HOW DIFFERENT STANDARDS FOR POST ARBITRATION REVIEW CAN AFFECT HOW CASES ARE LITIGATED AND DECIDED

Moderator: Daniel Silverman, NAA: Introductions

A UNION PERSPECTIVE:

Dmitri Iglitzin, Esq.
Barnard, Iglitzin & Lavitt, LLP, Seattle, WA

A MANAGEMENT PERSPECTIVE:

Louis DiLorenzo, Esq.
Bond, Schoeneck & King, PLLC, New York, NY

A FORMER NLRB REGIONAL DIRECTOR'S PERSPECTIVE:

Daniel Silverman, Esq.
NAA and former Regional Director, NLRB Region 2, New York

PERSPECTIVE OF FLRA: WHERE IT IS NOW

Ernest DuBester, Esq.
former FLRA Chair, Arlington, VA

ARBITRATOR'S PERSPECTIVE AND FACTUAL SCENARIOS AND PUBLIC COMMENT: WHAT WOULD YOU DO

Ira F. Jaffe, Esq., NAA, Potomac, MD

Ira F. Jaffe

I plan to comment in greater detail in the context of discussion of the scenarios as to how potential post-arbitration review of the Award affects how cases are decided. Prior to discussing these scenarios, I would like to make a few personal observations from the Arbitrator's vantage point.

1) I do not believe that the fact that there is a potential for review by a court or an administrative agency significantly affects how I preside or how I decide the case. Recognition of the fact that review is a real possibility (or even a likelihood) may affect the manner in which my ruling is explained in the Opinion accompanying the Award, but not the decision itself. In these cases, I appreciate that while I am writing primarily for the benefit of the parties, I also am writing for the benefit of the review tribunal.

2) While the potential for review does not change my views as to the appropriate ruling, the inclusion of a statutory issue for decision in the arbitration does change the way that I approach the dispute. Once a statutory issue is found to have been properly presented for decision, I believe that we have an obligation to try to get the ruling right on the statutory question in ways that differ somewhat from the responsibility of determining contractual rights that are wholly within the collective control of the Parties.

3) Getting it right requires that we be willing to research the law beyond the limited authority or arguments that the Parties may raise, particularly if one or both of the Parties are proceeding without attorney representation or if the issue presented is not one with which I am already intimately familiar. This may include raising questions with respect to one or more items at the hearing that the Parties have not raised (including any non-waivable limitations on

jurisdiction). I am not urging that we take on advocacy roles, but we also may not be able to remain wholly passive with respect to one or more legal issues in dispute.

4) In my experience, the Parties expect and are not surprised by such arbitral behavior. They know who they are asking to serve as Arbitrator or Mediator and understand that limited activism in that regard is often part of a fair and regular process for resolving the statutory issue appropriately.

5) Some of these approaches may leave the Arbitrator feeling less than comfortable, but it is part of the job. If something is discovered in research that is significant and that the Arbitrator believes was not adequately addressed in the Parties' presentations, then the Arbitrator may, in appropriate cases, wish to raise that issue or authority to Counsel and allow them the opportunity for comment or response, rather than potentially surprising them with the matter for the first time in the Opinion and Award. Occasionally, such supplemental discussions have even led to settlement.

6) While it is disappointing when a court or reviewing regulatory authority disagrees with an Award, we should not take it personally. Such review is in the nature of the structure of the underlying statute and is a consequence of being asked to decide statutory questions of interpretation and application that are not infrequently matters of first impression or near first impression. We earn a living reviewing and second guessing the decisions of others. It would be hypocritical to be highly sensitive when similar review is undertaken with respect to our determinations.

7) We understand that there are scenarios that arise under other laws – federal, state and local – that present similar questions of review of arbitration awards, including awards in interest disputes. Due to the constraints of time, however, we have chosen to focus upon the following:

a) potential review by the NLRB of an arbitration award under both Section 8(a)(3) and Section 8(a)(5) deferral situations; b) potential review by the FLRA pursuant to the Federal Services Labor-Management Relations Statute; and c) potential review by the federal courts pursuant to the Multiemployer Pension Plan Amendments Act ("MPPAA") revisions to the Employee Retirement Income Security Act ("ERISA"). We recognize that different reviews under different statutory designs addressing different types of issues will likely implicate additional and different concerns.

