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THE NATURE OF ARBITRATION: THE BLURRED LINE BETWEEN MEDIATORY AND JUDICIAL ARBITRATION PROCEEDINGS

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MY TOPIC COVERS various aspects of a single question: Should the arbitration process be viewed as an extension of the grievance procedure, with informal hearings and with the arbitrator alert to detect and encourage any openings for resolution of the case by agreement, or should it be viewed as a more formal and judicial proceeding, influenced if not governed to a large extent by the rules of evidence, with the arbitrator vigorously conducting the hearings much as a judge would in a court of law?

The various aspects of this central question raise many other questions. One such question is: What kind of judge and what kind of court proceeding is appropriate?

A simple example illustrates the wide ranging possibilities. For instance, a judge in a murder trial conducts a proceeding which differs greatly from a proceeding which presents the issue of whether to grant an injunction in a very hot local strike (such as one on the transit system). In the latter case, the judge almost always will call the parties into his chambers and hammer out a settlement, using all the clubs of mediation he can think of. This would be unthinkable in the murder trial.

It is also necessary to define what kind of arbitration we are talking about. I am not going to talk about interest arbitration cases (i.e., cases deciding the terms of a new contract). That is an entirely different ball game, and mediation is virtually unavoidable if you are going to do any kind of a job with it. Also, I am not

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* President, National Academy of Arbitrators, 1971; First Permanent Arbitrator, Major League Baseball, 1970-1972; Chairman, President Nixon's Railroad Board, 1970; Member, President Johnson's Railroad Board, 1964; Member, President Johnson's Airline Board, 1963; Member, President Kennedy's Aircraft Board, 1962; Member, National War Labor Board, 1944-1945; Chairman, Cleveland Regional War Labor Board, 1942-1943.

going to talk about arbitrations under permanent umpireships because they are quite different from *ad hoc* arbitration due to the lack of a continuing relationship between the arbitrator and the parties.

My remarks will deal solely with the *ad hoc* type of grievance arbitration, and even as to that, I will skip over situations in which the parties have jointly made it very clear to the arbitrator, either explicitly or otherwise, how they want the proceedings to be conducted. In such cases, the arbitrator will be well advised to conform to the parties' wishes. Nevertheless, there can be exceptions. For example, where the proceedings are getting badly out of hand, the obvious need for intervention by the arbitrator may justify deviation from the parties' procedural ground rules. I am often reminded of the saying of the first chairman of the War Labor Board, William H. Davis, who remarked: "There are exceptions to every rule, including this one."

So much for my preliminary reservations and disclaimers. I now turn to my selected topic.

There was, in the early days after the War Labor Board, a very lively clash between what were often called the Wayne Morse School and the George Taylor School. Wayne Morse, a former professor of law and an outspoken public member of the War Labor Board (and later an even more outspoken Senator from Oregon) had arbitrated numerous disputes on the West Coast waterfront before the war. The turbulent relationships between the parties in that bare-knuckle environment had doubtless convinced him that only a firm grip by the arbitrator, in a strictly judicial proceeding, could ensure a reasonably orderly and workable *modus operandi*. That kind of process also suited his personal style, which was not entirely unlike that of a lion tamer. At any rate, he took a dim view of the efficacy of any mediatory efforts by the arbitrator. In general, he had the support of Noble Braden, Vice-President of the American Arbitration Association, in that point of view.

The George Taylor School essentially viewed the central purpose of the arbitration process as one of nurturing the collective bargaining process and encouraging, whenever possible, a healthy working relationship between the management and the union. Two comments by George Taylor stand out in my memory: One, that the decision in a case should, if possible, not come as a surprise to either party; and, two, that the arbitrator served the parties well when he was able to develop a "consent to lose" on the

part of the side which was destined to be the loser. As to that last objective, I think he was talking primarily about continuing umpireships because one rarely has time to go into that sort of thing with *ad hoc* arbitration.

