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Federal Sector Labor Arbitration: Differences, Problems, Cures

Dennis R. Nolan*

I. INTRODUCTION

Does labor arbitration work in the federal sector? In one sense, it certainly does: thousands of grievances go to arbitration every year. Few of the resulting awards are challenged in court or in the administrative process, and few of those challenges are successful. In all other cases the award settles the specific case once and for all, if not the underlying problem.

If we ask instead whether labor arbitration in the federal sector works *well*, the answer is not so clear. Each participant in federal sector arbitration can cite its problems: over-use and misuse, erroneous and poorly written decisions, too frequent appeals, modifications and reversals. Arbitration in the federal sector suffers from difficulties far more serious than those in the private sector. In this essay I will discuss the problems caused by a few critical differences between the two labor relation systems, and suggest some partial cures. As serious as the problems are, they can be alleviated, provided agency and union advocates understand their causes and take the necessary corrective action.

II. CRITICAL DIFFERENCES BETWEEN FEDERAL AND PRIVATE SECTOR LABOR ARBITRATION

The first and most important difference between the two sectors concerns the scope of bargaining subjects and weapons. Private sector unions may bargain about virtually every subject affecting their members, including the most tangible matters such as wages, pen-

* Professor of Law, University of South Carolina. This article expands upon a talk presented on May 15, 1986, at a conference on federal labor relations sponsored by the Federal Labor Relation Authority and the Public Administration Forum. It will appear as a chapter in a book on federal sector grievance arbitration edited by Ralph R. Smith and Dennis K. Reischl and published by Wordsmith, Inc.

sions, health and welfare plans, and other fringe benefits. To be sure, private sector law distinguishes between mandatory, permissive, and prohibited subjects and many critical matters fall within the permissive category. If the union has significant bargaining power it will have no difficulty convincing an employer to bargain about plant closures, relocations, product design, or any other subject. If it lacks bargaining power, however, even a legally enforceable right to bargain about those subjects is worthless. The legal distinction between mandatory and permissive subjects thus has little practical effect in contract negotiations.

In sharp contrast, the Civil Service Reform Act of 1978 (CSRA) flatly bars federal sector unions from negotiating about the very subjects that most interest their members. Apart from the legal prohibition, federal unions lack bargaining power because the law deprives them of authority to strike or to compel union membership. Without union security agreements, unions must "sell" themselves to prospective members by their accomplishments—accomplishments which are exceedingly hard to achieve without the right to bargain over monetary rewards and the ability to exert economic pressure to win other rewards.

As a result, federal employee unions place far more weight on arbitration than other unions do. Unable to earn members by the results of contract negotiations, federal sector unions must demonstrate their worth in contract administration. Arbitration thus serves as an extension of collective bargaining, as unions attempt to use outside power—the arbitrator—to gain what they lack the power to achieve on their own. It serves as well to create the "product" unions must sell to their customers, namely representation in grievance procedures.

The second major difference is in the role of external law. In the private sector, contractual provisions are dominant and arbitrators can virtually ignore positive law. In the federal sector, collective bargaining is expressly subject to statutory and other law. In fact, it owes its very existence to law. Neither the parties nor the arbitrator can ignore the law. "To put it another way, full and proper consideration of law is compulsory and *always* within the scope of an arbitrator's authority in the federal sector."¹

The Constitution provides a good example. One has constitutional rights only against a government, not against a private employer, so private sector negotiators and arbitrators need not consider constitutional law. The federal sector arbitrator must not only consider constitutional principles, but he must also apply them precisely as a

1. Frazier, *Arbitration in the Federal Sector*, 41 ARB. J., Mar. 1984, at 70, 72 (emphasis in original).

judge would.²

The CSRA almost makes the Constitution look simple. Yet, the federal sector arbitrator commits reversible error if he follows contractual principles rather than statutory provisions. The many statutory provisions governing federal labor relations, and hence federal sector arbitration include:

(1) the nonwaivable management rights included in section 7106(a);³

(2) the "harmful error" standard for review of disciplinary action established in section 7701(c)(2)(A);⁴

