

WHAT ARBITRATORS DO

Arnold M. Zack

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Each one of us will answer the question of what do arbitrators do, of necessity from our own experience. With rare exception we all run our hearings alone, and we all write our decisions alone¹. We never get a chance to see how other arbitrators run their hearings or to observe or share in their thought processes leading to decision making and the writing of opinions to support those decisions. We also develop our idiosyncratic view of what we think all arbitrators are *supposed* to do, and have a firm view of our responsibilities to the grievant, to the advocates, to the parties, to those who negotiated and signed the collective bargaining agreement under which we were hired.

In meetings like this we proclaim from how we learned the craft and from our personal experience what we think is the preferred practice we all should follow to achieve higher standards for our profession, thus helping the parties and perhaps even society. US arbitrators with our history and responsibility in the pursuit of justice have a different history and responsibility than do arbitrators in Canada whose responsibility aims at protection of law as well as justice. My comments assume a US practice.

That US model has changed over the years since before the passage of the National Labor Relations Act, when it was first embraced by industry as a way to get minor workplace disputes out of the way, and even since the NLRA and the the Steelworkers Trilogy which gave our process congressional and judicial endorsement. And the model continues to change. Arbitrators who do employment arbitration have a different perception and experience with the process than those who do union-management arbitration and we are all now confronted with the question of how the process of arbitration will continue to change as administrative, judicial and perhaps even legislative intervention becomes ever more frequently in the process.

In this session you will get three or more perspectives on what US arbitrators do or should do. I think my most helpful contribution would be relating my view of what arbitrators do followed over the sixty years since I rendered my first decision in 1958. That genesis occurred before many of you were even born and was molded by my earliest connections and mentors. My Dad had been counsel to the House Labor Committee and had helped draft the NLRA and not surprisingly went to work to help set up the NLRB. I first worked as a typist for the NLRB in DC right after high school, was favored by MY Dad's friends and found it easiest to progress in the "family

¹ From my decades of holding hearings I can recall only a handful of panels where I was one of three neutral arbitrators: a few state interest panels, and a half dozen Presidential Emergency Boards,

business”. When I entered law school in September 1953, I signed up for a seminar on labor arbitration taught by a short rotund balding law teacher at Yale, its new Dean, Harry Shulman.

Harry like other labor economists and labor law teachers of the era was called on by the few employers and unions who embraced arbitration for help to avoid greater workplace unrest, and who were looking for an honest broker to regularly help them settle their disputes, as a permanent umpire. He did that for the Ford Motor Company and the UAW. Harry Shulman, George Taylor of Wharton, Ben Aaron of UCLA, Archibald Cox of Harvard, and Robben Fleming and Nate Feinsinger of U of Wisconsin, Paul Douglas of U of Chicago were among that group of acceptable knowledgeable academics. Others, who had served in a similar role with the War Labor Board minimizing workplace disputes to avoid war effort disruptions, like Saul Wallen, David Cole, Bill Simkin and Wayne Morse hung out shingles as arbitrators after the war. Although early identified as *arbitrators* their role was much more fluid, focusing on mediation, and resorting to decisions only when the parties could not negotiate resolutions. Then as now, parties often sought an arbitrator’s decision to relieve the internal political pressures often triggered by suspensions and terminations.

In 1955, a month before he passed away from Cancer, Harry Shulman delivered the Holmes Lecture entitled “Reason Contract and Law”² at Harvard Law School. His paper has been provided for attendants at our Austin Meetings. Yes, it is more than six decades old, but it is still highly instructive as to what those early pioneers in our field thought was the responsibility of arbitrators. The paper illuminates what arbitrators at the genesis of our trade felt the parties expected of them to “fill in the cracks”, to interpret and apply their negotiated CBA in a way that would get disputes “out of the way” through a reasoned and fair process. The paper guided my early sense of responsibility to the process and what is still what I believe should guide us now. In many respects it answers the question, for me, as to what arbitrators SHOULD DO now. He described the basic tenets of our process which I suggest continue to guide us all.