To summarize, Morse and Braden believed that the arbitrator's role was simply to decide the case put before him and let the parties deal with their relationship, without any kind of unsolicited help from the arbitrator. The opposite viewpoint was held by Taylor. He believed that the arbitrator, absent any clear mandate from the parties to the contrary, should view the case in the context of the overall good of the parties' relationship and do everything he sensibly could to handle the hearing, and the decision, so as to nurture that relationship. Needless to say, Taylor's approach favored mediatory efforts by the arbitrator whenever such efforts appeared feasible. Though risking over-simplification, I think the essential core of the difference between the two approaches is fairly stated.

Now, having spent much of my allotted time in describing the question I wish to discuss, what about the answer? My strong impression (although I cannot document it) is that, in the last forty-seven years, the distance between the Morse-Braden approach and the Taylor approach has shortened drastically, and that practical experience in grievance arbitration has steadily softened and smoothed the hard edges of the original positions. The reasons behind this wholesome development are many, but the principal reason is that the advocates and the arbitrators have come to know each other, and therefore know what to expect of each other.

Many of the issues which sharply focused the difference between the two schools have been thoroughly examined, and generally accepted principles have emerged. For example, in the early days it was fairly common to spend an ill-tempered hour or so arguing over which side had the burden of putting on its case first. Ralph Seward tells of a very early case of his where neither side would budge on the issue of who goes first. He finally broke the stalemate by deciding that *he* would go first. He began asking questions as to the nature of the case, gradually working the discussions around to the point where one side reluctantly agreed to go forward. By now it is pretty well established that management goes first on disciplinary cases and the union goes first on most other cases, and it is quite rare to have an extended argument on that subject.

Another (quite serious) conflict, which has cooled off a great deal since the early days, is the applicability of the rules of evidence. Most notable is the rule concerning hearsay testimony. It is still fairly common to hear lawyers object on grounds of hearsay. They do not, however, press those objections with much vigor and confidence. I would comment here that many objections on hearsay grounds miss the mark entirely, even on what I remember of the rules of evidence.[1] For example, assume that a superintendent is asked why he fired Jones, the grievant. The superintendent begins to answer by saying: "Well, the foreman rushed in and told me that Jones was refusing a direct order to perform the work." If the lawyer (or nonlawyer) representing the union objects that this is hearsay, the objection can usually be brushed aside quickly by pointing out that it is not hearsay as to what the foreman told the superintendent, though of course it is hearsay as to whether Jones actually did refuse to do the work.

At this point I am going to more directly address the Taylor vs. Morse and Braden dispute. I quote from a letter from Professor Sharpe suggesting that I address this question: "Why did the following confident prediction of George Taylor not come to pass?" He then quotes an early article by George Taylor:

> I have no hesitancy in expressing a conviction that, as collective bargaining matures and as cooperative relationships supplant "arm's length" dealings, organized labor and management will tend to choose the impartial chairman type of procedure. In other words, they will desire mediation in arbitration. I also believe these parties will tend increasingly to use the services of permanent chairmen rather than *ad hoc* arbitrators.[2]

Professor Sharpe's list of suggested subjects also asks a related series of questons:

> Why did the quasi-judicial approach to arbitration prevail? Is it related to evolution of the collective bargaining agreement itself? Skeletal vs. detailed? Was the problem-solving approach ever dominant? Popular? In what kinds of cases? If so, why did it decline? Were the parties dissatisfied with the arbitrator as problem-solver?

I think *ad hoc* arbitration *has* developed along quasi-judicial

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1. I gave a talk a while ago on the joys of being an aging arbitrator, and one of them was that you could say: "It's been so long since I went to law school that I don't remember the rules of evidence very well, and have to rely on common sense."

2. Taylor, *Further Remarks on Grievance Arbitration*, 4 ARB. J. (n.s.) 92, 94 (1949).

lines with little enthusiasm for mediation *as such.* (I am coming to a definition of what I mean by mediation "*as such.*") There are a number of reasons for this development.

For instance, the parties have become more sophisticated and comfortable in arbitration hearings. Therefore, they generally desire less input from the arbitrators. Secondly, the more detailed contracts prevalent today leave fewer areas for the arbitrator to fill. Therefore, there is less interest in getting an arbitrator's input on policy questions.