(3) the Back Pay Act,⁵ including the easy-to-forget "but for" test;

(4) the rule concerning awards of attorney's fees to certain prevailing grievants.⁶

The arbitrator must also apply the appropriate standard for review of agency action; that is, he must know when to test the agency's action by the "preponderance of the evidence" standard and when to use the "substantial evidence" standard.⁷ Finally, in addition to federal substantive and procedural law, the arbitrator must follow appropriate regulations,⁸ and must even apply the latest administrative decisions interpreting statutes and regulations. The District of Co-

2. *Devine v. Goodstein*, 680 F.2d 243, 246 (D.C. Cir. 1982) (arbitrator erred in applying equal protection, self-incrimination, and double jeopardy principles).

3. 5 U.S.C. § 7106(a) (1982). The statute provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

4. *Id.* § 7701(c)(2)(A); *see Cornelius v. Nutt*, 472 U.S. 648 (1985).

5. 5 U.S.C. § 5596 (1982).

6. *Id.* § 7701(g); *see Naval Air Dev. Center and AFGE Local 1928*, 24 Gov't Empl. Rel. Rep. (BNA) 643 (1986) (decided before the Federal Labor Relations Authority; Florey, Arbitrator).

7. 5 U.S.C. § 7701(c)(1) (1982).

8. *Id.* § 7122(a).

lumbia Court of Appeals put it quite bluntly a few years ago: "the arbitrator's authority can be no less than the MSPB's [Merit System Protection Board] but also . . . it can be no greater."⁹

The third difference involves judicial and administrative review of awards. For more than a quarter of a century, ever since the Supreme Court's *Enterprise Wheel*¹⁰ decision, private sector arbitration awards have been almost immune from judicial review. The arbitrator's decision is final and binding. The CSRA, on the other hand, expressly provides for judicial review in some cases and administrative review in others, not only on the narrow grounds available in the private sector, but also on the much broader basis that the award is "contrary to any law, rule, or regulation."¹¹

Moreover, the doctrine of *functus officio* (literally, "a task completed") terminates the private sector arbitrator's power and duties once he renders his award, while the federal sector arbitrator may find himself reluctantly involved in post-award proceedings. The Federal Labor Relations Authority (FLRA) may direct the parties to seek a clarification from the arbitrator,¹² and a federal court may order him to assist in litigation over his own award.¹³

The impact of judicial and administrative review is magnified by the final major difference between the federal and the private sectors, namely, the relative lack of deference reviewing bodies give to arbitration. Courts and the National Labor Relations Board routinely defer to private sector arbitrators' decisions.¹⁴ However, despite repeated endorsements of arbitration as a mechanism for dispute resolution, the same courts and the FLRA give much less deference to federal sector awards. In one recent case, the Court of Appeals for the Federal Circuit went so far as to assert that it need not uphold an arbitrator's decision on a question of timeliness because "[i]t is well settled that the interpretation of an agreement is for the court."¹⁵

This lack of deference is due only in part to the broader grounds for review found in the CSRA. It also reflects a much less receptive

9. *Devine v. Pastore*, 732 F.2d 213, 216 (D.C. Cir. 1984). See also *Cornelius v. Nutt*, 472 U.S. 648 (harmful error rule); *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981) (setting out standards for review of agency discipline); *Huey v. Dep't of Health and Human Serv.*, 782 F.2d 1575 (Fed. Cir. 1986) (MSPB and FLRA definitions of filing date).

10. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

11. 5 U.S.C. § 7122(a)(1) (1982) (administrative review by the Federal Labor Relations Authority). See also *id.* § 7121(b) (judicial review).

12. See, e.g., *Veterans Admin. and AFGE Local 3692*, 19 F.L.R.A. No. 15 (1985).

13. *Devine v. Goodstein*, 669 F.2d 736 (D.C. Cir. 1981) (arbitrator ordered to file the record of the arbitration with the court).

