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FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL
GRIEVANCE ARBITRATION PROCEEDING

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL
GRIEVANCE ARBITRATION PROCEEDING

STATE OF OHIO
STATE EMPLOYER RELATIONS BOARD
STATUTORY LABOR ARBITRATION TRIBUNAL
COMPULSORY CONCILIATION PROCEEDING

MICHIGAN EMPLOYMENT RELATIONS COMMISSION
STATUTORY LABOR ARBITRATION TRIBUNAL
ACT 312 ARBITRATION PROCEEDING

In the matter of the Arbitration between:

WESTERN OHIO TRANSPORTATION AUTHORITY BOARD

Employer

-and-

FMCS Case No. 05-02017
Grievance: D. Y Discharge

INTERNATIONAL WORKERS OF THE WORLD and its LOCAL UNION NO. 123456 of DISTRICT #01, AFL-CIO

Union

_____/

ARBITRATOR'S OPINION AND AWARD

I. APPEARANCES

FOR THE EMPLOYER:

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FOR THE UNION:

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DATED: OCTOBER 26TH 2006

Allah

Zen and the Art of Opinion Writing.

Zen picture

The Medium is the Massage. Marshall McLuhan

Picture of Marshall McLuhan

Arbitration as A.D.R. – Alternate Dispute Resolution.

A.D.R. is multi-headed.

The Opinion is the culmination of the hearing.

Arbitration in practice is not a one size fits all proposition. Hearings should not all be conducted the same. The level of formality may vary. As a general rule, informal but with some structure works best, but it depends on the parties, their relationship, their expectations, the nature of the grievance and allegations, and the nature of the disputed issues and proofs. This is especially difficult, since the arbitrator, especially an *ad hoc* arbitrator, typically has less *a priori* knowledge of the parties and their relationship than anybody else in the room. It is the pinnacle of an arbitrator's professional judgment to vary from "standard practice," particularly in an ad hoc appointment, to create a process that best fits the situation and the parties. You are trying to treat this patient, not the average patient.

As an arbitrator thou shalt not mediate, but thou may conciliate. I don't let parties tell me what they are willing to settle for, but I often use my "good offices" to get them to take a final chance to settle. This usually occurs after the issues are stipulated, all the exhibits marked, and opening statements are made. While it is outside my purpose to detail this process today, I note in passing that the parties settle at hearing well over half of the cases that come before me.

This is relevant to me because it has an impact on what is left over. I think that a lot of my remaining cases are several cuts more difficult than garden variety cases. They are cases that require the judgment of the arbitrator, with an award that one party of the other prevails totally.

One kind of opinion does not fit all cases.

Tailor the opinion – substance and form – to the dispute.

Form follows function. Mies Vander Roe
Bauhaus picture

It's an Opinion, NOT a Brief. As a general rule, I don't put in citations to exhibits since it has little value.

There is NO legal requirement for an opinion. USWA and Enterprise Wheel 363 U.S. 593 (1960) says arbitrators do not owe the court an explanation, but "a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement."

COURT REPORTERS

If there is a court reporter, get the transcript. It is my rule that nobody is going to have a better record than me.

If there is a court reporter, get an understanding on the record that your opinion constitutes the official record of the proceeding. Put that somewhere in the opinion, maybe in a footnote.

This is consistent with the Code of Professional Responsibility, which states: "*A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.*"

> A court reporter[1] was present and a full transcript produced. It has been reviewed by the arbitrator.[2]

If there is a court reporter, get a copy of the transcript on disk. This is not to be shared with the parties, thereby impairing the earnings opportunities of the court reporter. But

It will facilitate your review of the transcript – you can load it onto your computer and not have to carry the hard copy around.

It will facilitate your quotation of portions of the transcript – a practice I heartily endorse. If the parties have gone to the trouble of getting a court reporter and transcript, someone evidently expects you to read it. Your opinion should fulfill that expectation.

If someone wants to tape record the proceeding, it's OK. I don't have a problem with that, since it is almost impossible for an advocate to conduct the hearing, watch the witnesses, conduct direct and cross examinations, and then make notes so they can prepare their closing argument or post hearing brief.

If someone wants to tape record the proceeding, get an explicit promise that it is being used for the personal purposes of the advocate, and will NOT be used in subsequent proceedings to supplement the record or attack the award. Put that somewhere in the opinion, maybe in a footnote.

Quote from the record. Especially the transcript if one is supplied. Or from your notes, if they are verbatim, accurate, and relevant. It will help convince the readers, some of whom you are billing for your services, that you actually reviewed the record and made a principled decision.

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[1]Recorded by NETWORK REPORTS, P.S., CER-####, Fax (800) 123-4567. E-mail courtreporting.com.

[2]Overall, the transcripts are accurate. However, they are not perfect. Ms. S was very helpful and professional. Her presence inured to counsel and the arbitrator's benefit. However, I note in passing that there was a serious but obvious typographical error, wherein the witness's testimony was misattributed as a statement of the arbitrator. See pages 614 and 615. On page 643, the word "grafts" is incorrectly used when the question referred to "graphs." Notwithstanding the use of a court recorder, the parties agreed that the arbitrator's opinion and award constitutes the "official record" of the proceeding.

PROTECT CONFIDENTIALITY

When you have rendered your opinion, get rid of your notes, including electronic copies. The law is clear that they are protected by quasi-judicial privilege, and are not subject to subpoena. The mental processes of a judge, and of an arbitrator, should not be subject to discovery or inquiry. Bradley vs. Fisher. If you get a subpoena for that kind of information, you must resist; in my opinion this is an ethical and professional obligation. If we permit breach of the confidentiality of the process, or a breach of the sanctity of our deliberative and mental processes, then arbitration itself is at risk.

If it is an AAA case, contact the AAA general counsel's office, and they are very effective. If it is a case from the local or state agency, contact them. I had a situation where there was an attempt to have me and the delegates in an interest arbitration testify to the events in the executive session. MERC and the Michigan Attorney General's office became involved in the case. If you are a member of the National Academy of Arbitrators, contact the Legal Representation Committee.

Nevertheless, it is possible that notes might be ordered to be produced. There is always the possible divergence of what we think the law is, and what it may become. Good policy can be replaced by bad practice. If your notes are gone, there is nothing to uncover. Footnote: Any first year law student could figure out that Richard Nixon would still be president if he had burnt the tapes on the White House lawn based on 'national security' before the subpoenas issued.

Additionally, I have received inquiries from attorneys -- one filed a wrongful death law suit related to a discharge case; the other filed an EEOC complaint related to a pregnancy/discrimination grievance I heard. When I got the subpoenas I wrote them that my notes were privileged and that I was immune from having to testify as to my mental impressions. I told them I would resist any inquiry to the utmost, and that they would get my testimony when "it was finally ordered by the Court of last resort." I indicated I sent copies to the parties' counsel, the AAA, and the National Academy of Arbitrators Legal Representation Committee. I warned that my general practice is to purge the file and my notes after the hearing. I stated that everything goes through a shredder. [I use and endorse the Office Depot Ativa 1800, which does 18 sheets at a time, has a seven year warranty, and is available from Office Max – sometimes at almost half price.] I noted that they could obtain a copy of my opinion, since it was on file with the American Arbitration Association. Additionally, rather than merely using "delete" for my electronic notes, I use "WIPEFILE" which overwrites it six times. Finally, I wrote that in the intervening years I had scores of cases, and in any event had little recollection of the matter beyond what was set forth in my opinion. They went away. They always go away.

The following is an excerpt from a judicial opinion on confidentiality:

Garzella v. Borough of Dunmore, No. 3:05-CV-01626 (M.D.Pa. 09/07/2006)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 3:05-CV-01626
2006.MPA.0001114< http://www.versuslaw.com>
September 7, 2006

POLICE OFFICER TONY GARZELLA, PETITIONER,
v.
BOROUGH OF DUNMORE, BOROUGH OF DUNMORE COUNCIL, ET. AL. RESPONDENTS.

Presently before me is the issue of whether or not Alan A Symonette, Esq., who served as an arbitrator in the creation of the contract between Dunmore and the Dunmore Police Association, may be compelled to testify in this case. For the reasons discussed below, the motion to Quash will be granted. * * *

DISCUSSION

The primary issue in this case is whether or not Mr. Symonette's role as arbitrator grants him testimonial immunity in this case. Mr. Symonette primarily relies upon Federal Rule of Civil Procedure 45(c)(3)(A), Cahn v. Int'l Ladies Garment Union, 311 F.2d 113 (3d Cir. 1962), and In re: EquiMed, Inc., The Estate of EquiMed Inc. v Ernst & Young, LLP, 2005 W.L. 2850373 (E.D.Pa.) Oct. 28, 2005.

Rule 45(c)(3)(A)(iii) states that the court issuing a subpoena shall quash it if it requires disclosure of privileged or other protected matter and no exception or waiver applies.

Cahn holds that in "performing quasi-judicial duties, an arbitrator is "clothed with an immunity, analogous to judicial immunity, against actions brought by either of the parties out of his performance of his duties." Cahn at 115.

Finally, EquiMed quotes language from United Food & Commercial Workers Int'l Union v SIPCO, Inc., Civ. No. 90-250-B, 1990 U.S. Dist. LEXIS 20210 (S.D. Iowa Oct 16, 1990) stating that arbitral immunity includes testimonial privilege. It also acknowledges a well-recognized exception in which an arbitrator may be deposed regarding claims of bias or prejudice.

In the case before me, Mr. Symonette is relying on a long standing precedent of granting judicial immunity to those serving quasi-judicial roles, such as an arbitrator. This precedent was established in Cahn, and cited as recently as 1994 in Boraks v. American Arbitration Ass'n, 517 N.W.2d 771, 772 (Mich.App., 1994). Plaintiff's counsel seeks to avoid the problem of immunity by claiming that Mr. Symonette acted as an "interest" arbitrator, whose arbitration pertains to setting new terms and conditions, rather than a "rights" arbitrator, whose arbitration pertains to disputes arising under a pre-existing contract. Under the Cahn case, "if one is appointed by agreement of parties to act as arbitrator and is empowered to resolve disputes between them" than he qualifies as fulfilling a quasi-judicial role. Cahn, 203 F.Supp. 191 at 194. Plaintiff relies on the United States Court of Appeals for the Third Circuit's definition of interest and rights arbitration in CITGO Asphalt Refining Co. v. The Paper, 385 F.3d 809, 817 (3d Cir. 2004) FN5 in which the court defines "rights" arbitration using the term "disputes" and does not use "disputes" in their definition of "interest". Plaintiff's counsel, however, mistakes the circuit court's choice of terms for a legal conclusion that an "interest" arbitration does not deal with the resolution of a dispute and therefore would not qualify the arbitrator for immunity. This is not the case, as in both cases the arbitrator is dealing with disputes. The only difference in these terms is that one deals with a future contract, while the other deals with a contract currently in existence. The case of High Concrete Structures, Inc. v. United Electrical, Radio and Machine Workers of America, Local 166, 879 F.2d 1215 at 1219 (3d Cir. 1989), uses the term "dispute" to describe what may be resolved by an arbitrator in both "interest" and "rights" arbitration. This is further bolstered by the use of "dispute" in describing "interest" arbitration in nearly every other circuit. See Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass., 666 F.2d 618 (1st Cir. 1981), Silverman v. Major League Baseball Player Relations, 880 F.Supp. 246 (2nd Cir. 1995), Local Union No. 637, Intern. Broth. of Elec. Workers, AFL-CIO v. Davis H. Elliot Co., Inc., 13 F.3d 129 (4th Cir. 1993), Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co., 1 F.3d 1464 (5th Cir. 1993), AK Steel Corp. v. United Steelworkers of America, AFL-CIO-CLC, 127 F.3d 1102 (6th Cir. 1997), American Postal Workers Union, AFL-CIO, Milwaukee Local v. Runyon, 185 F.3d 832 (7th Cir. 1999), and Sheet Metal Workers' Int'l Assoc, Local 14 v. Aldrich Air Conditioning, Inc., 717 F.2d 456 (8th Cir. 1983). Therefore, there is no reason that the fact that Mr. Symonette participated in what might be described as "interest" arbitration would prevent him from claiming immunity.