Reliance on the principles espoused in the paper, reinforced by periodic reading even to this day, is, for me, a helpful reminder of the value and goals of the process and our role in it. I think it is still a forceful guide as to how we should exercise our authority in managing the process, particularly his basic conviction that both sides are “interested in the welfare of the enterprise, neither would unashamedly seek contractual commitments that would destroy the other,” and they anticipated that through the grievance procedure both expected that disputes would be adjusted by the application of reason guided by the light of the contract, rather than by force or power.

² digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5629&context=fss

According to Shulman negotiators in collective bargaining earnestly sought to legislate acceptable language to embrace future variables based on their prior experience and the clashing advice of constituents but recognized that

“No matter how much time is allowed for the negotiations there is never time enough to think every issue through in all its possible applications and never ingenuity enough to anticipate all that does later show up; ...there is never... enough time to do an impeccable job of draftsmanship” and the two parties may attach different interpretations to the words they do agree to.³

In describing the arbitrators’ standard for decision making, Shulman warned that in choosing between “conflicting interpretations, each of which is more or less permissible, strict rules or canons of interpretation are neither practical nor helpful. “In the last analysis what is sought is a wise judgment”

Shulman described the arbitrator, not as “a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept” or with a general charter to administer justice for a community which transcends the parties. “He is rather a part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement They are entitled to demand that at least on balance his performance be satisfactory to them and they can readily dispense with him if it is not.” (We all certainly recognize that inevitability).

Perhaps my most remembered quote from the paper is that the arbitrator be sure to hear all contentions either party desires to make; “The more serious danger is not that the arbitrator will hear too much irrelevancy but rather that he will not hear enough of the relevant”.

That contemporary mid 1950’s view of what arbitrators do is what I assumed to be the standard when, after law school, I began as an intern for Saul Wallen. He brought me to the tenth NAA meeting in Santa Monica, in 1957 when the membership was largely composed of those giants I mentioned earlier. The membership then, of about 300 was made up of union and management advocates many of whom also arbitrated, academics who arbitrated part time and a handful of full time arbitrators, working as umpires for big corporations in the steel, auto, rubber tire, rail, and other industries. Three years after that meeting, the US Supreme Court issued its Steelworkers Trilogy embracing and even quoting much of the Shulman paper as its rationale, granting us the legal authority to make final, binding and enforceable decisions.

³ ibid. p1004

The debate was then beginning between the problem solvers from the Taylor wing and the adjudicator wing espoused by VP J. Nobel Braden⁴ of the AAA who argued that arbitrators were like private judges obligated to resolve grievances at arms-length based solely on the hearing room presentation of the parties.

The advent of the Trilogy, three years after my first arbitration case, certainly bolstered my sense of purpose and legitimacy as an arbitrator with its quotations from my teacher Shulman legitimized my embrace of the problem-solving role of the arbitrator standing in the shoes of the parties to render a decision that I felt was one, if given the chance, they would have resolved on their own⁵

How has that impacted on what I do at a hearing? Probably the most pressing concept has been to push the parties to recognize that it is better for them to resolve their problem rather than having me, an outsider impose a decision upon them. That goal is difficult when they hire me not as a mediator but as an arbitrator and when there are certainly many cases where they just want me to just decide to end their dispute.

I often wish I were hired solely as a mediator; it would be a simple manner to gather the parties together, to shuttle between them, to hear their views on the issue and then to nudge them together. But then I would not have the power of decision. I find a bar between doing both, mediating and arbitrating in the same case. I realize that many of our members do both freely and frequently, and that their clients probably expect them to mediate with each team and if unsuccessful then proceed to render a decision assuring finality. I have never been comfortable in donning that two part cloak.

I feel I was hired as an arbitrator, and that it would be unfair of me to exercise my authority to decide a case on the record, when I had the added knowledge of private communication with one side from which the other side was barred. I realize that it might result in a better decision than one based solely on the record. I really think George Taylor should prevail over Nobel Braden. Early on I tried that approach as was routine for the best of the problem-solving giants, but then, I had a case where an airline employee, fired for taking copper tubing from a scrap bin, denied it throughout the grievance procedure. When I undertook to mediate and met privately with the union, the grievant acknowledged having put the copper tubing into the bin and then later removing it. He offered to quit if only the employer would give him a

⁴ J. Noble Braden, Sound Rules and Administration in Arbitration, 83 U Pa Law Review(1934) 189-191

