The Arbitration Dialogues

An Advocate Talks to Arbitrators and an Arbitrator Talks Back

By Stuart M. Israel and Barry Goldman

Dialogue. If it was good enough for Socrates and Plato, it's good enough for us. The following is the latest manifestation of the dialogue that has engaged us for some time. We have conducted this disputation at the Institute of Continuing Legal Education's (ICLE's) Advanced Negotiation and Dispute Resolution Institute, at the Michigan Region of the National Academy of Arbitrators, and in streets, alleyways, and coffee bars throughout Michigan. As you will see, labor advocate Stuart M. Israel offers brilliant insights for the edification of benighted arbitrators. Neutral arbitrator Barry Goldman responds with learned and wise commentary. The result, you will recognize, is a model for amity and understanding between the advocacy and arbitration communities of profundity equal to Rodney King's immortal *cri de coeur:* "People, I just want to say, you know, can we all get along?"

Stuart's remarks appear in regular text, Barry's in *italics.*

Keep an Open Mind

You have extensive experience. You're smart. You're a quick study. These are strengths. They're some of the reasons we selected you from among all those arbitrators and former judges shmoozing at the bar meetings. But these characteristics can be weaknesses, too. They can cause you to jump to conclusions, to pigeonhole, to prejudge, to stop listening.

Cases have infinite variations. You've seen a lot, but you haven't seen it all. Even if it seems you know all you need to know early on in the case, things are not always what they seem. As Mark Twain reportedly warned, what gets you in trouble is "what you know for sure that just ain't so." Keep an open mind until all the evidence is in, and let both sides have their "day in court."

I agree that it is important for an arbitrator to keep an open mind. But, as Arthur Hays Sulzberger said, "not so open that your brains fall out."

I'm willing to make the following deal. In philosophy it's called the Principle of Charity. I'll give you the benefit of the doubt and assume your case has merit. You give me the benefit of the doubt and don't try to get away with blowing rhetorical smoke.

Let Me Put on My Case, My Way

If you let me put on my case my way, I just might persuade you that your initial impressions need adjustment. Or, I might confirm your initial impressions. Either way, give me enough rope—to ascend to victory or to hang myself.

In addition, letting me put on my case my way recognizes that there are multiple objectives to be served at arbitration. The core objective, and your principal concern, is dispute resolution, getting to a clear, final, and binding decision. There are, however, other important objectives that arise out of the parties' needs and the complexities of the parties' relationships.

The integrity of the process, and the parties' satisfaction with the process, are dependent on more than outcome. Justice must satisfy the appearance of justice. If you are too restrictive in letting me put on my case my way, you plant the seeds of dissatisfaction with the process, and undermine the parties' confidence that justice was done. Winners prefer to win in a fair process. Losers more readily accept loss—and comply with awards, rather than challenge them in court or with passive-aggressive obstruction—if they believe the process was fair.

Union-management arbitrations—like other arbitrations between parties with ongoing relationships—often have implications beyond resolution of the narrow disputes at issue. Union-management arbitrations may involve ongoing beneath-the-surface struggles between the union and management, between plant management and company headquarters, between local and international union officials, between competing managers, between internal union factions, between the grievant and the grievant's immediate supervisor, and so on.

Lucky for you, you don't have to master the nuances of byzantine relationship dynamics roiling beneath the surface of the contract or discipline issue presented for your resolution. But I do. So please be sensitive to the fact that the way I present my case may be dictated by a universe of factors—very important factors—that are beyond your ken. Understand that I need to accommodate these factors, and that they may affect my witness selection, the content and style of my argument, and anything and everything else I do as an advocate. So let me do my job. Win or lose, I want to sing with Sinatra: "I did what I had to do… [and] did it my way."

Of course an advocate is entitled to present his case. He is not, however, entitled to change the subject and present the case he wishes he had.