Your letterhead. Include your address (nine digit zip code), E-mail address, telephone and facsimile numbers (including current area codes). Your name at the top of the opinion is an advertisement and a statement of your personal responsibility and pride in the opinion. Akin to the Masthead on a newspaper.

Union label on your stationery. It's the right thing to do. Unions will appreciate it. We are neutral on many issues, but not on this one. We are neutrals, not neuters.

ELEMENTS OF AN OPINION.

Not all are indispensable.

LIST OF ELEMENTS

Introductory matters
- Who
- What
- Where
- When
- Date of hearing
- Place of hearing
- How
- Witnesses
- Method of Appointment
- Exhibits
- Stipulations
- Nature of the case

Statement of the Issue

Statement of the Requested Remedy

Summary of Decision

Facts — Building Blocks – Number them.
- Procedural Background
- Substantive Chronology

Summary of testimony
- Witness by Witness

Discussion of credibility

Relevant Contractual Provisions
- Always include the arbitration clause

Positions of the parties

Discussion/Analysis — Discuss all the Issues, Issue-by-Issue

Six BUILDING BLOCKS
- Burden of Proof
- Procedural Issues
- Evidentiary Issues Don't forget them. If an arbitrator lets evidence in "for what it is worth", then there is still an issue. Tell them what it was worth
- Credibility. Explain that you made credibility findings and how you did it.
- Substantive Issues
- Remedies

Conclusion

Remedy

EDITING

"There is no such thing as good legal writing. There is only good legal rewriting." Louis Brandeis

Edit. Edit. Reedit. Reedit.

Don't send opinions out the day you finish them.

Do have someone else edit them Preferably a lay person with good English and editing skills.

[My wife, Bette Dobry, is available. She is a 1971 University of Michigan graduate in English, and has 25 years of editing experience involving arbitrators. She has a good sense of what an arbitrator's opinion should look like, and will tell you how to improve your work. Her rates are reasonable, and she will work through E-mail. You can contact her at DobryNic@sbcglobal.net.

Avoid redundancy and repetition :)

"I like to use all 48 crayons in the Crayola box." Tommy Dobry, Mixter Elementary School, 2nd grade, 1955.

The software you need.
Word Processing software
I use Word Perfect. I also have MSWord.
Learn to use one well.
Symbol function so you can have Particularly useful symbols include

§ ¶ ® ©

Use Grammatix in WordPerfect Tools.

Editor. Awesome. Tough. Will tell you when your sentences are too long. When your syntax is wrong. Will edit the whole document.

Complete Oxford Dictionary and Thesaurus with WordPerfect.
Better than the thesaurus that comes with the word processor.

Three cures for carpal tunnel syndrome:

OmniPage Pro Scanner software

Dragon Naturally Speaking

Have advocates send you an electronic copy of their briefs. Via E-mail or on a diskette. Easier than scanning. More efficient. You can edit down to their positions. Easier to edit than write.
Use the Merriam-Webster Thesaurus to tune up the positions.

The Award

"For all of the foregoing reasons . . ."

There are some judges that believe that anything outside the **AWARD** is surplusage. So you have to have a device to incorporate by reference the rest of the opinion.

The Stipulated issue is answered, "**Yes**."

Answer the question presented.

The Grievance is **DENIED**.

The Grievance is **GRANTED.**

The Grievance is **GRANTED IN PART AND DENIED IN PART**.

Specify the remedy within a reasonable degree of certainty. The Code of Professional Responsibility says that awards shall be definite, certain and concise as possible.

Understand that advocates, and potentially a reviewing court, may *not* be reading it from the same perspective as you wrote it.

Example: "Effective August 1, 2001, the Grievant shall be reinstated and made whole for all lost seniority, wages and benefits."

Horror story. Michigan Court of Appeals enforced my "evident intent." Ignored a 33 page opinion that explicitly found that there was no just cause for the discharge, and which deal with the fine points of the interaction of PERA, the Sheriff's Act ("employee at will"), and the contract "just cause."

An arbitral appointment carries with it the inherent power to specify an appropriate remedy.[3] As the United States Supreme Court has recognized, an arbitrator must have wide latitude in formulating remedies:

> "WHEN AN ARBITRATOR IS COMMISSIONED TO INTERPRET AND APPLY THE COLLECTIVE BARGAINING AGREEMENT, HE IS TO BRING HIS INFORMED JUDGMENT TO BEAR IN ORDER TO REACH A FAIR SOLUTION OF A PROBLEM. *THIS IS ESPECIALLY TRUE WHEN IT COMES TO FORMULATING REMEDIES.* THERE THE NEED IS FOR FLEXIBILITY IN MEETING A WIDE VARIETY OF SITUATIONS. THE DRAFTSMEN MAY NEVER HAVE THOUGHT OF WHAT SPECIFIC REMEDY SHOULD BE AWARDED TO MEET A PARTICULAR CONTINGENCY. NEVERTHELESS, AN ARBITRATOR IS CONFINED TO INTERPRETATION AND APPLICATION OF THE COLLECTIVE BARGAINING AGREEMENT; HE DOES NOT SIT TO DISPENSE HIS OWN BRAND OF INDUSTRIAL JUSTICE." [EMPHASIS ADDED.] STEELWORKERS V ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 597, 46 LRRM 2523, 2425 (1964).

Remedies are a huge issue. Unfortunately, they are frequently treated as an afterthought (or not thought about or addressed at all). In a discharge case, an employer who raise the subject may fear that this is an implicit concession that Grievant may be entitled to some kind of remedy. Nevertheless, in a discharge case there are many difficult questions, which can vary depending on the facts, the contract and the relevant law. For example, is Grievant entitled to overtime? In a discharge case for absenteeism or failure to maintain a regular schedule, should a back pay claim be limited by the time the Grievant usually would have been absent – if he only works *half* the time, how can he be entitled to *full* back wages. Is an employer entitled to an offset for outside employment? What about unemployment compensation? Failure to seek suitable substitute employment? Mitigation of damages? What about health insurance and interim medical expenses? Hill & Sinicropi, Remedies in Arbitration 2nd Ed.

Asking the parties – hypothetically – about remedy before the proceeding begins gives them a chance to permit you to retain jurisdiction as to disputes as to remedy, if any; and/or to put forward evidence on all of the remedy issues. If you don't have evidence on remedy, how can you finally and exactly determine remedy? It permits the parties to address the issue of remedy. It permits the parties to avoid going to court to have a judge "interpret" your award, which may very well be incomplete (e.g., you did not

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[3]See, e.g., Electrical Workers (IUE) Peerless Pressed Metal Corp., 989 F.2d 768, 82 LRRM 3089 (CA 1st), *cert. denied*, 414 U.S. 1022, 84 LRRM 2683 (1973). See generally, Marvin F. Hill and Anthony V. Sinicropi, Remedies in Arbitration, Second Edition, (BNA, 1991), pp. 42-48 and cases cited therein.

actually work out the math on computation of back pay.

Usually it is *my preference* that the parties let me retain jurisdiction over disputes as to remedy if any. I do not want to unduly lengthen the hearing on a remedy issue, which may be entirely hypothetical to begin with. It is also my experience that even with a retention of jurisdiction, 95% or more of the time the parties will be able to resolve the matter based on their view of the equities without any further need for the arbitrator to do anything.

Explicitly retain (or not) jurisdiction to resolve disputes as to remedy. Do this based on the stipulation of the parties at the arbitration.

FINALITY OF OPINIONS: DIRECT AND COLLATERAL EFFECTS

Consideration of finality. Use of prior awards between the same parties.

"The arbitrator's decision shall be Final and Binding" decision on the parties. Not just boilerplate.

Finality is a normative direction to the parties. It is their promise and an injunction against attacks, with by direct appeal or collateral attack.

Finality is an injunction on the court. It should prohibit judicial review.

But finality has an effect also upon the arbitrator.

First, it is a direction to the arbitrator to draft the opinion and award to have final and binding effect. As an arbitrator, one must take into account the foreseeable possibility of attacks in the courts, plus the existence of other forums. E.g., civil rights actions, unfair labor practice charges.

Second, it is a direction to a subsequent arbitrator that a decision of a prior arbitrator between the same parties is to be given final and binding effect. Collateral estoppel and res judicata effect. Stable labor relations. While the second arbitrator may not be literally bound to apply the decision of the first arbitrator, principles of stable labor relations at least requires that it be given presumptive effect. This is especially so where there has been a decision on the meaning of a particular contract provision, which was actually litigated and then the contract was renewed without change in the interim.

If you are cited to a case between the same parties, and it really is on point, I think it behooves you to not just "ditto" the prior opinion, but to discuss it. It is possible to discuss the finality of awards and the need for continuity. If you are not uncomfortable with the prior decisions result, it might be good practice to review the case on its individual merits, provided that you come up with a similar or distinguishable result.

Further, the final and binding language appears in the arbitration clause. This is essentially a constitutional provision, but like any other provision in the contract, the meaning of "final and binding" is subject to arbitral interpretation and application.

Thus, the arbitrator owes the parties a duty to make his award final and binding, and to give similar effect to prior awards between the same parties.

> The parties stipulated: (1) the grievance was properly and timely filed, and there are no procedural issues; (2) the case is properly before the Arbitrator for review and final and binding decision; and (3) the arbitrator would retain jurisdiction of any disputes regarding the meaning or implementation of the remedy, if any.

RELIANCE ON AUTHORITY, ESPCIALLY OTHER ARBITRATOR'S DECISIONS NOT BETWEEN THE SAME PARTIES.

Tough issue. Controversial. Some arbitrators believe that it was *solely their* personal judgment that was contracted for.

Some say never cite. Some say never cite to a case that was not cited by the parties.

Code of Professional Responsibility says:

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. An arbitrator must assume full personal responsibility for the decision in each case decided.

a. *The extent, if any, to which an arbitrator may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.*

b. *When the mutual desires of the parties are not known, or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full personal responsibility for the award.*

The Code raises more questions than it answers.

There are those of you who are so self confident that you feel no need to do research. Indeed, there are those who feel it is a matter of professional responsiblity not to do independent research.

Depending on the customs and expectations of the parties, I disagree.