14. *Enterprise Wheel*, 363 U.S. 593; *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

15. *Huey v. Dep't of Health and Human Serv.*, 782 F.2d 1575, 1577 (Fed. Cir. 1986) (citing *Dynamics Corp. of Am. v. United States*, 389 F.2d 424, 429 (Ct. Cl. 1968)).

attitude toward arbitration, and perhaps even a suspicion that arbitration is not a trustworthy way to settle the federal government's labor grievances.

III. RESULTING PROBLEMS

These differences produce three critical problems for federal sector labor arbitration.

First, federal sector parties overuse and misuse arbitration. Reliable statistics comparing the frequency of arbitration in the two sectors are not available, but it is the firm impression of every arbitrator I know who works in both sectors that federal employers and unions make far more use of arbitration than their nongovernmental counterparts. Worse, they seem to use it far more frequently for trivial matters and for cases which are not really debatable. In fact, there are cases which never should have reached arbitration and which must have done so because of the ignorance, stubbornness or vindictiveness of one or both parties.

Overuse and misuse of arbitration are predictable results of the CSRA's limitations on bargaining subjects and weapons. As noted above, unions need a product to sell to potential members, especially when they lack the legal authority to make union membership a condition of employment. To the extent collective bargaining fails to provide a satisfactory product, contract administration must. A private sector union can afford to ignore a small or unusual management breach; its federal sector cousin cannot, lest it be deprived of even one of those small benefits the CSRA allows it to negotiate. The private sector union can refuse to process a meritless grievance (though not all do), confident that its bargaining gains will outweigh the complaints of the disgruntled grievant; the federal sector union, unable to deliver the same benefits through bargaining, must demonstrate its worth by taking to arbitration some of those grievances it expects to lose.

Federal managers are not exempt from this criticism. To a degree now rare in the private sector, some federal sector managers are so anxious about their own authority that they force unions to arbitrate just to maintain their bargaining gains. Not all the meritless cases belong to the unions. Undue stubbornness on a manager's part not only forces a misuse of arbitration, it also provokes a suspicious spirit on the union's side which results in still more grievances. In this corrupting circle, arbitration becomes a weapon each side uses to blud-

geon the other, rather than a means of resolving those few disputes reasonable parties cannot settle on their own.

Second, federal sector arbitrators produce a startling number of erroneous and poorly written decisions. Forcing non-lawyer arbitrators to deal with legal issues causes many of the worst federal sector arbitration decisions—those that are just plain wrong or so poorly written as to be useless or even counter-productive. Consider the most extreme example of judicial exasperation with an arbitrator: Judge Harry Edwards' tirade against an opinion of Arbitrator Harold White:

Although the arbitrator's judgment appears not inconsistent with our first decision in this case, it is difficult to fathom any coherent line of reasoning in his long and rambling opinion, which consists almost entirely of random quotes from other sources. In reading his opinion, we are hard-pressed to identify either a glimmer of reasoned consideration, to which we might defer, or a hint that his observations bear any significant relation to the real world. . . . An opinion such as that submitted here forces the court to choose between placing its stamp of approval on utter gibberish or conducting what would amount to de novo review on a hopelessly inadequate record.¹⁶

Not having seen the award that prompted these comments, I cannot evaluate their accuracy. Assuming the award was as bad as Judge Edwards says, I can speculate about the reasons for its shortcomings. The case involved a fairly arcane legal rule, the "harmful error" doctrine. The court remanded the arbitrator's first decision to him for reconsideration in light of the court's interpretation of the relevant law. The arbitrator was not a lawyer, may not have had access to a law library rich in federal sector authorities, may not have been blessed with sufficiently clear briefs, and may not have believed the parties were willing to pay for the amount of study time it would take to master the issue. He took a stab at the question because the court told him to, no doubt doing his best under the circumstances, and perhaps tried to camouflage his lack of knowledge with quotations from tangentially relevant authorities. Judge Edwards, who wanted only a simple answer to the question, exploded.