Certainly, justice must be seen to be done, arbitration conducted properly has a therapeutic effect and there is more to labor arbitration than just cranking out awards. But none of those salutary effects can be achieved if the parties spend the day wandering vaguely in search of something they know not what. Part of an arbitrator's job is to keep the parties' eyes on the ball.

There is another problem here as well. What one side calls "letting the parties present their case" the other side is likely to call "failing to control the hearing." It depends, as so many complaints do, on whose ox is being gored.

Your Time is Our Time

Prominent arbitrators at a recent ICLE seminar were asked to advise advocates on effective arbitral advocacy. As is typical at such events, many included admonitions on efficiency: The parties should come early to discuss stipulations. The parties should come early to mark joint exhibits. The parties should come early to discuss settlement. Start the hearing on time. Don't interrupt the hearing to confer with clients or witnesses or the other side. Keep things moving. Don't keep the arbitrator waiting.

To these arbitrators I respond with a line from a 1924 song made famous by Rudy Vallee: "Your time is my time." Or, more to the point, the arbitrator's time is the parties' time. The parties retained you for the day. Be prepared to spend the day.

It is inevitable that sometimes you will be called on to wait. Sometimes this is because the parties are dilatory or disorganized or slothful. Most often, however, it is because of the immutable principle that things must unfold in their own time. As it is written: "To everything there is a season, and a time to every purpose under heaven."[1] There is a time to mark exhibits, and a time to discuss settlement. Often these times don't arrive until all the necessary parties are in one place, focused on the dispute at hand. Often it is necessary to seize that time, even if it means that you are left to twiddle your arbitral thumbs.

Being an arbitrator is like being in the Army: hurry-up-and-wait. Of course, being an arbitrator is safer than being in the Army, and brings in the big bucks. So be ready to sit around while the parties do what they gotta do. Work on another decision, or read the newspaper, or check out Ecclesiastes, but stop kvetching.

Yes, you paid for my time, and you are entitled to waste it however you want. You can make me sit around all morning while you interview your witnesses and prepare your case. I don't mind at all. I always bring a book.

You can also tell me the hearing is in Pontiac and when I get there you can call and say you moved it to Mt. Clemens. You can make me sit at the table while you carefully number each page of each copy of your exhibits. But you can't expect me to be happy about it.

In short, you have a right to waste your arbitrator's time, but it is a silly thing to do.

Don't Be a Clock Watcher

Arbitration hearings are art, not science. They don't run on the clock. If it makes sense to keep going to accommodate the parties, do what makes sense.

Arbitrations are expensive. They consume the parties' staff time. The parties pay for lawyers, and some lawyers charge lots. Witnesses—particularly union witnesses—are likely to be missing work without compensation, or they may be using up their hard-earned days off or vacation time. Everybody involved is investing heavy resources when a dispute comes to hearing. So it almost always saves expense to avoid an extra hearing day, even if this requires going beyond "regular business hours." The parties don't want to come back another day if it can be avoided, even if you have to work after 5:00 p.m., or after 6:00 p.m., or until 7:30 p.m., or even if it means that you will have to lean on one unreasonable party or the other to continue past "normal" quitting time.

I'm not saying that anybody should abuse anybody else's schedule, but the arbitrator should not be the reason why an extra hearing day is necessary. There will be occasions when you can't go past a certain time because you have other important commitments. If you have time restrictions, however, you should let the parties know well in advance, when the hearing date is scheduled or, in extenuating circumstances, later, but as soon as you know about your time restriction. Otherwise, let the parties continue until they're done, and don't watch the clock.

Fair enough. It shouldn't be the arbitrator's fault if the hearing has to go to another day. I'll stay late if I can and I'll tell you in advance if I have to teach that night or drive to Muskegon. But the lawyers have some responsibility here too. Don't tell me you have "one more question" or "we'll be done by 2 p.m. if we work through lunch."

This is not rocket science. An arbitrator with low blood sugar is not your friend. As the immortal Sippie Wallace said, "Don't be no fool."

It's fine to be succinct. But your decision ought to *demonstrate* that you heard, understood, and fairly considered our arguments.