DICTIONARY

Main Entry:hu£bris
Pronunciation:*hy*-br*s
Function:noun
Etymology:Greek hybris
Date:1884

: exaggerated pride or self-confidence
–hu£bris£tic \hy*-*bris-tik\ adjective

THESAURUS
Main Entry:hubristic
Function:adjective

Synonyms PROUD 1, arrogant, cavalier, disdainful, haughty, high-and-mighty, insolent, overbearing, supercilious, superior

I worked for George Roumell for about six months. But that was really too short a time for me to claim that he was my "mentor."

But largely, I had to learn how to be an arbitrator on my own.

So I take a somewhat different approach then those who proudly state they never open a book and never cite a case.

To begin with, I think that my personal judgment should be informed by generally accepted arbitral standards. The Common Law of the Shop: The Views of Arbitrators edited by Theodore St. Antoine. It is a chorus, not a solo. It is heterogeneous. There frequently is not one commonly accepted arbitral standard. One must pick and choose amongst the reasoning and the cited arbitrators. [In my sight, all arbitrators are not created equal.]

And I have seldom encountered as case I could not distinguish on the facts or the contract.

Nevertheless, with only a quarter century of experience, I like to know how the Ted Highs and Richard Mittenthals of the world decided similar issues. There is an old book, The Steelworkers Handbook, that is particularly useful.

No new ideas under the sun.

Plagiarism is the sincerest form of flattery.

"To invent you need a good imagination and a pile of junk." Thomas A. Edison

"The secret to creativity is knowing how to hide your sources." Albert Einstein

The problem with a book like Elkouri, How Arbitration Works, is that the uninitiated may misinterpret its very existence to mean that there is a monolithic "law of the shop." There isn't.

Second, I am trying to apply not "the law of *the* shop" but "the law of *a shop*." Meaning a particular shop.

So the inquiry for me is not just, 'how does Stan Dobry feel today about this issue?'

Rather, I am trying to ascertain the contractual intent, in light of all the relevant contract language and practice, on a particular matter. This sometimes requires me to do things that I would not if I were plenipotentiary.

Your own prior decisions.

Citation by parties to my own prior decisions.

Some advocates think this is a "gotcha."

If a party goes to the trouble of citing my prior decisions, it is my general rule that I at least need to expressly distinguish it before I ignore it. Because my method of analysis is so firmly rooted [I believe] in the particular parties' relationship, transplants of opinions are unlikely to survive.

Do's and Don't of Opinion Writing

Don't

The gratuitous statement: 'The advocates have done an excellent job in presenting a difficult case.'
Bad form.

"The louder he talked about his honor, the faster we counted our spoons." – Ralph Waldo Emerson

Humor should not be used in opinions. Very dangerous.

Baby splitting. Solomon: The real story.

Concentrate on what is on your plate. You must consume only one meal at a time. Don't worry about the past or the future. As the late Harry Dworkin used to say: "If all the parties who need good

arbitrators only use you once, there is more than enough to keep you busy for two life times."

Obiter Dicta

Latinism. General rule: Avoid Latin phrases.

A judicial "by the way". A statement by a judge or an arbitrator that was not necessary to making the decision.

Tends toward the side of gratuitous advice. Beware. You were hired to decide a particular case, not to create new controversies

Avoid arrogance.

If you have a structure that is

POSITION OF THE UNION

you don't need to incessantly natter, The Union argues. . . The Union states . . . The Union claims . . .

Bon Mots

Beware Great words and phrases.

Do not become bewitched by the well-formed expression. Sometimes they are too sharp, too nettlesome, too true, or too extraneous. Just because you said it well does not mean that it fits the particular case.

Stroehman Bakery case was in part a reversal based on the whimsicality of a bon mots.

Don't scoreboard. Fallacy of composition. Can't control the cases that come in front of you. That is up to the parties, especially when they are settling their perceived losers. There is no reason to believe that your outcomes should fit a particular profile. Reporting services like Simpsons frequently get it wrong, anyway. For example, I have seen a case where a discharge was converted to a 12 month suspension with reinstatement, but without back pay or benefits. It was reported as a "Union Win" and an "Employer Loss."

Don't worry about scoreboarders. If they can't bother to comprehend your reasoning and the complexity of the process, you don't want or need them as clients.

Demographics. There is always a need for good arbitrators. There is a shortage of acceptable arbitrators. Rule of 85/15.

Do:

Be concise.

Either write a rough cut of the facts soon after the hearing, or at least review your notes (assuming you have good notes) and make corrections, additions, observations regarding conduct, credibility, etc.

"If I had more time, I would have sent you a shorter letter." – Voltaire.

Use shorter sentences.

17 Word Rule.

According to my father, MERC Mediator Stanley M. Dobry, may he rest in peace, a study showed that the average reader could only effectively handle sentences 17 words long, or shorter. Lose the train of thought. I agree, even though I don't know the actual source for this rule. I would add that sentences longer than 17 words are likely to be run on or too convoluted, anyway.

Word are the tools of arbitrators. They are the notes we use to sing our song. Use a thesaurus and a dictionary as you write.

"The medium is the Massage." – Marshall McLuhan

Show feeling, humanity, belief, attachment and knowledge.

Demonstrate that you are oriented to time, place and person.

Establish that you understand your jurisdiction and respect the limits of your authority.

Convey that being an arbitrator is not just a position of power; it is one of duty.

Respect the rules of the forum.

Respect the parties.

When you are the guest invited to the table, it is impolite to expectorate on the food or to call your host a bad name.

Don't make the advocates look stupid for having picked you. Somebody has to lose, but no one has to be made to look small.

You can hold that one of the parties is a loser without humiliating him or her. Advocates are doing their job with the cards they are dealt.

Write the opinion to make the loser look good.

When you set forth the relevant contractual provisions, especially if you do so in the context of your discussion, do not do so neutrally. Use **bolds** and/or ***italics*** to direct your reader's attention to the pertinent language.

Be humble.

Chronologically telling the story is almost ways better.

Sometimes it is good to lay out the facts separately (and generally chronologically).

Sometimes it is better to integrate them into the discussion as relevant.

You have an ethical obligation to write an honest opinion dealing with the facts as they are, even those that do not line up with your ultimate resolution. [Of course, they aren't facts until you say they are.]

Don't overlook or ignore critical questions, evidence and disputes. You are being paid to address the substantial questions presented. That is why they pay you the "big bucks." If it was easy, everybody could do it.

"Smooth seas do not make skillful sailors." African Proverb

Make sure you answered the right issue with the right answer. Beware the dangers of using "Get" for prior opinions.

Reread the entire opinion, word for word, before you send it out.

Write in active voice. Get rid of "had" and "have" forever.
Economy of words is a virtue.

Structure. Free flow.

Unified discussions with an intermingling of facts, positions of the parties, contract and analysis is very effective. A well written discussion can dispense with the need for separate sections dealing with facts, contract, and positions of the parties.

Mystery novels. You don't necessarily have to keep the award secret. At least half the parties will flip to the last page first, anyway

Consider having an explicit summary of your opinion and award early on.

Expostulate guidelines and principles. Both parties want to know whether you were listening and whether your judgment passes muster.

Write for the losers. You don't have to convince the winners, since they probably convinced themselves of the rightness of their cause.

You can write for the publishing companies and prospective users of your services. Even if permission to publish is denied, results and opinions are circulated amongst the cognoscenti. Unions and industry groups have their 'jungle tom-toms.' All arbitration is local, even on a national level. You are only as good as your last decision.

Keep your eye on the ball. Balls and strikes.

Functus officio. Legal doctrine. When you are hired to make an award and have done so, your office and your authority terminate. Unless the parties agree to extend your tenure.

6. Post Hearing Conduct

C. Awards and Opinions

1. The award should be definite, certain and as concise as possible.

a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case, and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues, forthrightness to an extent not harmful to the relationship fo the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

Credibility findings

One of the most sensitive things you do as an arbitrator.

You rarely need to call people a liar. There are parts of the country where making those kind of finds can amount to "fighting words."

Don't do it.

It is enough to make a relative judgment, *e.g.*: "the testimony offered by the employer was more credible."

If you are going to make credibility findings consider the following:

"Arbitrators like other finders of fact are often required to determine issues of weight of evidence and credibility of testimony. Decisions such as these should not be made until the entire record is analyzed It is important to analyze not only the quantity of the evidence, but also the quality. Experience teaches that truth telling is a personal trait. Some witnesses would not tell anything less than the whole truth and nothing but the truth. Other witnesses may deliberately shade their testimony to put themselves or something in the most favorable light. Compounding this difficulty is the fact that human memories are malleable and fallible. Especially with the pasage of time and the retelling of the tale, it is entirely possible for a witness to honestly believe something that is incorrect. Repeated questionings can plant the seed of a confabulated memory. Eye witness testimony may be handicapped by a poor vantage point or a physical impairment.

"Thus, mere certainty of belief is not always equivalent to a certification of accuracy. Nor is it conclusive on the inquiry.

"I disagree with certain stated principles or formulae for evaluating credibility: i.e., discharged greivants always have something to hide and their credibility is inherently suspect. The witnesses should start with an even playing field. The mere fact that a grievant was discharged is proof only of that fact, nothing more. By itself, it is not evidence does that she did the act charged, that she is untruthful, or that the discharge was warranted or for just cause.

"I have carefully considered and analyzed all of the record, even thouigh I found it inappropriate to mention each item specifically. I considered the demeanor of the witnesses, the content and plausability of their testimony, and their motivations. I gave weight to the total fabric of the testimony, in light of the entire record.

"Therefore, in light of the foregoing, I conclude that the testimony proferred on behalf of the Employer is more weighty and more credible."

Putting in statements about "demeanor" is particularly effective in staving off potential judicial attacks. Even judges understand that sitting effectively as an appellate court, there is almost no way for them to evaluate the demeanor of witnesses they have not seen.

Issues of law.

When the Arbitrator was appointed, he was designated by the parties to be their contract reader, and to interpret and apply on a final and binding basis the law, as necessary, as though it were part of the contract. See Eastern Associated Coal vs. Mine Workers District 17, 121 S. Ct. 462, 265 LRRM 2865 (2000). Citing Theodore J. St. Antoine, "Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, in Arbitration - 1977", Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (BNA Books, 1978) 29, 30-36. See also, Theodore J. St. Antoine, "Presidential Address: Contract Reading Revisited," Arbitration 200:

Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators (BNA Books, 2001), 1-19.

As a matter of practice, I think that if you can read the contract consistent with the law, but as a separate source of rights essentially independent of the law itself, you most insulate your award from judicial review. Then the court is forced into the position of having to substitute its judgment as to the meaning of the contract for yours, something it is expressly forbidden to do.

SPIELBERG AND COLLYER

Writing cases that are Collyerized is different. Collyer Insulated Wire, 192 NLRB 837 (1971). Should consider writing a different kind of opinion, as you are not writing solely for the parties, but should expect scrutiny by the National Labor Relations Board under Spielberg Mfg. Co., 112 NLRB 1080 (1955).

So too, I just wrote a case that was remanded to me, where I was convinced that my decision would likely be subject to a further appeal. This required me to consider issues of law, including the fact that the case had been remanded to me by order of a circuit judge, and that was now "The Law of the Case."

Judicial review.

Less than 2% of cases are ever appealed.