This case highlights the arbitrator's dilemma. Most arbitrators are not lawyers. Few of the arbitrators who are lawyers, and almost none of those who are not, are familiar with the CSRA, with applicable regulations, or with the FLRA or the MSPB rulings. Even if they knew what they needed, arbitrators typically lack access to those authorities and all too rarely do advocates provide the arbitrator with copies of the relevant documents, let alone a full explanation of their importance. How then can a conscientious arbitrator apply the law to the case at hand? In the private sector the problem does not even exist, because most cases involve only factual determinations or narrow questions of contractual interpretation. If the average federal sector arbitrator spent the necessary time to find, master, and apply

16. *Devine v. White*, 711 F.2d 1082, 1083-84 (D.C. Cir. 1983).

the legal authorities, he would probably have to do it at his own expense. If he were to bill the parties at his usual per diem, they might refuse to pay and almost certainly would not select him again.

Third, federal sector awards are all too frequently modified or reversed by higher authorities. The ready availability of judicial and administrative review, coupled with the relative lack of respect reviewing authorities give to arbitration, guarantees that there will be more challenges to federal sector than to private sector awards and that a higher percentage of these will be successful.

In the private sector, less than one percent of arbitration awards are challenged in court and only a tiny fraction of those challenges are successful. In the federal sector, about twenty percent are challenged and almost a sixth of those challenges are at least partially successful.¹⁷ The mathematically inclined reader will note that successful challenges amount to only about four percent of the total number of awards. What is important is not the percentage itself, but the comparison with the private sector. The losing party in the federal sector is at least ten times (and perhaps as much as a hundred times) more likely to win on a challenge than the private sector party. Obviously, these odds will stimulate still more challenges, especially since it costs little or nothing to ask for FLRA review. It is no secret that a few unions and agencies routinely petition for review of all adverse awards—a practice that not only undercuts the utility of arbitration but also poisons the unit's labor relations.

Why do the FLRA and the courts modify or reverse so many awards? Even a casual glance at a volume of FLRA decisions reveals the answer: almost all of the modifications and reversals are due to a conflict between the award and some law, regulation, or applicable judicial or administrative decision. In short, some arbitrators are simply unable to handle an arbitration system that is subject to external law, however expert they may be at making factual determinations or at interpreting contracts.

IV. SOME SUGGESTIONS

No arbitration system will ever be perfect. The federal sector system can be improved, however, with some relatively simple actions.

The parties should more carefully screen cases before proceeding to arbitration. The best discipline is self-discipline. If labor and man-

17. Frazier, *supra* note 1, at 71; 24 Gov't. Empl. Rel. Rep. (BNA) 420 (1986) (stating that one of every six challenged awards was modified or set aside by the FLRA).

agement are concerned about overuse and misuse of arbitration, as they ought to be, the most effective remedy is to screen the cases in the grievance procedure with a fine sieve, so that only the purest get to arbitration.

Two types of screening are essential. The first and most important is the screening each party gives its own cases. Obviously, every representative at each step of the grievance procedure should evaluate the merits of the grievance carefully before pushing it along to the next step. That is easier said than done, of course, because a lower-level representative loses nothing personally by advancing the grievance but may suffer by conceding or compromising it. Thus, it is much easier to pass the issue along for someone else to resolve. However, this is not a solution to the problem. It simply amounts to an admission that the parties lack the necessary courage to make hard decisions.

There are a few ways to force those hard decisions. One is to change the reward structure. If lower-level representatives were forced to bear some responsibility for failing to settle weak cases, the tendency to pass everything along would be reduced. One method is to keep close records and to demand explanations when an arbitration award reveals one side's complete lack of evidence or argument. Another method is to make lower-levels pay more of the costs of lost arbitrations. Regional or national union offices that pay some or all of the bills, either directly or by providing services, should charge their local offices if an arbitrated grievance is demonstrated to be meritless. In the same fashion, the costs of arbitrating indefensible grievances should be charged against the office or facility in which the problem arose, rather than being allocated to a separate budget for labor relations controlled only at higher levels.