Opinion Writing: "Attention Must Be Paid"

I'm speaking here for all arbitration advocates, borrowing from *Death of a Salesman:* "Attention, attention must finally be paid to such a person."

We put on our case. We presented witnesses and evidence. We wrote a brief. We presented logic, authority, and common sense in impassioned argument. We did our job. Now it's your turn. Attention must be paid. Your job is to address and analyze our arguments, and make a clear and reasoned and responsive decision.

Some arbitrators write decisions that are, let's say, disappointing. It's not just the outcome. Parties can live more easily with an adverse decision if they believe they got their "day in court." They believe this when they perceive that their arguments were heard, understood, and fairly considered, even if their arguments were rejected. Some arbitration decisions don't foster this perception. It is not necessary for your decision to be a *magnum opus* in every case. It's fine to be succinct. But your decision ought to *demonstrate* that you heard, understood, and fairly considered our arguments.

The worst sort of decision in union-management cases goes through the motions. It begins with lengthy quoted passages from the collective bargaining agreement. The quotes go on for pages. They include not just the key language—that requiring interpretation and application, which will be the subject of later analysis—but a lot more. Too much more, like the four-page grievance arbitration procedure, although the sole issue is whether discipline was supported by "just cause." Who needs re-typed contract language? After all, the collective bargaining agreement is stipulated exhibit 1. Next, this sort of decision lists the parties' "contentions." It offers no analysis, just rote lists. Finally, in the shortest section, this sort of decision presents its conclusions, abruptly.

I want more. I also want less. I made arguments for a reason. Usually my reason is that I think my arguments might persuade you to decide the case in my client's favor. Sometimes, however, I make arguments because my client or the grievant believes they are important and insisted that I make them, even though I counseled against making those arguments. Whatever their purpose, my arguments deserve more than placement on a list. They may not warrant exhaustive exegesis, but they deserve respect. You show respect by stating your reasons for adopting or rejecting those arguments. If I have to give up quotation of contract language and summary lists of "contentions" to get more analysis, sign me up.

I'm sure there are parties who are content with the Gary Cooper school of arbitral decision writing: "yup" or "nope." Some expedited procedures mandate one-paragraph or even one-sentence decisions. Such decisions have their place, but most of the time most parties want their *full* "day in court." This means they want their arguments analyzed and addressed. Most parties also want their money's worth. Many accept the common billing ratio—two days "study" and decision writing for each hearing day—but expect two days' worth of analysis and judgment. There may be many reasons to keep decisions lean—economy, clarity,

diplomacy, etc.—but the "day in court" principle should guide your decision writing. Here is a form:

> The union/company argues that _____. The argument is based on Article ___ of the collective bargaining agreement and the testimony of _____. This argument does not control/controls because _____.

Using this form will show that you listened. We may not win, but attention will have been paid, and that's what getting a "day in court" is all about.

We have all read arbitration opinions that set out the facts and arguments in the Background section, set them out again in the Statement of Facts, set them out again in the Positions of the Parties, pad the whole thing with page after page of contract provisions and then say, "In light of the above the grievance is denied."

I have considerable sympathy for the parties who have to pay for these awards. As Truman Capote said about Jack Kerouac, "That's not writing, it's typing." I would be hugely annoyed if someone re-typed my contract onto his stationery and billed me for "study time."

That said, I don't agree that every argument by every advocate needs to be addressed in the opinion. First, if argument one is dispositive, it isn't necessary to discuss arguments two, three, and four. Second, while it is probably good practice to address each argument made by the loser, the winner is less likely to be so acutely concerned with every detail. Third, there is the principle of arbitral parsimony. The more we say, the more trouble we can cause. The rule is to say only as much as is necessary to decide the issue, and do no harm.