In my case, I think it is far less than 1%. And of those, that I know of only two my awards were denied enforcement by Courts. Both cases involved reinstatement of alleged drug offenders. I did both based upon my reading of the contracts involved. One was an over the road steel hauler. I wrote an opinion that dealt with the nuances of the Drug Free Work Place Act and the Department of Transportation Regulations. The Court conceded that I had applied them correctly. I also determined that the contractual language, which stated that based on a properly conducted test, the testimony of the Medical Review Officer that a driver had tested positive for cocaine "shall be deemed conclusive" required – first -- a showing that the test had been properly conducted. In that case, the MRO did not testify to quantitation or cut offs, so that there was an insufficient showing of the validity of the test in the first place. In violation of the limits on judicial review, the District Judge disliked my interpretation of the contract which it said did not contain the express requirements that I found to be implicit in the language. The district judge said I "had dispensed my own brand of industrial justice" and then substituted his own brand of industrial justice. The District Court ignored the final and binding nature of arbitration under this contract, and said that my award was "contrary to public policy."

If you know the case is going to court, write the decision like the judge is looking over your shoulder.

But don't lose an excessive amount of sleep over this. You can't write at a level that will please the lowest denominator in the judiciary. If they choose to ignore express Supreme Court limitations on their authority to justify a result, they may well do it no matter what you write or do – apparently the law, the facts, and limitations on your and their jurisdiction and finality will mean little to them.

Use the words "Final and binding" a lot. Get the parties to stipulate that the matter is properly before the arbitrator for "final and binding resolution" and note it in your opinion.

The Decisional Process: Making the Decision

The Opinion is the Fruit that Grows from the Hearing Tree

For it to work, it must be the seamless result of the hearing process.

Style, Substance and Form are intertwined.

These two are interrelated. The substance can dictate the form and vice versa.

Szymanski case.
Problem: Interrelate 40 factual situations, complete with full quotations of tape conversations, into a dozen different principles without repeating them.

FOOTNOTES:
Uses and abuses.
Put your citations into them.
Write the opinion simply and directly, but use the footnotes to point out that you understood the nuances.
Permits you to write the opinion at different levels for different persons. Presumably the lay people will just ignore them.

Difference between the public and private sectors. Different level of union penetration. May need to be more pedantic in the public sector, as they do not have fifty years of collective bargaining and arbitral experience like the private sector. There is another problem in the public sector, which seems to be that as soon as somebody gets trained in the subtleties of labor relations, they are voted out of office or replaced.

Write to please and persuade yourself. Use the opinion writing as an analytical tool first. Then as an expositional esssay, Finally, a perfect opinion is both a learning and teaching opportunity.

ALTERNATE THEORIES ON DECISION MAKING.

Quantum leap theory. You know the right decision and are writing to justify it. This theory puts a premium on heuristic thought processes developed by close personal relationships between mentors and apprentice arbitrators. It supposes that the "instinct" for the right result has been osmotically imbued through proximity to great arbitrators, or through vast amounts of personal decisional experience.

"Ask the experienced rather than the learned." Arabic Proverb

Slogging through the record theory. You don't know the decision until you've heard the case and agonizingly analyzed it brick-by-brick.

Rule of primacy, thesis and antithesis. Another theory of decision making is akin to watching a tennis game. You hear something, decide if it is plausible, process it, and then the burden of persuasion falls on someone.

I like active listening. As the arbitrator I know less about the case then everyone else in the room. Opening statements are critical to give me a framework to organize the data I am about to receive.

[On the subject of active listening, I frequently will write notes in brackets to myself about questions or thoughts or lines of inquiry that may come up. Very helpful to memorialize the fleeting inspiration.]

Aggressive advocates will sometimes try to waive opening statements. I am not happy with that. I usually handle the situation by telling them they have a right to do

that, but that it will leave me completely in the dark for a long time as to what they might have to say. I also point out that surprise is overrated, and that this is the final step of a grievance machinery in which there was supposed to have been full disclosure. That is usually enough said. I rarely have to drift though a hearing without first having heard both sides opening statements.

My three year old granddaughter likes to work puzzles. Puzzles that fit into a framework, and have the outlines cut in stencil into the back, are a great analytical help. If I have some idea of the shape and color of the puzzle and the pieces, and the location of particular pieces in the whole puzzle, then you can make a better decision.

Avoid prejudging the case. Do not think that because you've heard a paragraph -- especially one that sounds like another case you've heard -- that you've read the whole novel.

Whatever theory you might try to apply, it is your job to keep an open mind until the whole case is in, and you have reviewed ALL of the exhibits and arguments. This is required of judges, juries AND arbitrators.

General Conclusion

Perfect opinion is the perfect blend of analysis, form, words, and thoughts which fulfills the record, and which makes the perfect award.

Feng Shue

Merriam Webster Collegiate Dictionary

Main Entry:feng shui
Pronunciation:*f**-*shw*, -*shw*
Function:noun
Etymology:Chinese (Beijing) f*ngshui geomantic omen, literally, wind-water
Date:1797

: a Chinese geomantic practice in which a structure or site is chosen or configured so as to harmonize with the spiritual forces that inhabit it; also : auspicious orientation, placement, or arrangement as determined by feng shui

"Every music has its own soul. Quincy. It doesn't matter what style it is, be true to it."
Ray Charles to Quincy Jones – The Autobiography of Quincy Jones

When you are done, your opinion should convey that the decision is the ineluctable consequence of the contract and the record.

Main Entry:in£eluc£ta£ble
Pronunciation:*i-ni-*l*k-t*-b*l
Function:adjective
Etymology:Latin ineluctabilis, from in- + eluctari to struggle clear of, from ex- + luctari to struggle, wrestle; akin to Latin luxus dislocated— more at LOCK
Date:circa 1623

: not to be avoided, changed, or resisted : INEVITABLE
–in£eluc£ta£bil£i£ty \-*l*k-t*-*bi-l*-t*\ noun
–in£eluc£ta£bly \-*l*k-t*-bl*\ adverb

Pontius Pilate would not make a good arbitrator, but he had something to tell us. Refused to take personal responsibility for making the hard decision.

But his symbolic washing of the hands might be something to emulate.

While you have ethical and personal responsiblity for your opinion and award, in the larger sense your opinion can make it clear that it is not you who is reinstating the grievant or sustaining the discharge.

It is the facts, the record, the contract, and the concept of just cause that make the result, not you.

As you write your opinion be open-minded. An opinion is an exposition of your findings and conclusions on the arguments presented.

It is also an analytical tool. It is the glass through which you view the case. When the case won't write to support your conclusion, there is a reason. Perhaps your conclusion is wrong. This is then a good juncture to start over. Perhaps your analysis is faulty, or you have overlooked something. Does it all flow logically?
NEVER send out a decision that is in disharmony. You can use "one hand and other hand" but ultimately you must decide and it must point to the decision you reach.

Zen

Main Entry:Zen
Pronunciation:*zen
Function:noun
Etymology:Japanese, religious meditation
Date:1727

: a Japanese sect of Mahayana Buddhism that aims at enlightenment by direct intuition through meditation

As Justice Roberts said of the United States Supreme Court: "We are not final because we are infallible, we are infallible because we are final."

Don't use a cheap ballpoint pen to sign. The final expression of your personal responsibility for the perfect opinion is your signature. The perfect quality goes into the perfect opinion before the perfect signature goes on.

Smooth seas do not make skillful sailors. African Proverb

He who knows little, quickly tells it. Italian Proverb

When two quarrel, both are to blame. Dutch Proverb

Whoever gossips to you will gossip about you. Spanish Proverb

Don't speak, unless you can improve on the silence. Spanish Proverb

Words must be weighed, not counted. Polish Proverb

The beginning is half of every action. Greek Proverb

Ask the experienced rather than the learned. Arabic Proverb

Experience is the comb that nature gives us when we are bald. Belgian Proverb

Fall seven times, stand up eight. Japanese Proverb

A tree never hits an automobile except in self defense. American Proverb

Beware of the young doctor and the old barber. Benjamin Franklin

When your work speaks for itself, don't interrupt. Henry J. Kaiser

To invent you need a good imagination and a pile of junk. Thomas A. Edison

The secret to creativity is knowing how to hide your sources. Albert Einstein

The best way to have a good idea is to have a lot of ideas. Linus Pauling

A conference is a gathering of important people who singly can do nothing, but together can decide that nothing can be done. Fred Allen

He uses statistics as a drunken man uses lampposts–for support rather than for illumination.

Andrew Lang

The louder he talked about his honor, the faster we counted our spoons.

Ralph Waldo Emerson

Go away. I'm all right. H. G. Well's last words

The Six Phases of a Project:

1. Enthusiasm
2. Disillusionment
3. Panic and hysteria
4. Search for the guilty
5. Punishment of the innocent
6. Praise and honor for the nonparticipants

Award

"For all of the foregoing reasons . . ."

There are some judges that believe that anything outside the **AWARD** is surplusage. So you have to have a device to incorporate by reference the rest of the opinion.

The Stipulated issue is answered, "**Yes**."

Answer the question presented.

The Grievance is **DENIED**.

The Grievance is **GRANTED.**

The Grievance is **GRANTED IN PART AND DENIED IN PART**.

Meaning of words and phrases.

Dictionaries

Bargaining history

Past practice

Covenant of good faith and fair dealing

Recognition clause

Management Rights

Reserved rights theory was

"It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to mange the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded." Steelworkers vs. Warrior & Gulf Navigation Co., 363 US 564, 46 LRRM 2414 (1960) quoting with approval from Cox, Reflections Upon Labor Arbitration, 72 Harv. L.Rev. 1482, 1498-99 (1959).

Grievance settlements

Attempts at settlement.

Settlements that were completed, but are executory.

Law of a shop

Effect of an award upon the shop, morale.

Interface of contract and the law.

General duty clause OSHA. Violent employees.

Effect of award upon other proceedings. Civil Rights case. Alexander vs. Gardner Denver. NLRB unfair labor practice charges – deferral.

Creeping legalism.

82% of cases have briefs.

We are in labor relations, not law

Keep your eye on the continuing relationship.

Do not treat the opposition or the parties as though they were a party to a federal district court lawsuit whom you will never see again.

OPINIONS

Forms of opinions

Memorandum

Full analysis (an analytical tool)

Something in between

For whom do you write:

Practitioners'/Presenters

The archives of the employer and union – Giving principles and guidelines

The Grievant

The Union Shop Committee/The Foreman on the Plant Floor

Outside agencies

Publication

Yourself

BRIEFS

Deciding whether to file a brief.

Prehearing briefs (having your cake and eat it too).

Table of contents on long briefs. Table should be organized by order and list subjects (including issues discussed)

Introduction (Set the scene)

Summarize the facts (Fairly, but highlighting those that favor your interpretation)

Don't be biased. Don't slant.

Never mislead. Ethical obligations. Possible repercussions from arbitrator and opposing party,

Be clear.

Subsections detailing supporting evidence

Cite to the transcript (page and line) and to the exhibits. QUOTE the good stuff

Be chronological. (Although a flashback or background can be used later to good effect)

Clarity and simplicity are goals.

Quote the contract. Once in toto. Once in your argument.

Use italics and bold to highlight. [Emphasis added.]