We now proceed to the scenarios that we hope will engender some lively discussion and disagreements among panelists and also encourage questions from the audience.

Scenario #1 – NLRA Deferral; Claim of Wrongful Discharge on the Basis of Union Activity

The Board's approach to deferral is summarized in Dan Silverman's paper and thus need not be addressed here. Given the language of Section 10(a) of the Act, deferral is a matter of NLRB discretion and, as noted, the particular standards and their application have changed somewhat over the years.

The Parties' Agreement contains standard Teamster "cardinal sin" language that requires that discipline be only for just cause, but which further provides that: 1) an employee must receive a written warning prior to suspension or termination; 2) that the written warnings have no force or effect after nine months; but that 3) committing enumerated "cardinal sins" may result in suspension or discharge without the need to have first received a written warning. None of the enumerated cardinal sins encompass the behavior of the Grievant in this case. The discipline and discharge language of the collective bargaining agreement does not include as one of the cardinal sins "or other offenses of similar seriousness," despite the Company having proposed unsuccessfully in the last three negotiations to add such language.

The undisputed facts were as follows. The Grievant has worked for the Company as a driver for 15 years and has been a Shop Steward for 10 of those years. The Grievant is meeting with a supervisor regarding a complaint of a bargaining unit employee that has not yet, but may become, a grievance. After hearing the complaint, the supervisor tells the Grievant that the meeting is done and directs him to leave the office immediately and to begin his run for the day. The Grievant replies that he is not done. The supervisor, who is much larger, angrily replies that the Grievant is done and approaches the Grievant. When he gets to within 3 feet or so of the Grievant, he looks down at the Grievant and says that if he does not leave now and begin work, then he is "going to kick his Black ass and force him to do so." When the supervisor takes one additional step towards the Grievant, the Grievant pulls a pistol out of a small back holster, and says "I don't think so." The Grievant did not point the gun at the supervisor, but also did not take advantage of an opportunity to have backed away from the supervisor. The Grievant then tells the supervisor that he "better not touch him" and that, if he tries to do, so then he will be guilty of assault and subject to arrest. The Grievant is an auxiliary police officer in a neighboring town. This occurs in a state where auxiliary police are authorized to carry their service firearms at all times.

The Company has a posted rule against bringing guns onto Company property and a policy with respect to Workplace Violence Prevention that includes a blanket proscription on bringing weapons to work.

The supervisor responds to the Grievant's pulling out his gun by physically backing off. The supervisor says nothing about the Grievant continuing to carry his service weapon while on Company premises and while on the clock.

The Grievant returns his weapon to his holster and leaves. The Grievant performs his daily deliveries without incident. When the Grievant returns to the garage at the end of the day, he is issued a notice of discharge for gross insubordination and for violation of the Company's

Workplace Violence Prevention policy. The Grievant had no discipline on his record in the preceding 9 months.

The next day a grievance is filed alleging violation of the Discharge or Suspension provisions of the Agreement "and any others applicable," but does not specifically mention violation of the contractual anti-discrimination provisions on the basis of Union activity, the contractual anti-discrimination provisions with respect to race, or the contractual language recognizing the right of stewards to represent members free from intimidation, harassment, coercion, or over supervision.

A Charge is also filed with the National Labor Relations Board alleging violations by the Employer of Sections 8(a)(1), (3), and (5), of the Act. The Board has deferred the Charge pending completion of the grievance and arbitration process.

The grievance is unable to be resolved locally and is appealed to arbitration.

Questions:

1) Should the Parties submit to the Arbitrator only the just cause question or include the claim of violation of the NLRA?

2) If the Union and Employer disagree concerning the scope of the issues presented for ruling, how should the Arbitrator rule and what are the limitations on the Arbitrator's authority in that regard?

3) If the Union seeks broad remedies available under the NLRA and the Arbitrator sustains the claims of discrimination on the basis of union activity in violation of the contractual anti-discrimination clause and/or the NLRA, should the remedies be limited to those under the collective bargaining agreement or extend to those available under the law? If the Arbitrator finds that the discharge was motivated by discrimination on the basis of union activity, but awards only contractual relief (e.g., no interest, no posting, calculation of offsets and back pay as is typical in labor arbitration, no consequential damages), what should the Board do?