Issue Subpoenas on Request, and Don't Become Prematurely Involved in Subpoena Disputes

Arbitrators have the right and responsibility to issue subpoenas. Parties have the right to the issuance of subpoenas. These principles are addressed by arbitrator Thomas L. Gravelle in "Subpoenas in Labor Arbitration."[2]

Arbitrators should sign subpoenas in blank, upon a party's request, without involving the opposing party. Arbitral subpoenas should be available to parties in the same way that judicial subpoenas are available to parties in court litigation. If, after subpoenas are served, recipients or opposing parties have objections, they can bring them to the arbitrator as appropriate, prehearing or at the hearing. If necessary, aggrieved parties and subpoena recipients can seek court enforcement or protection.

Some arbitrators believe that both parties must be consulted before a subpoena is issued, and that the content of subpoenas must be subject to pre-issuance debate. This is wrong. Such a process forces the requesting party to identify witnesses prematurely, revealing strategy and, in some cases, putting potential witnesses in difficult positions. Such a process embroils the arbitrator in disputes over the substance of the case before the arbitrator has adequate information about the substance. Such a process prematurely gives attention to potential problems that may be obviated by settlement, or by strategy changes, or by the identification of alternative witnesses, or by the fact that the witness moved to North Dakota.

> Most of the time most parties want their *full* "day in court." This means they want their arguments analyzed and addressed.

Arbitrators should not require a requesting party to do any more than make the request. There is no reason for the arbitrator to become involved in the content of subpoenas, or to invite debate among parties about subpoenas, unless and until there is a dispute with practical consequences, which will not be the case until *after* subpoenas are served and contested.

If you—as arbitrator—are tempted to make subpoena requests adversarial, fuggeddabouddit. Issue subpoenas on request. Address disputes if and when the subpoenas are served *and* the disputes are real.

I agree. Absent obvious abuse of process, it is my practice merely to sign subpoenas and pass them on. Some arbitrators believe this amounts to ex parte *communication and won't issue a subpoena without copying the other side. There is merit to this view, but I think on balance Stuart's is the better approach.*

I did decline recently to issue subpoenas to 15 government officials, including the governor. But that was a special case: pro se party, 81-page, single-spaced grievance with allegations going back 20 years.

Here, as with many of these points, a rule of reasonableness is required.

No Big Surprises, Please

Beware if you are tempted to write a decision that goes like this:

> The union argues that _____. This argument is based on Article 3 of the collective bargaining agreement and the testimony of _____. This argument does not control because _____.
>
> The company argues that _____. This argument is based on Article 6 of the collective bargaining agreement, the grievant's signed confession, and the videotape evidence. This argument does not control because _____.
>
> What controls is Article 21 of the collective bargaining agreement. Subsection (A)(1)(c)(iii) contains the governing language. Although neither party and none of the witnesses mentioned this subsection at the two-day hearing or in the collective 67 pages of the parties' briefs, I found this subsection during my four days of study. Whoa, I thought, I can base my decision on this obscure little subsection.

> I have no idea why neither party and no witness mentioned this subsection. I have no idea what either party might say about subsection (A)(1)(c)(iii). Still, I am relying on it to seal their fate.

If there was a good reason why subsection (A)(1)(c)(iii) wasn't mentioned by either side, you don't know it. Why presume that you have some unique insight? Why presume that you have superior contract-reading skills? Why presume that one of the witnesses didn't explain why the subsection is inapposite at the moment your mind wandered, or when the train rumbled by outside the hearing room window and you maybe missed a few sentences of testimony?

If you are inclined to give determinative weight to something not addressed by either party, make sure that you're fully informed. Ask for supplemental briefs. Or convene a telephone conference. If the parties' arguments and the basis for your decision pass like ships in the night, there is a substantial risk that your ship is in the Twilight Zone.

I agree. If the parties based the case on Article 3 and argued Article 3 in the briefs, the arbitrator's job is to rule on Article 3. He is making a mistake if he relies on some obscure passage he discovered in Article 21. I agree that in the rare case where the arbitrator cannot in good conscience ignore Article 21, he does the best service to the parties and the process if he raises the question in the hallway with both advocates if the hearing is still in progress or in a conference call with the lawyers if it is not.