Use Reported cases. Provided citations (Good idea to provide copies – highlighted at hearing)

Use cases from your own relationship. The law of **a** shop.

Unreported decisions (always provide copies)

Seek fairness, morality.

Consider invoking traditional equitable consideration.

Common law of the shop.

Law of the Land (External law)

Accepted arbitral standards.

Definitions.

Stress the equities (including seniority – or lack thereof -- in a discharge case).

If you are representing a discharged grievant, work to humanize him or her. Mention them **by name**. Invoke their family and the devastating effects of the discharge.

If you are representing a discharged employee, apply the Seven Tests as a defensive weapon. Show the unfairness of the process and of the result and penalty

If you are representing a company that discharged someone,

show the history of the rule and its application.

Show the Rule. Show notice of lack thereof.

Apply the "Seven Tests" as an offensive weapon. Show the fairness of the process and of the result and penalty. [Consider using the Seven Tests as part of your structure.]

Burden of proof. (N.b., the disparity between contract and discipline cases)

How long ("too many notes")

"Know thy arbitrator" [Experience of the arbitrator, general, industry, and in your plant]

Arbitrators tend to write their decisions the same way. Follow the well worn path.

Plagiarism is the sincerest form of flattery. Matter of Del Rio, 400 Mich. 665.

Write the arbitrator's opinion for the arbitrator.

But writing an opinion and a brief are different.

Submit the brief on time. [but be flexible on needs for extensions. Golden Rule.]

Submit the brief on disk or via E-mail if you can.

Relief requested. Not just an afterthought. Proofs on remedy.

Rebuttal to the other side's position.

Retention of jurisdiction.

The standard for review of arbitration awards is "one of the narrowest standards of judicial review in all of American jurisprudence." *Tenn. Valley Auth. v. Tenn Valley Trades & Labor Council*, 184 F.3d 510, 514-15 (6th Cir. 1999) (quoting *Lattimer-Stevens Co. v. United Steelworkers of Am., Dis. 27*, 913 F.2d 1166, 1169 (6th Cir. 1990)) (internal quotation marks omitted). In reviewing an award, a court's scope of review is limited to determining whether "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S. Ct. 364, 371 (1987). So long as the arbitrator's award "draws its essence from the collective bargaining agreement" and is not merely the arbitrator's "own brand of industrial justice," the award must be upheld. *Id.* at 36, 108 S. Ct. at 370 (internal quotations omitted).

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns [a] construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of Am. v. Enter. Wheel & Car Co., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960). Thus, while an arbitrator is accorded wide latitude in construing a collective bargaining agreement, the arbitrator's interpretation and award must be grounded in the language of the contract. *Misco*, 484 U.S. at 38, 108 S. Ct. at 371. The Sixth Circuit determined that an arbitrator's award fails to draw its essence from the collective bargaining agreement when:

> (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.

Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Dana Corp., 278 F.3d 548, 554 (6th Cir. 2002) (quoting *MidMichigan Reg'l Med. Ctr.– Clare v. Prof'l Employees Div. of Local 79*, 183 F.3d 497, 502 (6th Cir. 1999)).

In addition, courts may upset an arbitration award if it is rendered in "manifest disregard of

the law," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995), or if it is contrary to a well-defined and dominant public policy. *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 467 (2000). Also, an

arbitration award may be vacated based on arbitrator bias if the moving party demonstrates "evident partiality." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328-29 (6th Cir. 1998) (citing 9 U.S.C. § 10(a)(2)).

The CBA provides that the Employer will discipline or discharge an employee only for just cause. It does not, however, define just cause. While a precise definition of just cause does not exist, a comprehensive body of arbitral analysis on the subject is available and certain basic principles of what constitutes just cause are generally recognized. Just cause is a concept with a well developed meaning. By using those terms, the signers made an informed decision divvying up the burden of proof, and requiring a fair result based upon facts and a full weighing of equities.

In other words, the phrase "just cause" is a term of art, which was negotiated and is understood in light of more than a half century of arbitral interpretation and application.

In interpreting the parties' language and their intent, the arbitrator bears in mind **Seven Cardinal Concepts Related to Just Cause in Arbitration**. They are:

1. *"Just cause" is a mixed question of law, public policy, contract (including practices) and fact, which the parties have agreed to have finally adjudicated by the arbitrator.*[4] The arbitrator owes his first duty to apply the contract, but if the contract incorporates the law then it must be applied to. This is a difficulty which is more common in public sector cases. However, even in private sector cases, a well-informed decision ought to be done in a manner consistent with the law, if such a reading is plausible.

2. *"Just cause" has an inherent procedural due process aspect to it.*[5] This concept should be

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[4]When an Arbitrator was appointed, he was designated by the parties to be their contract reader, and to interpret and apply on a final and binding basis the law, as necessary, as though it were part of the contract. See Eastern Associated Coal vs. Mine Workers District 17, 121 S. Ct. 462, 265 LRRM 2865 (2000). Citing Theodore J. St. Antoine, "Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, in Arbitration - 1977", Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (BNA Books, 1978) 29, 30-36. See also, Theodore J. St. Antoine, "Presidential Address: Contract Reading Revisited," Arbitration 2000: Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators (BNA Books, 2001), 1-19.

[5]In 1964, Arbitrator Carroll Daugherty attempted to crystalize the existing "common law" definition of just cause into seven independent tests. Some of them implicitly support the need for "due process" as part of any just cause analyses. These tests, in the form of questions, represent a generally accepted analysis of the just cause standard.
The seven tests articulated by Arbitrator Daugherty are summarized as follows:
1. Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer's rule of managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's

understood in the context of the particular industry and union; and the mechanical application of the "Seven Tests" is controversial among arbitrators. Although the seven tests articulated by Arbitrator Daugherty are useful in determining whether just cause exists in a particular disciplinary proceeding, they are not intended to be rigidly applied without regard to the employment setting in which they occur. Even Arbitrator Daugherty explained that the seven tests "do not represent an effort to compress all the facts in a discharge case into a 'formula.' Labor and human relations circumstances vary widely from case to case, and no formula can be developed where all of the facts can be fed into a 'computer' that spews out the inevitably correct answer on the sheet of paper. There is no substitute for sound human judgment."[6] Nor does it ineluctably follow that every procedural error will result in voiding a disciplinary penalty. Nevertheless, at a bare minimum, a fair investigation which yields facts that stand up at the arbitration hearing is required.

3. *"Just cause" is individual. It depends on the facts.*

4. *"Just cause" is not monolithic.* It must relate to each employer's and union's unique policies and practices, and the total record. If there is no negotiated agreement that particular behavior will result in a specified penalty, the meaning of the phrase "just cause" is subject to interpretation and application, like any other contract term. Therefore, the question is not, "How does the arbitrator feel about it?" Rather, "what does the agreement require?" The law of *a* shop controls, not the generic law of *the* shop.[7]

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business, and (b) the performance that the Employer might properly expect of the employee?

3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?

5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

[6]Whirlpool Corp., 58 L.A. 421, 427 (1972).

[7]The inherent misconception of treatises on labor arbitration -- such as Alan Miles Ruben, Ed., Elkouri & Elkouri, How Arbitration Works (6th Ed) (BNA, 2003) [published with the assistance of the American Bar Association Labor and Employment Law Section] – is the implication that there is one "law of the shop." A better and more true to life representation of arbitral analysis is exemplified in Theodore J. St. Antoine, Ed., The Common Law of the Workplace: The Views of Arbitrators, 2nd Edition, 48 (BNA Books, Washington, D.C., 2005), which demonstrates a perceptible sensitivity to the many elements in a record, and the diverse

5. *"Just cause" means the employer has the burden of going forward with evidence, and the ultimate burden of persuasion.*

6. *"Just cause" means the penalty fits the crime.* "Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?"[8]

7. *Penalty is 'the other side of the coin' of remedy.* The proportionality of the penalty to the offense proved, if any, is related to the remedy for the alleged contractual violation. It is well-established that the arbitrator has broad remedial power, and that such a grant of authority is inherent in the phrase "just cause." Accordingly, the arbitrator's judgment on the issue of remedy and the propriety of penalty is precisely what the parties bargained for in their labor agreement's arbitration section. An arbitral appointment carries with it the inherent power to specify an appropriate remedy.[9]

Pratt fails to show an agreement between the parties as to this alleged limited scope of the arbitration. The arbitrator framed the arbitration as "the Union's request for a hearing on alleged damages," further indicating that the Union differed from Pratt on the scope of the arbitration. (Arbitrator's Report at 9.) Once a dispute is submitted for arbitration, the matter of framing the issues is "to be resolved by the arbitrator," who is "limited by the language of the contract." *Avon Products, Inc. v. Int'l Union, UAW, AFL-CIO, Local 710*, 386 F.2d 651, 657 (8th Cir. 1967). The arbitrator in this case reconciled the conflicting positions by ruling on the single or multiple Grievance dispute and then moving on to the merits.

Pratt next argues that the arbitrator overstepped his contractual boundaries because the merits

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chorus of arbitrators' opinions. It was compiled under the auspices of the National Academy of Arbitrators, although notes it does not represent official "NAA policy."

[8] *See generally, Adolph M. Koven and Susan L. Smith, Just Cause: The Seven Tests (2nd Ed.) (BNA, 1992)* pp. 377-447.

[9] See, *e.g.*, Electrical Workers (IUE) Peerless Pressed Metal Corp., 989 F.2d 768, 82 LRRM 3089 (CA 1st), *cert. denied*, 414 U.S. 1022, 84 LRRM 2683 (1973). See generally, Marvin F. Hill and Anthony V. Sinicropi, Remedies in Arbitration, Second Edition, (BNA, 1991), pp. 42-48 and cases cited therein. As the United States Supreme Court has recognized, an arbitrator must have wide latitude in formulating remedies: "*When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.* Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." [Emphasis added.] Steelworkers v Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 46 LRRM 2523, 2425 (1964).

of the Grievance had not proceeded through all of the grievance steps. The Supreme Court has made clear that the issue of "procedural arbitrability" is left to the arbitrator, not the courts. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-59, 84 S. Ct. 909, 918-19 (1964). The arbitrator here considered Pratt's claims that the Grievance had not passed through all steps of the grievance procedure outlined in the CBA and determined that the issues relating to the merits were properly before the arbitrator. Pratt concedes that "an arbitrator might find that satisfaction of grievance procedure steps. . . have been waived, excused, or rendered futile." (Pl.'s Mem. Supp. Cross-Mot. Summ. J. 18.) Consistent with Pratt's statement that an arbitrator may find that grievance steps have been rendered futile, the arbitrator reported his finding that "the parties are at impasse." Because the issue of procedural arbitrability is left to the arbitrator, the Court will not interfere with the arbitrator's procedural ruling that the merits were properly before him.

In deciding the Grievance on the merits, the arbitrator was limited by the language of the CBA. The arbitrator's interpretation of the contract must be given deference. There is nothing in the record indicating that the arbitrator overstepped his bounds in ruling on the merits once the

parties agreed to submit the grievance to arbitration. After determining that the Grievance could proceed without separation, the arbitrator made a procedural determination that the Grievance was ripe for adjudication on the merits. The arbitration clause is very broad and provides that a grievance that has proceeded through the grievance procedure, as the Grievance did in some form, "may be appealed to arbitration by the Union serving the Company." It is plausible that under the CBA's language granting the Union authority to appeal the Grievance to arbitration, the arbitrator would accept the Union's position that the merits of the Grievance were the proper subject for arbitration and to reject Pratt's contrary argument. Based on the CBA's broad definition of "grievance," the broad arbitration clause, and the apparent disagreement between the parties as to the scope of the arbitration, the arbitrator arguably construed the CBA by arbitrating the Grievance on the substantive merits.