One factor overlooked by George Taylor is that there were few men during the early years of arbitration who, like George Taylor and Harry Shulman, had the rare gift for inspiring management and union leaders to have confidence in their *ability* to make an effective contribution to the relationship. John Dunlop has, at times, made the same doubtful assumption (i.e. that many arbitrators have the same gifts as he and can do the same things that he can). Of the handful who may be said to have demonstrated that special gift over the long haul, two of them are sitting up here today, Syl Garrett and Ben Aaron. The other member of this distinguished panel, Jack Day, probably could have joined that elite fraternity. However, after a flashy start in arbitration, he got sidetracked into practicing law, running for Congress, and becoming a judge, thus becoming the only one of us who can speak from personal experience as to the relative mind-sets of judges and arbitrators. The only distinction I can claim is the dubious honor of having the largest number of *former* permanent umpireships (in several of these the parties have since abandoned the permanent umpire system altogether).

That suggests another possible explanation of why there has not been the growth in permanent umpireships which Taylor envisioned. Only those major umpireships where the early incumbents were men who could inspire confidence in the system have survived. There are numerous examples: Taylor at General Motors, Shulman at Ford, Garrett at U.S. Steel, and Ralph Seward at Bethlehem Steel. In sum, permanent umpireships have not proliferated because the arbitrators, even though generally competent, lacked that special gift.

Another suggestion from Professor Sharpe's letter: "In your experience did the steelworkers' trilogy, particularly Justice Douglas' characterization of arbitration in *United Steelworkers of*

America v. Warrior and Gulf Navigation Co.,[3] noticeably promote one view of arbitration over the other?"

I don't think that Justice Douglas' rather elaborate comments on the allegedly vast expertise of arbitrators really had much effect. Most arbitrators felt that he overstated our so-called expertise. *Warrior and Gulf* did discourage appeals to the Court, for a while at least, but I don't think it had any real effect on the *type* of arbitration procedures.

The next item here, number four on Professor Sharpe's list, asks: "Has your experience been more problem-solving or quasi-judicial?"

The answer is that for me, the *ad hoc* proceedings have been much more quasi-judicial, but with heavy doses of what might be called quasi-mediatory efforts.

That brings me to a happy memory. In the mid-1950's, IRRA in Philadelphia scheduled what was billed as a debate between me and Noble Braden on the question: "Should an arbitrator mediate?" It developed into something of an anti-climax, I am happy to report. It turned out that we had very little in the way of disagreement between us, and that most of the shouting on the question involved misunderstandings as to what constituted "mediation" in an arbitration hearing. I had prepared a series of scenarios for the debate which I will share with you, with a little updating and editorial license.[4]

Case No. 1. The grievant is discharged for theft. The company seeks to introduce the grievant's past record of warnings and suspensions for other offenses — absenteeism, poor performance, and insubordination — asserting that it is relevant if only as bearing on the credibility of grievant's denial of the theft. The union objects because this prior record was never mentioned in the pre-arbitration steps of the grievance procedure and because it has no relevance to the theft charges. If the evidence is permitted, the union says it will demand another day of hearing to investigate and rebut that evidence.

Is it "mediation" for the arbitrator to call a sidebar conference with the two spokesmen and try to work out some agreed method of handling this problem, perhaps via offers of proof? I

3. 363 U.S. 574, 581-83 (1960).

4. These scenarios, incidentally, are not at all hypothetical. They are drawn from actual experience, and frequently these sidebar efforts have borne some fruit, at least in reducing the length of the hearing.

think not, although it probably could be described as "procedural mediation."

Case No. 2. The grievant was given a two-day suspension for careless workmanship. At the hearing, the grievant and his foreman give conflicting and uncertain testimony as to the charge of carelessness, both as to the triggering incident and as to several previous incidents. Each side seems determined to put on several witnesses as to each of these incidents. The union is demanding to have the company produce records of other employees who assertedly produced equally poor work without being disciplined. A second or even third day of hearings appears likely if all of these matters are explored.[5] The arbitrator calls for a sidebar caucus with the spokesman for each side and asks whether the two-day suspension is important enough to warrant the time and expense that will result. He suggests that they may want to discuss it with each other in his absence and see if they can come up with some way of disposing of this grievance without prejudice. The arbitrator makes it clear, however, that he is perfectly willing to go ahead with the hearings and decision if that's what the parties want to do.