If you are inclined to give determinative weight to something not addressed by either party, make sure that you're fully informed. If the parties' arguments and the basis for your decision pass like ships in the night, there is a substantial risk that your ship is in the Twilight Zone.

I wish to raise only one small qualification, but one that applies to several of Stuart's points. The implicit point he makes several times is "Trust me, I know what I'm doing. If I ignore Article 21 or make silly arguments or appear to be wasting time, it is because the lawyer hath reasons that the arbitrator knoweth not."

Fair enough. But arbitrators do not always have the luxury of dealing with advocates as skilled and experienced as Stuart. Certain adjustments may be necessary when that condition does not obtain. As the circus owner said when the human cannonball threatened to retire, "You don't know how difficult it is to find a man of your caliber!"

Number Exhibits from One to Whatever

When it comes to exhibits, linear is the way to go. Start with one, go to two, move on to three, and so on. This is more efficient than having three consecutively numbered sets, one set of joint exhibits, and one set each for the two parties. What matters, after all, is whether an exhibit is admitted, whether by stipulation or by arbitral ruling. Once the exhibit is admitted, anyone can use it. Anyone can argue the exhibit is definitive proof of something or other, or that it is insignificant. With one set of exhibits, post-hearing briefs are briefer. There is no need to differentiate between "Joint Exhibit 1" and "Union Exhibit 1" and "Employer Exhibit 1." There is only one Exhibit 1. To paraphrase Aristotle's Law of Identity, one is one. That's the way it's supposed to be.

I agree completely and can't see any reason to do it any other way. Fewer moving parts, fewer opportunities to mess things up.

Don't Give the Employer Credit for the Grievant's Unemployment Compensation

Before you decide to address the grievant's unemployment benefits in a back pay award, read John G. Adam's article, "Deduction of Unemployment Compensation Benefits from Back Pay Awards."[3] You may decide—in the august company of the United States Supreme Court and the National Labor Relations Board—that you need not concern yourself with such "collateral" matters.

If, however, you decide to address unemployment benefits, your back pay award should direct the employer to reimburse the state agency for unemployment benefits paid to the grievant, with the back pay balance paid by the employer directly to the grievant. This ensures that the grievant's unemployment credits are restored, the employer's unemployment experience is accurately recorded by the state, and all meet their tax withholding and payroll tax obligations. This provides a true "make whole" remedy and brings the world back into balance.

Or, keeping arithmetic to a minimum, your award might direct the employer to pay the full back pay amount to the grievant, leaving the responsibility for reimbursement of the unemployment agency to the grievant. This is less preferable, but at least sets the stage for everybody to do the right thing.

What your award should *not* do is give the employer offset credit for unemployment benefits against the back pay award. This leaves the grievant with diminished unemployment credits, and is not a true "make whole" remedy. The offset method's apparent simplicity, and its favorable tax consequences for the employer, make it a typical feature of arbitration awards, well-intended but erroneous.

My practice in a make whole remedy is to order the employer to make the grievant whole and to retain jurisdiction in the event the parties are not able to work out the details.

I understand there are those who feel that retaining jurisdiction is an unsavory attempt by a functus officio *arbitrator to squeeze an extra billable day out of a case. I disagree. On nearly every occasion when I have been asked to exercise my retained jurisdiction, the matter has been resolved with a phone call and no further expense to the parties. I think this is a far better solution than forcing the parties into sending the matter to a new arbitrator and incurring the expense of bringing him up to speed.*

Don't Ask if the Grievant Has Anything to Add

In labor arbitration, the grievance almost always is the union's grievance, not the grievant's. The attorney prosecuting the grievance almost always represents the union, not the grievant. These are meaningful distinctions. The union and the grievant may not always be in full alignment on how a case should best be presented, and labor law gives the union broad discretion to decide whether and how to prosecute grievances. So, while the grievant may have lots to add, it likely is irrelevant, and may be profane, self-destructive, and otherwise inappropriate.