The proceeding is convened pursuant to the parties' collective bargaining agreement. Under Article V, GRIEVANCE PROCEDURE, the arbitrator is given specific authority to resolve the grievance, and such decision "shall be final and binding on both parties without further appeal."

The hearing was held on January 19, 2006 at the Holiday Inn in Jackson, Michigan. Three witnesses testified under oath or affirmation, namely: For the Union: **G**, Vice President and **R**, Steward. Six exhibits were marked, and five were received into evidence. Subpoenas were issued. Grievant chose not to testify in his own behalf. The parties had a full opportunity for examination and cross examination, and to present any evidence that they chose. Oral arguments were made.

Initially, an evidentiary and procedural issue must be resolved.

The Union offered Union Exhibit 6, documentation concerning a related unemployment compensation proceeding. The employer's objection was deemed a motion to strike, which was taken under advisement by the arbitrator. The Employer's objection is **SUSTAINED**. Therefore, Union Exhibit 6 is struck from the record. Thus, it was not taken into consideration by the arbitrator in deciding this case.[7]

"Just cause" is a concept with a well developed meaning. By using that phrase, the signers made an informed decision divvying up the burden of proof, and requiring a fair result based upon facts and a full weighing of relevant equities.

Working under that contract, the employer chose to summarily terminate Grievant's employment. Given the contract's implicit preference for progressive discipline,[8] the employer must be held to a rigorous standard of proof.

Therefore, the question is not, "How does Mr. Arbitrator feel about it?" but rather, "What does the parties' bargain require?" We are applying not the law of the shop, but the law of a shop.[9] The arbitrator [9]The inherent fallacy of treatises on labor arbitration -- such as Alan Miles Ruben, Ed., Elkouri & Elkouri, How Arbitration Works (6th Ed) (BNA, 2003) [published with the assistance of the American Bar Association Labor and Employment Law Section] – is that they imply that there is a unitary law of the shop. A better and more true to life representation of arbitral analysis is exemplified in Theodore J. St. Antoine, Ed., The Common Law of the Shop: The Views of

and to fashion the scope of their grievance machinery and arbitration process. It is the parties who created this forum, and they themselves have defined its rules.

The CBA provides that the Employer will discipline or discharge an employee only for just cause. It does not, however, define just cause. While no precise definition of just cause exists, a comprehensive body of arbitral analysis on the subject is available and certain basic principles of what constitutes just cause are generally recognized. "Just cause" is a concept with a well developed meaning. By using that phrase, the signers made an informed decision divvying up the burden of proof, and requiring a fair result based upon facts and a full weighing of relevant equities.

Working under that contract, the employer chose to summarily terminate Grievant's employment. Given the contract's implicit preference for progressive discipline,[8] the employer must be held to a rigorous standard of proof.

- "Just cause" is individual. It requires consideration of an individual's circumstances and disciplinary record, and all mitigating and aggravating circumstances proved at the hearing.
- "Just cause" must be based on the credible proofs presented at the hearing.

! "Just cause" is not monolithic. It must relate to each employer's and union's unique policies and practices, and the total record. Absent a negotiated agreement that particular behavior will result in a particular penalty, the meaning of the phrase "just cause" is subject to interpretation and application, just like any other contract term.
Therefore, the question is not, "How does Mr. Arbitrator feel about it?" but rather, "What does the parties' bargain require?" We are applying not the law of the shop, but the law of a shop.[9] The arbitrator
Arbitrators (2nd Ed.) (BNA, 2005), which shows a sensitivity to the many facets in a record, and demonstrates the heterogeneous chorus of arbitral opinion. That book was compiled under the auspices of the National Academy of Arbitrators, although it does not purport to represent any NAA policy.

Arbitrators (2nd Ed.) (BNA, 2005), which shows a sensitivity to the many facets in a record, and demonstrates the heterogeneous chorus of arbitral opinion. That book was compiled under the auspices of the National Academy of Arbitrators, although it does not purport to represent any NAA policy.
[10]Truth telling is a personal characteristic. Some witnesses refuse to tell anything less than the whole truth and nothing but the truth. Others will attest, but may deliberately shade their testimony or story to put themselves, something or someone in the best light.
[11]The retelling of the tale, suggestive questioning, and passage of time, makes it entirely possible – even likely -- for a witness's "memory" to be embellished. They sometimes become firmly convinced of something that is wrong. Imagined memory (to compensate for memory loss or to 'fill in the blanks') and repetitive questioning go hand in hand. Repetition of stories from flawed speakers to flawed listeners and back carries the likelihood of bad communication, dropped signals and irreparably contaminated memory. It is a truism that people want to be well regarded, and will sometimes cast themselves in the roles of hero or victim. effectuates the parties' agreement as proven in the record presented.

David Feller used when he address the Academy a few years ago (I can't find his speech on the bound volumes), when he argued the Steelworkers trilogy back around 1960, it was on the theory that labor arbitration is different in design and intent from all other arbitrations and involves skill and expertise that regular judges do not have. The Supreme Court bought that argument and followed it for a number of years. However, in recent years, the Court has shifted its position and now regards labor arbitrators as just another variety of "junior judges" and therefore are qualified to decide the same issues that courts do. If we believe that new theory, we should give credit for all kinds of arbitrations, and not just to employment arbitrations. I still believe Feller's original contentions that we are specialists and that our crucial role in labor relations is unique.

But then, I am an old-timer.

These are not "appeals." They are collateral attacks on a final proceeding. The right to appeal was explicitly waived by the parties in a signed writing.

National labor policy favors finality.

Judges think that they are there to review something. It is a fact that labor law is an elective course in law schools. Most judges have not taken it, and don't umderstand it. They literally are unschooled on the question of notional labor policy. Likewise, many have not worked for a living, at least in a shop, and have no conception of "the law of shop" or the law of a shop.

Not ordinary contracts.

Plain meaning rule.

Corbin. Words must be understood in context.

Roberts Dictionary of Industrial Relations.

In arbitration and in law, context is everything. As Mr. Justice Oliver Wendell Holmes wrote: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[10]

1.3. The Plain Meaning Rule

Even when the Parol Evidence Rule bars parol evidence for purposes of contradicting or supplementing a contract's terms, parol evidence is generally still admissible for the purpose of interpreting terms found in the writing. Nonetheless, a US law doctrine known as the Plain Meaning Rule, where adopted, bars extrinsic evidence, particularly evidence of prior negotiations, for the purposes of interpreting a contract, unless the term in question has first been found to be ambiguous. In contrast to the Parol Evidence Rule, the Plain Meaning Rule concerns only contract interpretation and does not purport to bar contradictory or supplementary terms. The Plain Meaning Rule is based on the proposition that, when language

[10]Towne v. Eisner, 245 U.S. 418, 425 (1918). Incidentally, this quote appears in the frontispiece of Harold S. Roberts, Roberts' Dictionary of Industrial Relations (3rd Ed) (BNA, 1986).

is sufficiently clear, its meaning can be conclusively determined without recourse to extrinsic evidence.[24] Under the Plain Meaning Rule, the preliminary analysis concerns whether the contract term in dispute is clear. Only if the term is deemed ambiguous, may evidence of prior negotiations be admitted for purposes of clarification.[25]

1.4. Merger Clauses

The parties may wish to assure themselves that reliance will not be placed on representations made prior to the execution of the writing. The Merger or Entire Agreement Clause (the "Merger Clause") has been developed to achieve certainty in this regard. The Merger Clause, which usually appears among the concluding terms of a written agreement, provides that the writing contains the entire agreement of the parties and that neither party may rely on representations made outside the writing.[26]

In approaching contract interpretation every court should heed the strong words of Corbin:

> [I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons.

Corbin § 536.

Despite the accuracy of the conclusion that seldom will any word or phrase carry only a single meaning which is readily discernible by any reader, this court on occasion has embraced the "plain meaning rule."

> The Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.

J. Calamari & J. Perillo, Contracts § 310, at 166-67 (3d ed. 1987). In following this rule, this court has held that only if a contract is ambiguous on its face will the court look to evidence of the parties' intent as shown by the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations. E.g., St. Yves v. Mid State Bank, 111 Wn. 2d

374, 378, 757 P.2d 1384 (1988); Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn. 2d 488, 496, 268 P.2d 654, 45 A.L.R.2d 984 (1954); Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc., 13 Wn. 2d 370, 384, 125 P.2d 668 (1942).

The plain meaning rule has been criticized by leading commentators. See, e.g., Corbin § 542; 9 J. Wigmore, Evidence §§ 2461-62 (1981); Williston § 629; 2 E. Farnsworth, Contracts § 7.12, at 277-78 (1990); Calamari & Perillo § 3-10. The rule has been rejected by the Uniform Commercial Code, UCC § 2-202 comment 2, and the Restatement §§ 2002-04.

I would submit that "arbitration" by definition is "final and binding." Certainly that is what we are used to in traditional labor (so-called "rights") arbitration.

As one editor wrote:

arbitration, n. A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing -parties and who decision is binding. -- Also termed (redundantly) binding arbitration. "

The same source has definitions which follow the main definition for the phrases

ad hoc arbitration * * *

adjudicative- claims arbitration * * *

compulsory arbitration "Arbitration required by law or forced by law on the parties."

final-offer arbitration

grievance arbitration [which has an extended subset of definitions} as follows:

1. Arbitration that involves the violation of interpretation of an existing conract * The arbitrator issues a final decision regarding the meaning of the contractual terms. 2. Labor law. Adjudication of an employee's grievance, usu. relating to an alleged violtino of the employee's rights under a collective=bargaining agreement. * The arbitration procedure is set out in the collective-bargaining agreement. Grievance arbitraiton is the final step in grievance procedure. -- also temred rights arbitration. See GRIEVANCE PROCEDURE. * * *

interest arbitration * * *

judicial arbitration -- "Court-referred arbitration that is final unless a party object otothe

award"

rights arbitration "See grievance arbitration"

voluntary arbitration. "Arbitration by agreement of the parties."

Bryan A. Garner, Ed., Black's Law Dictionary (7th Ed.), (West, 1999), p. 100.

The ouroboros

Consider: In mythology, religion and chemistry, there is a serpent whose end is her beginning as she endlessly eats her own tail.[11]

This case is like that. Its beginning, middle and end are inextricably knotted. There are myriad issues: industrial and constitutional due process; admissibility, weight and sufficiency of evidence; use of prior discipline; existence of theft and fraud; consideration of extenuating, aggravating and mitigating circumstances; fitness of penalty; opportunity for rehabilitation; management rights; disparate treatment and penalty; legal restrictions regarding management rights; and limitations on the powers of the arbitrator.

Questions of arbitrability.

Prohibited subjects (e.g., probationary employees, changes in retiree health insurance).