Is this "mediation," and if so, is it inappropriate conduct by the arbitrator? I don't think it is, and in many cases it has resulted in resolving the grievance.

Case No. 3. As a variation on the above, suppose the arbitrator calls the spokesmen aside before the testimony begins and asks whether they have personally discussed the case with each other before the hearing, and if not, whether there is any useful purpose to be served by their doing so now in the absence of the arbitrator. I would rarely have done this thirty or even fifteen years ago, but I do it fairly often now, especially when there is some suspicion that they might welcome such an inquiry. It has often turned out that one or both of the spokesmen are delighted to have the question raised, having been hesitant to raise it themselves for fear of suggesting a lack of confidence in the strength of their respective cases.

Case No. 4. At the hearing, the discharged grievant testifies with obvious bitterness about the impossible relationship he has with management. He claims management is determined to get

5. In the early days, when some of us were hurting for business, we would be delighted with the prospect of a second or third day of hearings, but it's not quite so appealing as you get older.

rid of him. Is it appropriate for the arbitrator to call a caucus and ask the union spokesman if the grievant really wants to return to that kind of hopeless relationship or is he just seeking to clear his record and get some backpay so he can then quit?

The union spokesman may indicate that this might be worth exploring if the company is willing to make an offer of some suitable cash settlement, labeled as "severance pay." And the company spokesman, eager to avoid a possible reinstatement of the grievant, may indicate that he is willing to explore that idea. The arbitrator then bows out of the discussions. In a number of cases, this has resulted in a cash settlement without reinstatement, presumably a result the arbitrator could not have reached by way of a decision (at least I have never heard of a case where an arbitrator decided a case on that basis).

Case No. 5. The fifth, and last, scenario involves what may be called a "procedural problem." The company has refused to pay report-in pay to some dozen employees who arrived at the plant during a snowstorm. They had not heard a company announcement on the radio nor received telephone notification that the plant was going to be closed down that day. The arbitrator suggests, in a caucus or perhaps in the open hearing, that instead of hearing the individual circumstances in all twelve grievances, one or two fairly typical cases be heard and decided. The parties then should attempt to resolve the other cases in light of the ruling on those test cases. Is that appropriate? I suggest that it is.

So much for the scenarios. As each of these scenarios was presented, Noble Braden promptly commented that he saw nothing wrong with *that* kind of suggestion by the arbitrator. I, in turn, readily agreed with his main thesis that the arbitrator should not himself try to assume a mediator's role on the merits of the case, absent a joint request that he do so.

What, then, might constitute inappropriate and arguably improper "mediation" by the arbitrator? Two kinds of conduct come to mind. One would be *exerting pressure* on the parties to settle the case following their negative response to any of the above-described inquiries. The line between innocent inquiry and improper pressure may be shadowy in some situations, but there *is* a line, and arbitrators are well advised to be careful not to step over it.

The other form of inappropriate conduct arises when the arbitrator suggests to the parties specific proposals for settlement of the grievance (unless the parties have mutually agreed that some

proposals would be helpful). There may be exceptions, but in most instances this is unwise, if not actually improper. However, if the arbitrator stops short of making specific proposals, and merely discusses with the parties the practical consequences of various possible outcomes, there seems to be no impropriety involved.

I have not discussed the propriety of the arbitrator engaging in what I would call "real" or "out-and-out" mediation without the consent of the parties. This is not only improper but virtually impossible as a practical matter. That kind of mediation typically involves meeting separately with each side and acting as a go-between in the back-and-forth discussion of settlement terms. This, of course, requires consenting parties.