⁵ My faith in and reliance on those giants was reinforced when in 1966 I was hired as Director of the Labor Management Institute of the AAA, to “explore” the prospect of extending collective bargaining to a whole new realm, the public sector. To explore this issue, the prospect of arbitrators encroaching on the prerogatives of the legislative, our authority to usurp governmental authority over employment issues and the like the AAA assembled a Board of Advisors that included Saul Wallen, David Cole, Ralph Seward, Clark Kerr, George Shultz, Nate Feinsinger, John Dunlop. The Institute pushed for the expansion, was responsible for the creation of the Office of Collective Bargaining in NYC and securely tied me to the problem solving priorities of our process.

bland neutral recommendation for any later job. I relayed that to the employer which refused and I then had to render a decision, fatally, for him I just couldn't erase his private admission. I never undertook to med-arb again. I don't want to put myself in a position where I get information from one side outside the hearing of the other, if required to decide on the on the record testimony.

I guess, that after all the claimed influence of those early giants who did both, I haven't the gumption to do the same. Perhaps I take too seriously the empowerment given to me to render a formal decision based on the hearing record.

In compensation for that weakness, I try repeatedly to push the parties toward discussion and settlement though never meeting either side privately. Whether it be asking the advocates to go out in the hall to agree on an issue or meeting with them both in the hall after opening statement, or even urging them to talk during or at the end of the hearing, I take every opportunity to push them together as long as I don't meet with one party out of the hearing of the other. I urge them to talk privately, I recite a chamber of horrors listing outrageous decisions I might reach if forced to decide on the record before me. But I guard my right and obligation to render the decision, still following Shulman's standards if I fail to get them to talk. I am comfortable with that role but still fearful that the outcome I select might be off track or might be different from what I might have mediated, or worse that I screw it up from ignorance, from missing a crucial bit of testimony or contract language.

Still preferring a mediated outcome, I often propose the alternative: arb med, mediation AFTER the arbitration. There, after the formal hearing, I write out not the opinion but my decision, and pocket it, before actively mediating for a fixed period of time. If there is no resolution by that deadline, I whip out the decision and that is the outcome of the case. If the parties settle, I tear up the decision without disclosing how I would have ruled. That procedure works best in interest disputes where it precludes the need for any medication prior to any hearing; in right disputes increasing reliance on transcripts and briefs often imposes the burden of convening a post hearing session, a delay and extra cost both sides usually prefer to avoid.

The upside of my perpetual push of the parties back to negotiation is that maybe half my cases are resolved by the parties themselves, freeing me of writing time and burdens. While that approach can be financially costly as writing days go up in smoke, it is not as much of a downsize as might appear. Don't forget, I have not ruled against either party, I have, if anything improved their standing with their clients by helping them to agreement. That does pay off in giving me a greater acceptability for any future case than if I had ruled. A perpetually refilling calendar is a pretty good psychic reward.

But when I do decide a case, I take solace in the reassurance of Shulman, that the parties contemplated binding arbitration of grievances because they are of less significance than the big contract in chief that they negotiate, that it does the filling

in cracks that they anticipated; that it has much less societal impact than would taking such disputes before a judge, and that our renderings are at worst only temporary until the parties' next negotiations.

I suspect my view of the practice, like the perspective of the ant on the elephant is rather limited, but those clients still seem to accept my pressures, my tilt to Taylor over Braden. Others, probably a majority of our Academy may follow different approaches to the practice. That fungibility has been vital to our success as an institution, and to our internal rapport as competitors. The parties have their choice of many arbitrators adhering to differing philosophies to choose from resulting in a variety of answers to the question of "What do arbitrators do?" We all follow the goal of resolving the issue put before us to enable the parties to get back to the core work of their institution, the grievance before us having been resolved out of the way.

The system has worked quite well, it has permitted the growth of the NAA and the opportunity for us to develop worthwhile friendships while learning from one another as to how to do, what we do, better.