Prohibited procedures (group grievances, signing requirements, alleged untimeliness)

Plain meaning ("the management's rights clause is clear and unambiguous, and the matter of subcontracting is left to the company's sole discretion; moreover, the arbitration clause prohibits subtraction from or addition to the contractual language; and the contract expressly bars the existence of implied obligations or past practice.")

Plain meaning (allegedly negotiated penalties vs. the contract's requirement for "just cause") – can the arbitrator substitute

Scope of remedy.

Creative remedies (e.g., interest, attorney's fees, cease and desist orders).

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[11]The Ouroboros, a.k,a.: oroborus, uroboros, and oureboros. In various forms, this is a symbol found in Egyptian, Phonecian, Greek, Norse and Hindu mythologies. The serpent biting, devouring, eating its own tail symbolizes the cyclic Nature of the Universe: creation out of destruction, Life out of Death. The ouroboros eats its own tail to sustain its life, in an eternal cycle of renewal. It is also an emblem of immortality and constant renewal. Alchemically, the basilisk/ouroboros is also used as a purifying glyph. In the 19th century, a vision of Ouroboros gave the German chemist Friedrich August Kekule von Stradonitz the idea of linked carbon atoms forming the benzene ring.

Scope of the grievance. Jurisdiction over changed facts or events.

*The Honorable Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 06a0092p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY; FIRSTENERGY NUCLEAR OPERATING COMPANY; FIRSTENERGY GENERATION CORPORATION,

Plaintiffs-Appellees/Cross-Appellants,

v.

UTILITY WORKERS UNION OF AMERICA, LOCAL 270,

Defendant-Appellant/Cross-Appellee,

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No. 04-3566/3567

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

No. 03-02018—John M. Manos, District Judge.

Argued: June 10, 2005

Decided and Filed: March 14, 2006

Before: NORRIS and DAUGHTREY, Circuit Judges; JORDAN, District Judge.*

COUNSEL

ARGUED: Emily A. Tidball, GOLDSTEIN & O'CONNOR, Cleveland, Ohio, for Appellant. Gary W. Spring, ROETZEL & ANDRESS, Akron, Ohio, for Appellees. **ON BRIEF:** Emily A. Tidball, Bryan P. O'Connor, GOLDSTEIN & O'CONNOR, Cleveland, Ohio, for Appellant. Gary W. Spring, ROETZEL & ANDRESS, Akron, Ohio, for Appellees.

OPINION

LEON JORDAN, District Judge. The Cleveland Electric Illuminating Company, FirstEnergy

Nuclear Operating Company, and FirstEnergy Generation Corporation, the plaintiffs in this case, appeal the district court's enforcement of the arbitrator's determination that the grievance filed by defendant Utility Workers Union of America, Local 270, on behalf of retirees was arbitrable. The defendant cross-appeals the portion of the district court's ruling requiring the retirees' consent as a condition of representation. For the reasons that follow, we affirm the district court's opinion.

1At arbitration, the parties agreed to bifurcate and stay the active employees' grievance on this matter until the issue concerning the retirees' representation was settled.

I. BACKGROUND

On December 2, 2002, the defendant, Utility Workers Union of America, Local 270 ("Union"), filed a grievance on behalf of its members and retirees against the plaintiffs, Cleveland Electric Illuminating Company, FirstEnergy Nuclear Operating Company, and FirstEnergy Generation Corporation (collectively "Cleveland Electric"), alleging that Cleveland Electric's decision to make changes in health benefits was a violation of the collective bargaining agreement ("CBA"). The grievance states: "The Company unilaterally and without bargaining changed the health care provisions and providers including but not limited to Preferred Provider Organizations, Prescription Coverage, Traditional Plans, and Health Maintenance Organizations for both active and retired members." The complaint proceeded through the CBA's grievance steps to arbitration with Cleveland Electric contending all along the way that the Union's grievance was not arbitrable with respect to the retirees because they were not employees covered by the CBA.

The parties submitted the issue of arbitrability to the arbitrator for his consideration, and he determined that the Union was not required to represent the retirees or to bargain on their behalf because the retirees were not members of the Union.**1** But, since the Union and Cleveland Electric agreed to include retirees' benefits in the CBA, the Union had standing to seek arbitration on behalf of the retirees for benefits that were included in the CBA. Importantly, at arbitration, Cleveland Electric did not argue that the arbitrator had no authority to decide the issue of arbitrability. Rather, Cleveland Electric's argument focused solely on the arbitrability of the retirees' health benefits. Thereafter, pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, Cleveland Electric filed a complaint in federal court seeking to have the arbitrator's decision vacated. Cleveland Electric claimed that the arbitrator's ruling did not derive its essence from the CBA and was contrary to the CBA's express terms. Further, in its brief to the district court, Cleveland Electric questioned for the first time whether the arbitrator had authority to determine the arbitrability question. The district court found that the parties submitted the issue of arbitrability

to the arbitrator "without reservation" and that Cleveland Electric thereby waived its right to have the issue decided by the court. On the issue of whether the retirees' dispute over the changes in their health care provisions was arbitrable, the district court upheld the arbitrator's decision that the Union could represent the retirees in arbitration, but disagreed with the arbitrator's determination that the retirees' consent was not necessary unless evidence submitted in arbitration demonstrated otherwise. The district court found that the retirees, unlike the active employees, had individual contractual rights and that they could not be forced to arbitrate their grievance. The district court held that the retirees must consent to the Union's representation.

In its appeal, Cleveland Electric argues that the district court erred: (1) in finding that Cleveland Electric waived its right to have the court decide the issue of arbitrability and (2) in upholding the arbitrator's decision on arbitrability. The Union appeals the portion of the district court's opinion requiring the Union to obtain the retirees' consent before proceeding to arbitration over the health benefits.

II. ANALYSIS

A. Standard of Review

A district court's decision that confirms or refuses to vacate an arbitration decision is reviewed under the same standards as other district court decisions. This court must accept the

district court's findings of fact unless they are clearly erroneous, but questions of law are reviewed *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 407 (6th Cir. 1998).

B. Arbitrability of the Retirees' Grievance

The framework considered by the Supreme Court in *First Options* is useful in separating the issues before this court. There are three issues present in this case: (1) the propriety of Cleveland Electric's changes to the health care provisions of the CBA (the merits of the dispute); (2) whether the Union can force Cleveland Electric to arbitrate the merits related to the retirees' benefits; and (3) who has the authority to decide the second matter. *See First Options*, 514 U.S. at 942. Only the last two issues are before this court, and the last issue will be considered first.

1. Who has the authority to decide arbitrability?

The question of who, the court or the arbitrator, has the authority in a particular case to decide the arbitrability of a grievance determines the standard of review of the arbitrator's decision. If the parties have agreed to allow the arbitrator to decide arbitrability, the district "court should give

2The "Steelworkers Trilogy" cases are *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id.* at 943. On the other hand, if the parties did not agree to submit the arbitrability question to the arbitrator, then the district court conducts an independent review. *Id.*

Cleveland Electric raised the issue of who should decide arbitrability for the first time in its brief to the district court. It argued that the arbitrator had no authority to determine arbitrability of the retirees' grievance and, therefore, that his decision is void *ab initio*. Citing cases from the Supreme Court and this court, Cleveland Electric asserts that the question of whether the parties agreed to arbitrate a certain matter is to be decided by the court, not the arbitrator. *See AT&T Techs. Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986) (reaffirming the principle that the court is to determine whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, on the basis of the parties' contract); *see also Armco Employees Indep. Fed'n v. AK Steel Corp*., 252 F.3d 854, 859 (6th Cir. 2001) (finding that courts determine substantive arbitrability).

The Union did not address this issue in the district court because it had not been raised before, and its brief was filed the same day as Cleveland Electric's brief. In its brief to this court, the Union agrees with the general statement of the law set out above but argues that the district court was correct in its conclusion that the parties "clearly and unmistakably consented to the arbitrator's jurisdiction on the issue" and waived the right to have the issue decided by the court.

In *AT&T Technologies*, the Supreme Court referenced the "Steelworkers Trilogy," a series of cases decided in 1960,[2] and reiterated four principles for which these cases stand, one of which is that the question of arbitrability of a particular dispute is a matter for judicial determination. *AT&T Techs.*, 475 U.S. at 649. In this circuit, however, although a court is usually the proper venue for decisions about arbitrability, if the parties "clearly and unmistakably" submit the issue to the arbitrator "without reservation," then the parties have waived their right to have a court make the decision. *See Vic Wertz Distrib. Co. v. Teamsters Local 1038*, 898 F.2d 1136, 1140 (6th Cir. 1990); *see also Interstate Brands Corp. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 135*, 909 F.2d 885, 890 (6th Cir. 1990).

In *Interstate Brands*, the union filed a grievance related to the dismissal of one of its members. The company participated in the arbitration proceedings on the issue of arbitrability as well as the merits, but later complained that the issue of arbitrability was a question for the court. *Interstate Brands*, 909 F.2d at 890. The court, relying on *Vic Wertz*, held that an agreement to have the arbitrator decide the issue of arbitrability will be implied where the parties did not bring the issue to the district court in the first place. *Id.* Thus, the company waived its right to have the court decide the arbitrability question by participating in the arbitration proceedings. *Id.*

In *First Options*, a case cited by Cleveland Electric in support of its argument, the Supreme Court held that deference to an arbitrator's decision on arbitrability is not necessary unless there is evidence of a clear and unmistakable willingness to arbitrate the issue. *First Options*, 514 U.S. at 944. However, *First Options* did not involve a union or a collective bargaining agreement, so there was no underlying agreement between the parties providing for arbitration. The issue was whether private parties could be forced to arbitrate the issue of arbitrability just because they filed a brief with the arbitrator objecting to the arbitrator's jurisdiction. *Id.* at 946. The Supreme Court found that the objecting party (the Kaplans) forcefully opposed the arbitrator deciding whether they had to arbitrate their dispute, and the arbitrator's ruling, therefore, was entitled to a court's independent review. *Id.* at 946-47.

The circumstances in this case are more like those in *Interstate Brands* than *First Options*. Cleveland Electric submitted the question of arbitrability to the arbitrator for his determination, and we can find nothing in the record to indicate that Cleveland Electric wanted to reserve the question of arbitrability for the court. The district court found, and this court agrees, that Cleveland Electric waived the issue of who had the power to decide the arbitrability of the retirees' grievance by submitting the matter to arbitration "without reservation."

2. Was the decision on arbitrability correct?

The arbitrator found, and the district court agreed, that the issue of the retirees' health benefits was arbitrable. Based on this court's finding that the parties submitted the issue of arbitrability to the arbitrator, the arbitrator's decision is entitled to a deferential review. The arbitrator's decision will not be disturbed "unless it fails to 'draw its essence from the collective bargaining agreement.'" *Vic Wertz*, 898 F.2d at 1140 (quoting *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 891 (6th Cir. 1989)).

Cleveland Electric argues that the district court erred in finding that the issue of the retirees' health benefits was arbitrable. Cleveland Electric contends that the presumption of arbitrability does not apply to retirees, and without the presumption, the unambiguous language of the agreement excludes retiree disputes from the arbitration process. Further, the retirees have remedies in court that the members of the collective bargaining unit do not, so arbitration of disputes is not necessary.