Indeed, there are cases in which the grievant would like to squeeze a manager's neck until the manager's head pops. Grievants are not entitled to an unfettered forum to say or do all that they might want to say or do, however. There are cans of worms that should not be opened, and certainly not by an arbitrator's innocent but reckless invitation to add "anything."

Who does such a question serve? Nobody. If the union suppresses what the grievant would like to add (and get off his or her chest) *and* suppression harms the case (i.e., is outcome-determinative and injurious), the grievant has various legal remedies against the union. If what is harbored in the dark recesses of the grievant's soul remains there because of the wise counsel of the union *and* its suppression does not harm the case, all is good. The arbitrator should not open Pandora's Box.

I will ask if the grievant wants to make a statement only under two sets of circumstances. One is if I discussed doing so with both counsel in a meeting in the hallway and we determined it would be the best way to proceed. The other would be if I believed the employer and the union were in collusion and I was being asked to participate in a fraud. The former has occurred many times. The latter, I'm happy to say, has not.

Don't Ask if the Grievant is Satisfied with the Union's Representation

The grievant's satisfaction or dissatisfaction with the union's representation is irrelevant to the arbitration. It also may be uninformed or misguided. The grievant who'd like to squeeze the manager's neck, for example, may think the union is full of pacifist sissies. In the words of Miles Davis, "So what?" You, as arbitrator, can't do anything about the grievant's dissatisfaction—except grant the grievance.

If the grievant is justifiably dissatisfied *and* the union's conduct is improper, outcome-determinative, and injurious, the grievant has legal remedies. If the grievant's dissatisfaction is unwarranted or harmless, allowing its expression is distracting and superfluous. And the grievant's satisfaction or dissatisfaction with the union is not within the arbitrator's ambit. It is not for the arbitrator to represent or advise the grievant. It is not for the arbitrator to inquire into, much less evaluate and critique, internal union differences, particularly in front of the company. Nor is it for the arbitrator to appease, or mollify, or champion the grievant. If you want to represent grievants, be an advocate, not an arbitrator (if you're prepared to take the pay cut).

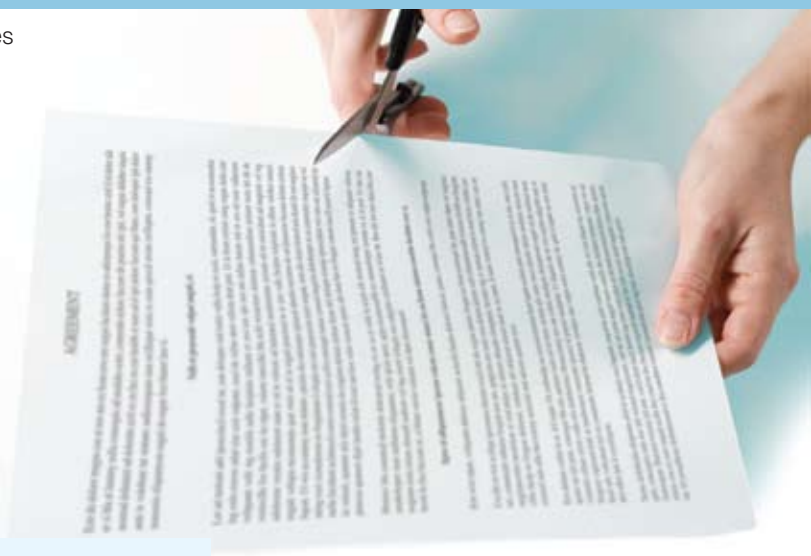
Right. It's none of my business.

If You Want the Grievant's Feedback, Ask the Grievant to Assess *Your* Performance

If you really want the grievant's innermost thoughts, don't ask about adding information or the grievant's satisfaction with the union. Instead, ask the grievant to assess *you*. Do it twice, once at the end of the hearing and again after your decision.