A final way to eliminate the worst cases is to give the person who will represent the party in arbitration a voice in the decision to arbitrate. Too often the advocate is belatedly handed the file on a dispute that never should have gone to arbitration and told to make the best of it. The advocate may know more about arbitration and be more objective in his evaluation than lower-level officials, but if the decision to arbitrate has been made before he sees the case, even his most pessimistic judgment will have no effect. If his opinion is sought earlier, however, he may be able to convince the deciding officials that arbitration would be futile.

A second type of screening will filter out some of the remaining cases. I refer to joint screening, or "pre-arb" meetings, as they are often termed. Joint screening is best performed by persons new to the dispute who are empowered to resolve it. For maximum econ-

omy, the final screening should be conducted long before the arbitrator has left home, preferably before the cancellation fee is applicable.

Finally, agencies and their unions should develop alternatives to traditional arbitration for cases they cannot settle. Grievance mediation has worked well in the coal industry, according to all reports; perhaps it could work in the federal sector as well. Several federal agencies already use expedited arbitration for minor cases and more could do so. Every case disposed of by alternative means is one less case burdening the regular arbitration system.

The parties must recognize that federal sector arbitration is different. Forewarned is forearmed. To deal with the problems caused by federal sector arbitration's singularities, the parties must appreciate the critical differences and must hold them in mind while moving to and through arbitration. For example, if the parties know the ultimate award may be challenged before the FLRA on the basis of an asserted conflict with a statute, they will be unlikely to overlook that statute's relevance to the case. If they know that complicated regulations or administrative precedent will be involved, they will be sure to select an arbitrator capable of dealing with such things and to provide him with the necessary information.

The remaining recommendations explain more fully how the parties can make productive use of their constant recognition of the federal sector's uniqueness.

The parties must learn to select only those arbitrators who are familiar with federal sector arbitration and are competent to deal with it. Selection of knowledgeable and competent arbitrators is no easy task. It has several essential aspects. The first concerns the arbitrator's training. Despite my own position as a legal educator, I carry no blanket recommendation for lawyers as arbitrators. There are far too many excellent nonlawyer arbitrators (and far too many less than excellent lawyer-arbitrators) for that. In the federal sector, however, legal training or comparable experience is a necessity. How else can the arbitrator be expected to work through the complicated authorities the advocates may use every day? Although someone has to use novice arbitrators, if there is to be another generation of skilled arbitrators, federal agencies and unions should not do so except for simple matters.

The second aspect of selecting an arbitrator concerns access to the relevant authorities. An arbitrator dealing with major federal sector disputes must have available, and know how to use, the U.S. Code, the Code of Federal Regulations, a reporter system of federal court

decisions, and reports of FLRA and MSPB decisions. No arbitrator has all of these in his office; indeed, only a good law library or federal agency library would have all of them. Accordingly, parties should select only arbitrators with access to such a library.

The third aspect concerns the wisdom of permanent arbitrators or panels of arbitrators. As if federal sector arbitration in general were not sufficiently complex, each agency has its own peculiarities. No arbitrator can master all of them in a single lifetime, but any good arbitrator can master a few of them, given repeated exposure. Stated more directly, the best way for parties to assure themselves of a competent arbitrator is to select a few likely possibilities and then make constant use of them. A single permanent arbitrator is one option, but such a close relationship may prove too limiting. A good alternative is a panel of arbitrators, each to be used in turn. Over time, each panel member will become familiar with the agency and its problems and should become more adept at resolving them.

If the parties want to receive good awards that will withstand legal challenge, they must educate the arbitrator about his role and about the case. Few arbitrators, not even those who arbitrate regularly in the federal sector, have a complete understanding of the arbitrator's role in the federal labor relations system. Without knowing his proper role, how can the arbitrator perform it properly? A great many of the FLRA's reversals of arbitration awards involve decisions that would be impregnable in the private sector, but are vulnerable in the federal sector because the arbitrator failed in one of the following respects: (1) to give proper deference to statutes and regulations; (2) to make an express finding that "but for" an unjustified personnel action, the grievant would have received a certain benefit;¹⁸ (3) to apply the "Douglas factors" when determining the appropriateness of a disciplinary penalty;¹⁹ or (4) to demonstrate that an agency's mistake resulted in "harmful error" to the employee.²⁰ If the parties want the arbitrator to avoid these technical traps, they must take responsibility for teaching him about them.