In response, the Union argues that the presumption of arbitrability applies to the dispute in this case, because it was the Union not the retirees who filed the grievance and the dispute is actually between the Union and Cleveland Electric. Second, the Union argues that the dispute involves the interpretation or application of a provision of the CBA. The fact that the dispute relates to retirees' benefits is not the deciding factor. Third, the language of the CBA is broad enough to encompass the dispute concerning the retirees' benefits making the presumption of arbitrability particularly applicable. Finally, the Union argues that the retirees' other remedies do not bar arbitration.

In addition to the principle of judicial determination of arbitrability discussed above, the Steelworkers Trilogy also established a "presumption of arbitrability." *Steelworkers v. Warrior &*

Gulf Navigation Co., 363 U.S. 574, 583 (1960). If the collective bargaining agreement contains an arbitration clause, the Supreme Court found that it should be presumed that the parties intended to arbitrate the dispute unless there is "positive assurance" that the arbitration clause does not cover the matter. *Id.* "[I]n cases involving broad arbitration clauses the Court has found the presumption of arbitrability 'particularly applicable,' and only an express provision excluding a particular grievance from arbitration or 'the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *See United Steelworkers v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 131 (6th Cir. 1994) (quoting *AT&T Techs.*, 475 U.S. at 650).

This court has held that the presumption of arbitrability is particularly applicable where the arbitration clause provides for arbitration of any controversy involving the interpretation of the CBA. *See Commc'ns Workers v. Mich. Bell Tel. Co.*, 820 F.2d 189, 193 (6th Cir. 1987); *see also Mead Corp.*, 21 F.3d at 132. In the agreement before this court, the parties clearly bargained for retirees' health benefits. The relevant provisions are found in Article X, section 3, of the CBA. The grievance procedures are set out in Article V of the CBA. Section 1 of Article V provides that "the following grievance procedure shall be used by the Union to settle or adjust any disagreement concerning the interpretation or application of this Agreement." There follows a set of procedures beginning with a grievance being filed and ending with arbitration. Nothing in the CBA expressly excludes retirees' benefits from arbitration.

Cleveland Electric argues that the retirees are not part of the collective bargaining unit and that the grievance procedures do not apply to them. This argument is unavailing. In *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971), the Supreme Court considered whether a midterm modification of retirees' insurance benefits was an unfair labor practice. The company sought to modify its contributions to the retirees' health benefits because Medicare was enacted. *Id.* at 161. The National Labor Relations Board found that the retirees' benefits were a mandatory subject of collective bargaining. *Id.* at 162. The Supreme Court held that the Board's decision was not supported by law; that the term "employee" does not include retired workers; that the retired workers are not employees included in the collective bargaining unit; and that retired workers' benefits are only a permissive subject of collective bargaining. *Id.* at 166-82. Nevertheless, the Supreme Court recognized that a union and company may agree to bargain for retirees' benefits, and once these bargained-for benefits are vested, retired workers may have contract rights under the collective bargaining agreement which they could enforce pursuant to § 301 of the Labor Management Relations Act if the benefits are

changed. *Id.* at 181, n. 20.

In spite of the fact that retirees' benefits are not a mandatory subject of bargaining, several courts, including this one, have held that where a union and a company bargain for retirees' benefits and include the benefits in their contract, the union has standing to represent the retirees in any dispute concerning those benefits. For example, in *Michigan Bell*, we held that the presumption of arbitrability applied to a dispute over retirees' benefits brought by the union because the union and the employer were parties to the contract providing for arbitration. *Mich. Bell*, 820 F.2d at 192. We pointed out that the union's assertion of rights for parties outside the bargaining unit was not dispositive of the duty to arbitrate. *Id.*; *see also Int'l Union, (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476, 1486 (6th Cir. 1983) (noting that the union, as a signatory to the contract, could bring an action for third party beneficiary retirees because it has a direct interest in maintaining the integrity of the retiree benefits created by the collective bargaining agreement).

The Eighth Circuit's opinion in *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985), was cited with approval in *Michigan Bell*. In *Alpha Portland*, the individual retirees were seeking enforcement of their rights in federal court, but the company objected arguing that the retirees had to exhaust the CBA's grievance procedures before filing suit in federal court under

§ 301. In arriving at its decision that the retirees did not have to exhaust the grievance procedures, the Eighth Circuit noted that the union would have had standing to represent the retirees rights under a collective bargaining agreement if it chose to do so, and an employer could not have refused to arbitrate its contractual obligations with the union. *Id*. at 1296.

The panel in *Yard-Man* relied on the Third Circuit's opinion in *United Steelworkers v. Canron, Inc.*, 580 F.2d 77 (3d Cir. 1978). In *Canron*, the Third Circuit considered a dispute over retirees' benefits brought by the union against the employer and noted that the employer was not required to bargain with the union over benefits of retired employees of its predecessor company. But, when a company contracts with the union to underwrite the premium costs of retirees' benefits, "the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions." *Id.* at 80-81. The *Canron* court held that the union had standing to represent the retirees in seeking arbitration under its labor contract with the employer and stated that the arbitrability of the dispute was not to be "calculated by the status of the grievants but by the nature and duties of the obligations of the parties under the contract." *Id.* at 80-82.

Cleveland Electric relies on *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), to support its argument that the presumption of arbitrability does not apply in this case. In

Schneider, the trustees of an employees' benefit trust fund brought suit against two companies who were parties to a multi-employer trust fund and who had not made the contributions to the fund as required by the trust agreement, as incorporated into the terms of the applicable collective bargaining agreement. The union was not involved in the case. The Supreme Court rejected the presumption of arbitrability because nothing in the trust agreement or the collective bargaining agreements evidenced an intent by the parties to require exhaustion of the arbitration remedies set out in the collective bargaining agreements. *Id.* at 372. Nevertheless, the Court recognized that "[t]he presumption of arbitrability is, of course, generally applicable to any disputes between the union and the employer." *Id.* at 372, n. 14. The obvious distinction between *Schneider* and the case before this court is that in *Schneider* it was the trustees who were seeking to enforce trust agreements, not the union seeking to enforce provisions of collective bargaining agreements.

We find that the presumption of arbitrability applies to disputes over retirees' benefits if the parties have contracted for such benefits in their collective bargaining agreement and if there is nothing in the agreement that specifically excludes the dispute from arbitration. Thus, unless there is "forceful evidence of a purpose to exclude the claim from arbitration," the arbitrator's determination in this case that the dispute is arbitrable must stand.

Cleveland Electric argues that the retirees have other remedies that the active employees do not, such as the right to file a § 301 action against the company. *See, e.g.*, *Pittsburgh Plate*, 404 U.S. at 182, n. 20 ("The retiree, moreover, would have a federal remedy under § 301 . . . for breach of contract if his benefits were unilaterally changed."); *Yard-Man*, 716 F.2d at 1485 (stating that "[e]ach retiree has an undisputable and effective remedy against the employer for a breach of contract under § 301(a)"). The fact that the retirees have an alternative remedy, however, does not preclude the Union from undertaking to represent the retirees' interests. We recognized as much in *Yard-Man*, when we found that the union would have standing to bring suit on behalf of the retirees to enforce their bargained-for benefits because the union had a "direct interest in maintaining the integrity of the retiree benefits created by the collective bargaining agreement," notwithstanding the fact that the retirees may choose to deal with the company on their own. *Yard-Man*, 716 F.2d at 1486-87.

We find that the arbitrator's decision "drew its essence from the CBA." Therefore, in the absence of any forceful evidence of a purpose to exclude the dispute over the retirees' benefits from

arbitration, we affirm the district court's adoption of the arbitrator's decision as to the arbitrability of the dispute.

C. Consent of the Retirees to Union Representation

The Union has cross-appealed the district court's decision to require the Union to obtain the consent of the retirees before taking the grievance to arbitration. The Union argues that because it has standing to pursue the retirees' benefits grievance, consent of the retirees is unnecessary; that a consent requirement contravenes national labor policy; and that the nature and extent of the consent requirement is ambiguous. Cleveland Electric contends that if the grievance is arbitrable, the district court was correct in its determination that the Union must secure the consent of the retirees before proceeding to arbitration.

The arbitrator recognized that the retirees might have individual rights outside of the CBA, particularly under ERISA, but he reserved a decision on the need for the Union to obtain the retirees' consent because it was not clear that the Union's claims were related to any of the retirees' statutory rights. The district court disagreed with the arbitrator's decision not to require the Union to obtain the retirees' consent. Unlike the arbitrator, the district court found that *Rossetto v. Pabst Brewing Co., Inc.*, 128 F.3d 538 (7th Cir. 1997), applied in this case. In *Pabst Brewing*, the Seventh Circuit recognized that a union has standing to arbitrate the meaning of a collective bargaining agreement that grants rights to third parties simply by virtue of the fact that the union is a party to the contract. *Id.* at 539. But this did not end the court's inquiry. The court held that because the retirees had statutory rights to the benefits, as well as other types of claims, which they could pursue directly with the company, the union must obtain the assent of the retirees before purporting to represent them at arbitration. *Id.* at 541.

We agree with the district court on this issue. There are at least two dangers in failing to require the Union to obtain the retirees' consent. On the one hand, as pointed out in the *Pabst Brewing* decision, the retirees could lose their rights to pursue their claims directly with Cleveland Electric if the Union obtains an unfavorable arbitration decision. *Id.* at 540 (stating that if the union "loses in arbitration, the retirees lose, period"); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Acme Precision Prods., Inc.*, 515 F. Supp. 537, 540 (E.D. Mich. 1981) (finding that in the absence of a de facto class action, the union's filing of a grievance or a lawsuit would preclude retirees from pursuing their claims with the company).

On the other hand, Cleveland Electric could be faced with numerous retirees' claims and lawsuits if a determination is made that the Union was not authorized to act on the retirees' behalf. This point was made clear in *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990). In *Meza*, an injured former employee filed suit against his employer for disability and pension benefits provided for in the collective bargaining agreement. The union had filed a previous lawsuit over these same benefits and claimed that its intent was to represent all the injured employees. The Fifth Circuit held that res judicata did not apply to Meza's suit because he was not a party to the prior suit; he was not in privity with the union and was not bound by the union's action; and he had not expressly or impliedly authorized the union to represent his interests. *Id.* at 1280. Thus, Meza's suit

was allowed to go forward notwithstanding the fact that the same issues had been considered in prior litigation between the union and company.

The Union argues that if it is required to obtain the retirees' consent, the district court's consent requirement was ambiguous in that it did not set out the exact nature and extent of the consent to be obtained. Cleveland Electric takes the position that anything short of a 100% yes-or-no response by the retirees is unacceptable. It is not this court's responsibility, however, to define

the consent requirement for the parties. The arbitrator is in a much better position to establish the consent guidelines.

Therefore, we agree with the district court that the arbitrator cannot defer the issue of whether the Union has received the consent of the retirees. Furthermore, it will be the arbitrator's responsibility to establish the nature and extent of the consent requirement.

III. CONCLUSION

For these reasons, we find that the parties submitted the question of arbitrability to the arbitrator and that the arbitrator correctly decided that the Union has standing to arbitrate the issue of the retirees' benefits. The Union's grievance over the retirees' benefits is arbitrable, and the district court's decision is AFFIRMED.