I'm using a bit of *reductio ad absurdum* here. I don't really expect you to survey grievants about your performance. Nor do I think it's a particularly good idea. Getting you to think about being rated by the grievant, however, will create empathy for advocates. It ought to cure you of any further desire to ask grievants to add their two cents or to issue seat-of-the-pants report cards assessing their unions' advocacy.

Asked and answered, counsel. We can move on.



Cut the Baby in Half Only When Absolutely Necessary

Solomon, son of David and Bathsheba and king of Israel for 40 years, was one of the most highly regarded arbitrators of all time. One influential source reports that Solomon was "wiser than all men."[4]

Solomon was also prolific. He "spoke three thousand proverbs; and his songs were a thousand and five."[5] And he had quite an international reputation: "…there came of all peoples to hear the wisdom of Solomon, from all kings of the earth, who had heard of his wisdom."[6]

Advocates who have good cases *don't* want baby-cutting arbitrators. Rather, they want wise arbitrators like Solomon, who *refuse* to cut the baby in half because doing so does *not* do justice.

Solomon made his reputation with one of history's first arbitration decisions. That decision is the source of the phrase "cutting the baby in half." This phrase often is used to characterize arbitration decisions today, so it makes sense to review the original "cutting the baby in half" decision. It is reported at 1 Kings 3:16–28.

The parties were two women who—for reasons that don't concern us here—"dwell[ed] in one house." Each recently "was delivered of a child." One of the babies died. The two women disputed which of them was the mother of the surviving infant. They brought their dispute to Solomon. Solomon held a hearing. He listened to testimony from the two women. He then started an arbitral tradition, summarizing parties' "contentions":

> The one sayeth: This is my son that liveth, and thy son is the dead; and the other sayeth: Nay; but thy son is the dead, and my son is the living.

It was a credibility dispute; a "she-said, she-said" case.

Solomon didn't ask for briefs. He didn't spend two days studying the record and writing an opinion. Rather, he said, "Fetch me a sword." He commanded: "Divide the living child in two, and give half to the one, and half to the other." That added a new dimension to the concept of "final and binding."

One of the women acquiesced: "It shall be neither mine nor thine; divide it." The other, however, protested. Her "heart yearned upon her son." She said: "Oh, my lord, give her the living child, and in no wise slay it." Solomon then issued his real decision, finding for the second woman. "Give her the living child and in no wise slay it: she is the mother thereof."

This made the news: "And all Israel heard of the judgment which the King had judged…[and] they saw that the wisdom of God was in him, to do justice."

There is something for arbitrators to learn from this early precedent.

The key is that Solomon did *not* cut the baby in half. The baby-cutting thing was just adept cross-examination. Solomon never even thought of actually cutting the baby. Cutting the baby would have been very bad. Solomon had his faults—he reportedly had 700 wives and 300 concubines,[7] which displayed a certain lack of judgment—but baby-cutting wasn't one of them. If Solomon really had cut the baby, we wouldn't be talking about his wisdom 3,000 years later. If we talked about him at all, he'd have the mixed reputation of, say, Vlad the Impaler.

So, if cutting the baby in half is a bad thing, why do some arbitrators do it with regularity? I'll tell you: they're misguided. Arbitration advocates like a baby-cutting arbitrator *only* when the advocates have *bad* cases. The thought process goes like this: If I have a bad case and choose a baby-cutting arbitrator, at least I'll end up with *something*.

Advocates who have good cases *don't* want baby-cutting arbitrators. Rather, they want wise arbitrators like Solomon, who *refuse* to cut the baby in half because doing so does *not* do justice.

Don't get me wrong. I'm not against moderation and measured, even-handed decisions. Sometimes reinstatement without back pay is appropriate. But when the grievant ought to get reinstatement with full back pay, plus interest, that's just what the arbitrator should award.

This is an old song and dance. Advocates never get tired of saying how much they respect an arbitrator who makes the tough call and the macho decision and steps up to the plate and does what's right and blah blah blah and how much contempt they have for baby-cutting and reinstatement without back pay. What these tough-talking advocates leave out of this account is that it only applies to macho decisions they win.