4) If the Arbitrator finds just cause for discipline, but not for termination, and mitigates the discipline to a Written Warning, but does not make any findings with respect to the claim of unlawful discriminatory motive, what should the Board do? Is your answer the same if the Arbitrator mitigated the discipline to a time-served (3 month) suspension?

Would the answer be the same if the Arbitrator overturned the termination on contractual just cause grounds, but affirmatively found that there was no proven discrimination on the basis of union activity?

Does the Arbitrator have any responsibilities to decide more than would be the case otherwise to minimize the likelihood of further proceedings and/or address all of the submitted issues?

5) If the Arbitrator finds that the issue of discrimination based on union activity issue is submitted and sustains that claim, should the Arbitrator also decide the contractual just cause question and the proper application of the cardinal sin provisions of the Agreement or treat those matters as moot?

6) What will the Board do if the Parties bargained for a bench ruling with no accompanying written opinion, so that there are no findings, just a bare conclusion? (Assume for purposes of this question reinstatement, mitigation of the penalty to a Written Warning, and an award of full contractual relief – i.e., rescission of the discipline and an award of back pay and benefits, but no interest and no posting.) Should the summary award reference the ultimate findings with respect to the NLRA issue, but do so without any detailed review of the underlying record evidence?

7) If the Arbitrator is to consider the NLRA issue (or the related contractual issue of discrimination for protected union activity), should the Arbitrator conduct independent research into the current state of the law? If case law is found that appears to be material, should the Arbitrator advise Counsel and seek comment prior to relying on those cases? If there is a split in the Circuits regarding the current position of the Board, how should the Arbitrator handle that matter?

8) If the Union believes that its NLRA argument is a strong one, should it opt not to arbitrate the NLRA question and, instead, solely pursue the Charge and oppose deferral by noting its unwillingness to arbitrate the assertion? If it does so, may it arbitrate the just cause issue alone thus obtaining the proverbial two bites at the apple (including the claim for extracontractual relief)?

Scenario #2 – NLRB Deferral in a Unilateral Action and Alleged Refusal to Bargain Situation

An employer makes a unilateral change to its Workplace Harassment and Professional Conduct Policy, noting explicitly for the first time that offensive comments, even when uttered in a joking or non-hate context, are strictly prohibited. The Policy previously provided that any violations would be handled in a "zero tolerance" fashion and that violations could lead to disciplinary action up to and including discharge. Employees were trained regarding the revised Policy.

Shortly after the training, a long-service employee is overheard by a supervisor uttering a racial epithet to another employee while he was telling an inappropriate joke. The employee admitted making the comment, but maintained that he was only making a joke to a coworker who was a long-time friend and did not realize that anyone else could overhear his telling of the joke. The Company, following investigation, terminated the individual.

The Union grieved the discharge as imposed without just cause. The Union also filed a Charge with the NLRB asserting that the Company's unilateral revision of the Policy, without notice or bargaining, violated Section 8(a)(5) of the Act. The unilateral revision of the Policy took place four months prior to the filing of the Charge. The Board deferred the Charge. The Union did not file a separate grievance asserting that the Company's unilateral policy revision

violated the Agreement, but did argue in the grievance regarding the Grievant's termination that the discharge was invalid, in part, because the policy revision was improperly adopted in violation of the Company's duty to bargain imposed by the NLRA and encompassed in the contractual Recognition clause.

The Company maintains that its right to promulgate reasonable rules and regulations under the Management Rights provision and the language of a standard zipper clause contained in the Agreement meant that it enjoyed the right to make the revisions unilaterally without violating either the Agreement or the NLRA. It also noted that the Union never requested to bargain after the Company had modified the policy and provided a copy to the Union and argued that the Union could not now timely challenge that action for the first time months later. The Union argued that the provisions of the Agreement were insufficient to satisfy the requirements needed to constitute a valid waiver of the right to bargain under the Act and that the Employer had acknowledged as part of the agreement to defer the Charge that it would not raise timeliness objections to the arbitration of the matter.