I should not close this subject without mentioning a hybrid process called "Med-Arb." Acceptance of this process is growing. To use "Med-Arb," the parties expressly authorize the arbitrator to act not only as mediator, but also authorize him to make final and binding decisions when mediation fails to produce agreement. The process may not be readily adaptable to most grievance arbitrations, but it has proven very effective in interest arbitrations. It brings heavy pressure on both parties to work closely with the arbitrator in seeking reasonable solutions, either by outright agreement or by consent decisions. This ensures an outcome which is largely acceptable to each side. In my opinion, "Med-Arb" is infinitely preferable to another hybrid process called "Final Offer Selection." The flaw in this latter process arises because the arbitrator *must* award the total final proposal of one of the two sides, thus virtually guaranteeing that the result will *not* be acceptable to both sides.

I want to close by leaving with you what I consider to be a classic description of what arbitration hearings were like in the early days, immediately after the War Labor Board closed up shop at the end of 1945. I began arbitrating about five years later. Charles Killingsworth, who served with the War Labor Board and later became a leading figure in academic circles at Michigan State University, has been a leader in the arbitration profession throughout the years. He gave this account at the opening of his talk at the 1972 Annual Meeting of the National Academy of Arbitrators:

> In looking back at early beginnings, one must guard against the rosy glow that often settles over a long-past experience that had its moments or hours of anguish. But I truly believe that it would be hard to overstate the excitement and the stimulation of

being an arbitrator in that time of radiant morning three decades ago.

First would come "The Call." It hardly counted, of course, if the caller was only somebody from the War Labor Board. The real thing was a call from a union or company man telling you they had a case they wanted you to arbitrate. A lot of us suddenly realized that being wanted was the next best thing to being loved. Then came the matter of a date for a hearing. It was always hard to resist the temptation to suggest tomorrow or the day after. Dignity required the pretense that you were all booked up for at least a week in advance. And then you had somehow to restrain your impatience while waiting for "The Hearing."

Almost every hearing produced some kind of incident that was worth telling and retelling back home to admiring family and friends. Several times I had to call a quick recess to prevent a fist-fight in the hearing room. Once a quick-tempered advocate stopped in midsentence, led out into the hall a member of his own group who had been commenting all too audibly on the proceedings, and then knocked him flat on his back. Once I had to call a recess because the hearing room was suddenly filled with tear gas — not intentionally, but because of a threatened riot outside. In a wartime shipyard, I held a week of hearings that opened at 1:30 a.m. and closed shortly after daybreak. And then there were the plant visits. I was constantly amazed by the conditions that people would endure to earn a living — unbelievable heat, unbelievable odors, unbelievable filth, unbelievable noise. The most memorable experience of my early arbitration career was standing inside a half-built steel ship with some 200 riveters working on it.

After the excitement and the glamour of the hearing came the morning-after feeling when you sat down to write the decision. You suddenly realized that the parties had not been very helpful at the hearing. Once, after listening to a somewhat confusing opening statement by a union representative, I asked, "Mr. Jones, would you mind telling me what clause of the contract you contend was violated?" He glared at me, and said, "Well, Doc, what the hell do you think we're paying *you* for?" The parties were usually pretty good at giving you the facts of the case, but sometimes weak on contract interpretation. And so, when you sat down and faced the necessity of rendering a decision, you began to realize that being an arbitrator involved not only excitement and glamour but hours of lonely mental anguish.

It is that anguish, I think, that partly accounts for the great pleasure that arbitrators have always found in each other's com-

pany — that, plus the shared feeling of working on the leading edge of a new frontier. Of course, we were dimly aware that there was a substantial history of arbitration *before* the 1940s, and there were a few old pros around to remind us that we were really rediscovering the wheel. The response of the new generation of arbitrators seemed to be, "Okay, but this is the very first time *I* ever discovered the wheel!" And it is true, of course, that we were involved almost entirely with parties and industries that had had no prior experience with arbitration. The inexperienced were leading the greenhorns.[6]

Thank you very much.

6. Killingsworth, *Arbitration Then and Now*, 25 PROC. NAT'L ACAD. ARB. 11-13 (1973)(footnote omitted).