One of the people who taught me how to conduct a hearing was Earl Ashford, an administrative law judge with Unemployment Appeals. Once, an old lady who appeared before Earl sent him a long letter singing his praises and calling him Solomonic. He said it is nice when that happens, but he is not going to get too excited about it until he gets one of those letters from the loser.

Lawyers all say they don't mind losing their losers as long as they win their winners. The mistake in their reasoning, as is often the case with reasoning, is in the unstated premise. Lawyers universally believe they know which are which.

If You're Going to Cut the Baby in Half, Cut the Baby in *Half*

In union-management arbitration of discipline cases, a typical resolution is reinstatement with no back pay. This often *seems* right. Management was wrong, but not all wrong. The grievant didn't deserve to be fired, but wasn't exactly employee-of-the-month material. So each side is partly wrong and partly right. The arbitrator "cuts the baby in half." The grievant returns to work, but doesn't get back pay. The employer must give the grievant her job back, but doesn't end up paying double, once for the employee who replaced the grievant and again for the grievant. The world is back in equipoise, right? Not always.

The reality is that the time between the grievant's last work day and the arbitrator-directed reinstatement is likely to be a considerable period—months, a year, or even more. Arbitration may be quicker than court litigation, but the wheels of justice still grind slowly. So reinstatement without back pay truly may mean reinstatement subject to an eight-month unpaid suspension. Or a year-long unpaid suspension. Or a 27-month unpaid suspension. If the partly-wrong employer had done the right thing in the first place, there would have been no more than a 30-day unpaid suspension, without a gap in benefits. More often than not, a reinstatement without back pay arbitration award results in an unpaid suspension far longer than the "just cause" suspension that should have been imposed by a partly right employer on a partly wrong employee.

So if you're thinking about cutting the baby in half, think about cutting the baby *in half,* not dividing the baby into 90–10 or 85–15 ratios.

Yes, it's true that it takes a long time for cases to get to arbitration and it's true that the delay is not the grievant's fault. And it's true that reinstatement without back pay after 30 days is a far different matter than reinstatement without back pay after a year and a half. It's also true that if a termination was improper, the grievant is entitled to be made whole. But the argument that the award should never impose a period of suspension longer than should have been imposed at the time of the offense goes too far.

A long period of time between the offense and the arbitration can work in the grievant's favor. His action may have been so profoundly stupid, for example, that an arbitrator looking at the case after 30 days would uphold the discharge. But an arbitrator looking at it after a year may feel that the grievant has learned his lesson and may be safely returned to the workforce. You don't want to cut off that possibility.

As the reader will have observed, we agree—more or less—on most points. Our differences are mostly a matter of emphasis. They come about primarily because we are addressing different audiences. Stuart is speaking to arbitrators about the things that annoy parties and advocates. He isn't saying arbitrators have no right to their views and curious practices. Stuart's point is about prudence, and giving the customers both what they want and what they need.

Barry's point is complimentary. He is saying that what parties really want is not always what they say—or think—they want. He is not saying that parties and advocates have no right to their view, for example, that Arbitrator X is a lily-livered baby-splitter. They are not only entitled to such views, they are entitled to enforce them by applying the arbitral marketplace's equivalent of "industrial capital punishment" and never selecting Arbitrator X again. Barry is saying only that one party's baby-splitter is another party's Solomon. ■

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FOOTNOTES

1. *Ecclesiastes* 3:1.
2. Gravelle, *Subpoenas in Labor Arbitration,* 9 Lab & Emp Lawnotes 5 (Spring 1999).
3. Adam, *Deduction of Unemployment Compensation Benefits from Back Pay Awards,* 7 Lab & Emp Lawnotes 8 (Winter 1997).
4. 1 *Kings* 5:11.
5. 1 *Kings* 5:12.
6. 1 *Kings* 5:14.
7. 1 *Kings* 11:3.