Are any of the considerations previously discussed with respect to the Scenario #1 different from the vantage points of: a) Union Counsel; b) Company Counsel; or c) the Arbitrator?

Federal Sector

Collective bargaining between federal agencies and the unions representing federal employees takes place pursuant to the Federal Services Labor-Management Relations Statute ("Statute"). The Statute incorporates, among other things, significant non-waivable management rights that limit the scope of bargaining and the ability of federal management to bargain away discretion in various areas. Those management rights are recognized and enumerated in Section 7106 of the Statute, 5 U.S.C. § 7106, which also provides that unions and agencies are required to negotiate procedures which management officials of the agency will observe in exercising those management rights and appropriate arrangements for employees adversely affected by the exercise of those management rights. Bargaining with respect to the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work, are negotiable at the election of the agency (i.e., is a permissive, but not a mandatory subject of bargaining).

In addition, the Federal Labor Relations Authority ("FLRA") is empowered by the Statute to rule on appeals to arbitration awards ("Exceptions"). Unlike the NLRB, the review authority of the FLRA is extremely broad with respect to resolving appeals as to whether the award of an Arbitrator is "deficient because it is contrary to any law, rule, or regulation." Section 7122(a)(1) of the Statute, 5 U.S.C. § 7122(a)(1). The FLRA is also empowered to review arbitration awards "on other grounds similar to those applied by Federal courts in private sector labor-management relations." Section 7122(a)(2) of the Statute, 5 U.S.C. § 7122(a)(2). Section 7122 provides further that "the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations."

The potential for FLRA review is inherent in every arbitration case. Further, if Exceptions are filed, then the arbitration award is stayed automatically pending resolution of the Exceptions.

Exceptions frequently involve claims that an arbitration award is contrary to Section 7106 or requires a remedy that is barred by other federal law and violates the principle of sovereign immunity. The standards that the Authority has applied in determining whether a bargained provision or an arbitration award violates Section 7106 or constitutes a lawful appropriate arrangement have changed over time. Similarly, the degree to which the Authority has substantively interpreted the Parties' Agreement and demonstrated its willingness to substitute its judgment for that of the Arbitrator in the course of determining whether the arbitration award failed to draw its essence from the Parties' Agreement has varied.

The Academy is fortunate that Ernie DuBester has graciously donated significant time and expertise over the years in his efforts to train Arbitrators hearing federal cases with respect to many of the unique requirements imposed upon them by the statutory and regulatory structures in place that govern federal agencies and unions and their bargaining. Ernie's paper does an excellent job of summarizing the complex, and not always intuitive, case law and concepts applicable to review of arbitration awards by the FLRA. His paper also identifies a number of potential pitfalls that Arbitrators should try to avoid when working in this sector. Rather than

attempt to duplicate his excellent overview, I simply commend it to you for your consideration if you are working in this sector.

We will examine a brief scenario that is designed to reflect the types of issues that Arbitrators hearing federal cases confront on a regular basis.

Scenario #3 – Valid Contractual Appropriate Agreement or Nonwaivable Management Right

The Union grieves, claiming that the Agency has violated a provision in the collective bargaining agreement that required that certain overtime work be assigned on an equal basis to both bargaining unit members and also to qualified non-bargaining unit members, including supervisors. The goal was to mitigate the high amounts of mandatory overtime required of bargaining unit employees due to a combination of high vacancy rates, staffing limitations, and high rates of employees not reporting as scheduled. The Agency stopped assigning the work in question to supervisors and other non-bargaining unit employees, resulting in bargaining unit members being required to work greater amounts of overtime than would have been the case if the Agency had honored the terms of its bargained for agreement.

The Agency argues that the contract provision was not violated, but alternatively argues that, even if the provision of the Agreement was violated, it is void as inappropriately restricting management rights.

At the hearing, the Agency also raised a procedural arbitrability argument for the first time based upon an assertion that the Union failed to properly appeal the grievance to arbitration since the appeal to arbitration, while timely, was sent by email to a different management official than the official who was identified in the collective bargaining agreement for receipt of such appeals.