But there is reason to be concerned about our future. That 1960's explosion into the public sector continued to fuel our profession and our Academy for the next half century. The rise of non-union employment arbitration has given rise to a separate form of process, one which is far less prevalent than its advocates proclaim. Of the ten to twenty million employees working with such mandated procedures an astounding few. From what I can perceive the AAA, which handles the largest number of employment arbitrations, administers only one or two thousand per year. Back in 1995 when we initiated the Due Process Protocol, I viewed employment arbitration as a different animal, one which would not impact on us. Those who the relatively few arbitrations of supervisors or managers would continue to do that, while the millions of non unionized workers required to use the cram down systems would accept buyouts or threats of heavy opposition and scarcely appeal to even their form of arbitration, and that has largely been the case.

But unfortunately it has had a heavy impact on us and our image as professional neutrals. The public and press scrutiny of mandatory arbitration of credit card, insurance and other disputes seems to be having an impact in minimizing the benefits and appreciation of "our" process. It matches perhaps the declining public perception of trade unions and thus collective bargaining as well. The decline in attendance at NAA meetings is a further reflection of our move back into the shadows we occupied before the empowerment of the Trilogy. That USSC role of 1960 in encouraging arbitration has been revised by then Court after its *Gilmer*⁶ decision with negative rather than positive impact on the role of union-management arbitration in protecting workplace fairness. The string of decisions that have overridden the intent of the

⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

draftsmen of the FAA to exclude arbitration of employment disputes has to my mind thwarted union organization by holding out the promise of “Our” fair neutral arbitration being gratuitously provided by employers without need for their employees to unionize for worker protection. The recent decisions of the court carry on that management tilted sequence including the Epic Systems v. Lewis decision that squelched the entitlement of freedom of assembly and association protected through of the facilities of the NLRB in favor of the myth of a freely negotiated individually contract that voluntarily and knowingly(?) distained class action. It went even further of course, with the Janis decision further eviscerating the obligation of public sector employees to contribute to the union for negotiating contractual improvements in their wages hours and working conditions. Those decisions leave in their wake a profile of workplace protection that is far less effective or pervasive that what was envisioned when I entered the trade. In 1955 34% of the private sector employees claimed union membership, a figure that is now down to just below 7%, even though tempered by public sector union membership of 36% to give us a combined membership of 10.7%⁷. Contrast that with 26.3% union membership in Canada⁸ in 2017.

The recent concerns over declining union membership, and declining volume of arbitration cases, which has been reflected in our own declining membership and attendance at our meetings, leading indeed to a single annual meeting must now be viewed in the light of the Janus decision which threatens to handicap the financial ability of unions to fund arbitration cases as they have traditionally. That too will have significant impact on what we do, or at least on how often we get a chance to do it.

Conclusion

I have tried to spell out in some detail the problem solving priority of the process that prevailed when I joined the profession, as viewed by Shulman, Justice Douglas, and the early giants of our field. I have tried to adhere to those precepts in my 60 years of practice. Some clients have continued to embrace my approach. Others have not, and have opted for arbitrators better suited to their style and needs, for which I assume you are all grateful. But even though I have tried to adhere to those earlier precepts, I, like other arbitrators, have been influenced by ever growing external pressures.

The external legal environment which led first management and then unions to rely ever more often on attorneys as advocates, has certainly impacted on what arbitrators do. Our decision writing has adjusted from providing guidance and helping them fill in the cracks of the parties negotiating history to responding carefully to the often legalistic arguments raised by the increasingly present attorneys. Instead of shop stewards and HR directors arguing for a preferred outcome of a grievance as of

⁷ <https://www.bls.gov/news.release/pdf/union2.pdf>

⁸ <https://stats.oecd.org/Index.aspx?DataSetCode=TUD>

old, now we confront outside counsel, uninvolved in the day to day problems of the shop making arguments based on the parties collective bargaining agreement, negotiating history, stare decisis and external law to persuade arbitrators often on quite different grounds and theories than in prior decades. Answering those legal questions is now what arbitrators increasingly do. That is consistent with our Canadian practice where arbitrators have responsibility to both law and justice while we US arbitrators, in compliance with the old theories of equity, and lacking legal credentials focus on justice.