The easiest way for the parties to do this is to prepare a joint memorandum to be given to all arbitrators, but especially to those new to the federal sector, setting out the essential factors of the federal arbitrator's role. Among the matters that should be included are the relationship of the arbitration award to statutes, regulations, and decisional authorities; relevant standards of proof when the arbitrator reviews agency action; limits on the arbitrator's remedial powers;

18. 5 U.S.C. § 5596(b)(1)(A)(i) (1982).

19. *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981).

20. 5 U.S.C. § 7701(c)(2)(A) (1982).

and the necessity of expressly addressing governing considerations before awarding back pay or attorney's fees.

Labor and management must also educate the arbitrator about the case itself. Not even the best-informed arbitrator can be expected to know every agency's regulations, practices, and collective bargaining agreements. If he is to learn about them at all, the parties must teach him. At a minimum, they must present the arbitrator with copies of (or at least citations to) all relevant authorities.

Finally, the parties must insist that the arbitrator spend the time necessary to master the federal arbitration system and the complexities of the individual case. Arbitrators unfamiliar with the federal sector will naturally concentrate on factual and contractual issues, perhaps to the exclusion of other authorities, and will resist spending the large amount of time required to study those other authorities. Only blunt directions will disabuse arbitrators of these predilections.

Another recommendation, which flows from the others, is that the parties make the necessary sacrifices to achieve top-quality arbitration. This requires the parties to use only an experienced arbitrator, provide the arbitrator with relevant authorities, and insist that the arbitrator spend the time necessary to draft an impregnable award. The parties must be prepared to bear the resulting cost. That cost may be steep because better arbitrators demand higher per diems and more study means they will charge more study time. Multiplying these factors produces a fee that will be well in excess of the private sector average.

Higher arbitration costs are always painful, but in the long run they will prove a good investment. Attempting to have cheap arbitration, for example, by selecting inexperienced arbitrators or refusing to pay for needed study time is false economy. Temporary savings will soon be outweighed by such long-term costs as appeals, reversals, relitigation, and of course, bad decisions.

Parties must train their advocates to deal with arbitrators. Most agencies and unions provide some training for their advocates. Such training usually concentrates on the mechanics of the grievance process—gathering evidence, presenting witnesses, writing briefs, and so on. Even trained advocates will frequently err, however, unless they learn to view the case through an arbitrator's eyes. Only one who appreciates that perspective can present a case in a way that will answer all of the arbitrator's questions and provide the most persuasive evidence in the most forceful way. Such an approach will go a long

way toward eliminating erroneous decisions and poorly written awards.

Appreciation of the arbitrator's point of view requires a special training—something more than that found in the typical education programs. Parties who wish to maximize their advocates' skills (and not, incidentally, to increase the chances of a favorable award) will assure that they are trained to deal with arbitrators, rather than just with facts and issues.

V. CONCLUSION

Labor arbitration in the federal sector works, but not as well as it should. The limited scope and weapons of bargaining cause overuse and misuse of arbitration. The applicability of law makes it difficult for many arbitrators to write satisfactory opinions. Legal rules combine with the easy availability of review and the lack of official deference to undercut the finality of arbitration awards.

No dispute resolution system achieves perfection, but federal sector arbitration could at least minimize some of its flaws with simple actions. Better screening of grievances would help to make better use of arbitration. Selection of better qualified arbitrators should eliminate the worst awards. Conscious attempts to appreciate the arbitrator's position and to educate the arbitrator about his proper role and about the case would improve the quality of the remainder.

Major improvements are never free. Higher arbitration fees are only part of the likely cost—better training for advocates, and more detailed preparation for arbitration will be at least as expensive. Together they amount to a major investment in better arbitration. That investment is worth making, not only because the alternatives (among them unnecessary arbitrations and baseless appeals) are even more expensive, but also because better arbitration means better awards, and better awards in turn promise better labor relations.

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