because they do not have to worry about any long-term consequences from the decisions. Regular arbitration may be seen as occupying an intermediate position on the scale both with regard to procedure and the impact on future cases. With a large employer like the Postal Service, the ability to funnel cases to the appropriate arbitration level enables the parties to strike the proper balance between resolving individual grievances promptly and setting future rules carefully.

Final Remarks

In his presentation during Thursday's session of the 2008 Annual Meeting, Chief Justice Warren Winkler of the Ontario Supreme Court spoke of the need for a "rule of proportionality" with regard to the procedures used in judicial litigation. He expressed the concern that judicial litigation had gotten so elaborate and expensive that routine legal disputes were effectively precluded from being part of the system. Legal mechanisms with procedures "proportional" to the claims at issue were required; otherwise, access to justice was being denied.

Chief Justice Winkler's comments apply to labor arbitration as well and dovetail closely with the above-discussed correlation between arbitration procedures and binding precedent. The calibration of arbitration procedures with the decision's precedential value allows for the parties to design an expedited arbitration process that results not only in a cost-effective dispute resolution system, but also enhances employees' "access to justice" on their workplace disputes. Absent expedited arbitration, employees' minor disputes would be far less likely to be heard in a timely manner, if at all. Applying the "rule of proportionality" to the arbitration process demonstrates that multiple, competing interests can be served while addressing even a complicated set of dispute-resolution needs.

Union and management representatives invariably will remain more insistent on the full range of hearing procedures for those cases that will have future consequences, and they will be more interested in minimal, speedy processes for those cases that do not. However, striking the best balance in developing arbitration programs will always require the judgment of the parties in their own workplace setting. Continuing to use the Postal Service as an example, one could ask whether more cases should be directed to the expedited process in order to get them resolved more promptly. On the other hand, perhaps the national arbitration program should be more vigorous in establishing more binding precedent to be followed. The parties at the Postal Service and elsewhere will necessarily sort through these types of considerations. But as they do, the linkage between procedure and precedent is likely to remain. Recognition of this relationship should not be regarded as a limiting factor, but rather as one that opens

up the ability to develop arbitration systems that serve the multiple needs of the parties.

II. Southwest Airlines

Robert B. Moberly* and William McKee** moderated a panel discussion of the state of labor relations at Southwest Airlines (SWA). Mr. Moberly introduced the topic by noting that consumer satisfaction with airlines has dropped to its lowest point since 2001, according to the University of Michigan's Consumer Satisfaction Index. Customer complaints include lost luggage, late or cancelled flights, overbooked flights, and charging extra for premium seats and checking bags. However, Southwest Airlines is the only one of seven major airlines with a high customer-satisfaction score, and has led its competitors in customer satisfaction for 15 years. The founder of the Index states that Southwest "gets people to their destination with their luggage, and their employees feel like they're part of the organization."

Moberly noted that MIT Professor Tom Kochan recently was interviewed by the *Wall Street Journal* about his forthcoming book on labor relations in the airline industry. When asked why employee relations are important, he stated, "a high level of engagement and a good labor-relations system are the keys to increasing productivity and service quality. And productivity leads to profitability." When asked whether any airlines are getting this right, Kochan stated, "The premier example . . . is Southwest Airlines, which happens to be the most unionized airline in the industry. Southwest gets to low cost by emphasizing improved productivity through loyalty on the part of employees, who stay a long time and operate a system that maximizes employee ideas and discretion solving problems and achieving financial objectives. . . . Southwest is a low-fare competitor, and they've had high-quality" jobs, and their employees are among the highest-paid in the industry.

Mr. McKee commented on his service on permanent panels with SWA and two TWU locals. He also recalled his first two hearings with SWA. During the first, which was held in a room lined with

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