Questions:

1) In determining whether to sustain or reject the procedural arbitrability claim, should the Arbitrator follow FLRA precedent or apply traditionally accepted arbitral standards?

Is the primary goal in that regard one of doing the appropriate thing under the Parties' Agreement, even if it results in the ruling being overturned on appeal, or is finality the overarching concern?

2) If the Arbitrator is persuaded that the agreement provisions are clear and also that, as applied, those provisions would violate Section 7106, should the Arbitrator follow the bargained-for provisions and leave it to the FLRA to invalidate the application of the collective bargaining agreement or follow the law and do so on her or his own?

3) Is the Arbitrator expected to research FLRA and other case law beyond any cases cited by the Parties in an effort to correctly decide the issues that are presented for ruling? If cases are identified in this process, should the Arbitrator ask the Parties to comment on that authority or simply issue the ruling with appropriate reference to that precedent?

NOTE:

In federal sector cases involving adverse actions, employees have a choice of appealing to the Merit Systems Protection Board ("MSPB") or through the negotiated grievance and arbitration procedures. The decision whether to appeal a grievance denial to arbitration still rests with the Union as the exclusive representative, not with the employee.

In 1985, the United States Supreme Court held that Arbitrators are bound to follow the substantive rulings of the MSPB in those cases to avoid forum shopping. Cornelius v. Nutt, 472 U.S. 648 (1985). There is no proscription on Arbitrators making procedural rulings that differ from those that would have been made by the MSPB. The obligation to use the same substantive standards does not mandate that the two processes otherwise be the same.

Does Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), change the obligation of Arbitrators to adhere to rulings of the MSPB if the Arbitrator believes that an otherwise applicable MSPB ruling is contrary to the written provisions of the law itself? In sum, is the reduced judicial deference provided to agency determinations in the review process limited to judicial review or is that same lesser deference applicable as well to arbitral decision making?

The ability to appeal an arbitration award with respect to an adverse action is governed by the same appeals provisions that would apply to MSPB rulings. The appeals would not go to the FLRA, but would proceed to court. Employees would have the right to appeal an adverse arbitration decision, but the right of the agency to appeal an adverse ruling is more limited under the law in light of the fact that the MSPB is a successor to the Civil Service Commission and is viewed as the final governmental decision maker with respect to the adverse action determination.

Scenario #4 - ERISA – Arbitration of Withdrawal Liability Disputes

The Multiemployer Pension Plan Amendments Act ("MPPAA") amendments to the Employee Retirement Income Security Act ("ERISA") provide for the imposition of withdrawal liability on employers who withdraw from multiemployer pension plans that have unfunded vested benefit liabilities. MPPAA further provides for mandatory arbitration of employer challenges to withdrawal liability demands and for potential review of those arbitration decisions in federal court.

The Parties in these cases are concerned about both the ultimate disposition of the individual case at issue and also about other cases that may be impacted by the ruling in that case. The Fund is often concerned about the potential that an adverse ruling may have with respect to other pending matters or claims and the possible fiduciary consequences of a ruling that finds the assessment to have been imposed contrary to law. The Employer may also be concerned about the impact of a ruling with respect to other claims by the same fund, or claims by other funds to which it contributes. Counsel for all parties may also be involved in arbitrations and litigation of the same or similar issues and be concerned about the possible persuasive impact of a favorable or adverse ruling.

Unlike the prior cases which involve questions of potential review of Arbitrator rulings by administrative agencies, these cases involve direct review of arbitration awards by the federal courts.

A central issue in many of these cases relates to the determination of the interest rate assumption used to calculate the amount of an employer's withdrawal liability. Section 4221(a)(3)(B) of ERISA provides that the plan's determination of unfunded vested benefits for a plan year is presumed correct unless it is shown by a preponderance of the evidence that the actuarial assumptions and methods were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations) or the plan's actuary made a significant error in applying the actuarial assumptions or methods. The United States Supreme Court discussed the meaning of that presumption of correctness in Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993).

A number of multiemployer funds use different interest rate assumptions for valuing vested benefit liabilities for purposes of withdrawal liability than they use with respect to calculating the value of vested benefit liabilities for funding purposes under the Internal Revenue Code. Relatively small differences in interest rate assumptions may trigger millions of additional dollars in withdrawal liability.