And that responsibility has been amplified as the public sector has been organized and arbitration has extended to its covered employees. Certainly the role of the arbitrator in public sector disputes is different from that role in the private sector. Neutrals in interest disputes do become entrusted particularly with a public responsibility to assure conformity to the various standards of wage determination called for in federal and state statutes and regulations. Even in public sector rights disputes arbitrators often have to adjust their private sector freedoms to the pressures imposed by external law, and the prospect of review by federal agencies such as the FSIP and FLRA. Dedication to the traditional view of resolving disputes so that the parties may expeditiously return to the mission of the enterprise or agency, as well as sheer practicality in minimizing conflict by compliance to judicial and governmental authority now means going well beyond merely filling in the cracks of the parties negotiating efforts. Issuing decisions that conform to “the law” is what arbitrators have increasingly come to do. Arbitrators face serious consequences in issuing a decision that knowingly conflicts with the law or which would be challenged in court to overturn what I might feel a more gratifying or equitable result. Thus the advent of an ever more confining legal environment has imposed increasing restrictions on what might have been our unquestioned authority in prior decades and has forced an adaptation of the answer to what arbitrators do. We must decide cases with sensitivity to those external standards that are lurking around us or have been imposed upon us. We must now be more attentive to those external legal realities not merely to help the parties avoid lengthy litigation, but for our own self interest in seeking to avoid litigation over the validity of our decisions, something that scarcely crossed my mind when I began my career.

The public perception, the political environment and the legal authorities have all had their impact on what a half century ago was a respected role in implementing the trade off of no strikes in exchange for adherence to an arbitrator’s decision. Unions have lost their clout, the USSC since the Gilmer decision has highjacked the word arbitration and diverted what was once a respected forum for equally powerful parties to resolve their workplace dispute resolution, with shared costs, jointly selected neutrals respecting collective bargaining agreements as their mutual law, into an employer controlled cram down process based on individual rather than collective contracts resulting in depriving unorganized workers as well as consumers of their statutory and collective bargaining rights. Collective bargaining arbitration, a universally heralded “clean” process is even disregarded as too insignificant by the

New York Times⁹ reports who wrote their multi article in October 2015 on credit card, telephone and employment arbitration as a societal evil, declining even when reminded, to carve out the fairness of our union management process¹⁰. Federal and State Courts have increasingly exercised their right to assert their public policy protection responsibility and frequent disinterest in collective bargaining to intrude on what used to be our unquestioned final authority to decide such issues based on contract rights. And society, fueled by our current political chaos has learned to look increasingly askance at trade unions and worker rights.

The more threatening question is what will arbitrators do in the futures as Epic Systems enshrines restrictions on the workers rights to avail themselves of NLRA protections and Janis decisions cuts into the income of unions, reducing their resources for hiring attorneys, paying their share of our fees, and threatening their financial ability to take public sector cases to arbitration. The political climate that prevails has extended that financial pressure to private sector unions in right to work states. What the upcoming election will do to alter this dismal forecast is hard to foretell. Even with a electoral results that might be viewed as altering this dismal projectory it is hard to foresee any rapid turnaround. And with the present US Supreme Court the anti worker projection would seem likely to continue until the profile of the Court is turned more respectful of worker rights. The impact of this US scenario obviously raises risks for the future of the NAA as well.

I have no prescription for turning around the external forces that have come tumbling down upon our shrinking universe of union management advocates for a peaceful workplace. As to what we can do, I suspect that the initial mindset of Shulman, Douglas and the early arbitration giants that we are there only to fill in what the parties would have done if they had worked harder to reach agreement, still holds, and that pushing them to take the cases from us by settlement, even med-arb or arb med may be the most effective way for them to continue to have faith in the process as being of benefit to their relationship. We US arbitrators are after all, there for their benefit.¹¹ Hopefully US society will recognize once again that collective bargaining has been an asset in building our economy and maintaining fairness while avoiding strife in the workplace, that our track record has been helpful in building and maintaining that fair workplace, and that Making America Great Again should also involve reinvigorating the institutions that made it great in the first place. Including us.

⁹ <https://www.consumeradvocates.org/.../news/new-york-times-releases-first-part-arbitra...>

¹⁰ My request to the reporters, one of whom had a father-in-law labor attorney, to distinguish the credibility of “our” arbitration was handily dismissed as referring to a minuscule portion of the arbitration universe

¹¹ I fear we missed the boat in terms of being entrusted with a national policy for workplace peace as seems to have been the impact of the Canadian Supreme Court on their labor arbitration institutions.