For approximately 40 years, the law in that area was fairly well established. Arbitrators recognized generally the validity of using different interest rate assumptions for different purposes, despite the language that governed actuarial selection of interest rate assumptions for funding purposes and for purposes of determining withdrawal liability being the same. The Actuarial Standards of Practice similarly recognized the propriety of using different interest rate assumptions for different purposes. Actuaries varied as to whether they used funding interest rate assumptions for valuing vested benefit liabilities for withdrawal liability purposes,

developed a different interest rate on an ad hoc basis, used PBGC rates that were applicable for mass withdrawals, or used some form of blend. The largest actuarial firm in the multiemployer area typically blended the PBGC and funding rates in a manner known as the "Segal blend."

Beginning in late 2021, however, several Courts of Appeals have adopted interpretations of the provisions of Section 4213 of MPPAA (as well as a number of other provisions of MPPAA) that departed from the case law as it had existed for the first four decades of MPPAA's existence. With respect to the issue of interest rate assumptions, one Court of Appeals found that fund actuaries were required to use the funding interest rate assumption for calculating withdrawal liability (Sofco Erectors v. Trustees of the Ohio Operating Engineers Pension Fund, 15 F.4th 407 (6th Cir. 2021). Another Court of Appeals found that, while the two interest rates need not be identical, they were required to be "similar" (UMW 1974 Pension Plan v. Energy West Mining Company, 39 F.4th 730 (D.C. Cir. 2022), cert. denied, 143 S. Ct. 1024 (2023). In GCIU-Employer Retirement Fund v. MNG Enterprises, 51 F.4th 1092 (9th Cir. 2022), cert. denied, 143 S. Ct. 2665 (2023), the Court of Appeals upheld an arbitration award that overturned a plan's use of PBGC rates for calculating vested benefit liabilities violated Section 4213 since it did not consider the experience of the plan and reasonable expectations. The courts in Sofco and MNG directed that the withdrawal liability be recalculated based on the use of the funding interest rate assumption. The Energy West court remanded for additional arbitration proceedings regarding selection of a statutorily valid interest rate assumption. In sum, with respect to interest rate assumption challenges, the rulings to date from the Courts of Appeals have adopted divergent holdings and analyses regarding the requirements of ERISA.

Assume that the selection of the interest rate assumption is central to the resolution of a dispute that is pending in arbitration.

1) How should the Arbitrator address the question of the applicable legal standard of review of the Fund's determination? Should the Arbitrator select one of the Courts of Appeals with which the Arbitrator agrees and ignore the others? Should the Arbitrator analyze the validity of the Fund's determination under all three approaches in the alternative? If the Arbitrator disagrees with all of these decisions of the Courts of Appeals, should the Arbitrator apply the interpretation of the law that she or he believes correct?

2) What if there is a different disputed issue under MPPAA that has a single Court of Appeals ruling or perhaps only District Court rulings? Is the Arbitrator bound by the Court of Appeals panel decision or should the Arbitrator nevertheless apply the law as she or he believes correct?

3) Are court rulings involving the same Fund and the same issue of statutory interpretation, but a different employer, entitled to any different weight?

4) Is it permissible for the same Arbitrator to utilize different approaches with respect to the determination of the interest rate assumption in different cases with wholly different parties? What are the disclosure obligations with respect to the Arbitrator's issuance of decisions that addressed that question that issued: a) before selection as Arbitrator in the case; or b) issued during the pendency of the arbitration case?

5) What weight should be provided to PBGC regulations and Opinion Letters following the ruling of the Supreme Court in Loper Bright when trying to determine the "single, best meaning" of the statute in question? In those cases where the statutory language is not clear and unambiguous, deference as set forth in Skidmore v. Swift & Company, 323 U.S. 134 (1944) would focus on the thoroughness of the agency's consideration, the validity of the agency's reasoning, the consistency of the agency's interpretation over time, and the agency's expertise in the relevant area and persuasiveness of its position, in determining the weight to give to the PBGC pronouncement.

6) Who is the Arbitrator primarily writing for in these cases – the parties or the Courts or both?