FOR WHAT IT'S WORTH

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Oh, Bitter Dicta

If you've ever been to a training program for labor arbitrators you know that we are supposed to avoid dicta. The idea is to answer the question before us and resist the temptation to offer gratuitous advice.

At the same time, and equally important, an arbitrator must explain the reasoning behind his award. It is not helpful to the parties if the award just contains the arbitrator's conclusion. Without the arbitrator's reasoning, the award cannot provide any guidance to the parties to inform their future conduct.

The careful reader will have noticed that these two essential rules directly contradict one another. Every word the arbitrator must include to explain the reasoning behind his award is dicta that he must exclude to avoid offering gratuitous opinion or advice.

Perhaps that overstates the problem. But it is at least true that the sweet spot—where the award provides just enough explanation but not too much dicta—is an elusive one.

Consider the following case.

> Superviser Jones tells worker Smith to put the red boxes on the roof.
>
> Smith doesn't do it.
>
> Jones issues discipline.
>
> At the hearing Smith argues:
>
> > It's stupid to put the red boxes on the roof.
> >
> > We never do it that way.
> >
> > We're just going to have to take them back down tomorrow.
> >
> > Taking the red boxes to the roof is hot and sweaty and boring and pointless.
> >
> > And a waste of time and effort.
> >
> > And Jones just told me to do that because he is a rotten *expletive deleted*.

The arbitrator finds, as he must, that the employer has the right to direct the workforce; Smith should obey now and grieve later; and the shop floor is not a debating society.

So far, so good. But suppose the record also shows that everything Smith said is perfectly true. It *was* a stupid, pointless, wasteful, expensive order, and it *was* issued because Jones doesn't like Smith and enjoys making his life miserable. What, if anything, should the award say about that?

There is a range of options. The arbitrator could say nothing about the order. He could say that since the order is not illegal, immoral, or dangerous, the employer is entitled to issue it and entitled to have it obeyed. He could say, "The wisdom of the order is not before me" which signals that he can see the order was stupid and vindictive, but he has no authority to do anything about it.

The arbitrator can say:

> In ruling that the employer had the authority under the contract to direct Smith to put the red boxes on the roof, I am not expressing any opinion on the question of whether the order was prudent or sensible or represented sound business judgment. My role as a labor arbitrator does not include evaluating business judgment. The question before me is only whether the CBA provides the employer the authority to issue such an order. I am constrained to find that it does.

Or the arbitrator can make a finding:

> I am persuaded that Jones' order was stupid, pointless, wasteful, vindictive, and issued solely to harass the Grievant. Nevertheless, under generally accepted principles of labor arbitration, I must find that Jones was entitled to issue the order, and Smith was obliged to obey it.

An arbitrator who says nothing about the order takes the risk that he will be perceived as having failed to understand the union's case. An arbitrator who says bad things about the order takes the risk that he will be perceived as shooting off his mouth about stuff that's none of his business. And an arbitrator who tries to find the sweet spot—by signaling or implying without actually finding that the order was stupid—risks being vilified by both sides.

It's tricky.

Readers are encouraged to send comments to me at bagman@ameritech.net. If I get enough interesting comments I'll do another column about this. ■

graduated from that program, and upon recommendation from New Prime, the plaintiff formed an LLC and entered into an independent contractor truck driver agreement with New Prime. The Agreement contained a mandatory arbitration clause. After New Prime allegedly consistently underpaid him in violation of the Agreement, the plaintiff stopped driving as an independent contractor for New Prime. One month later, New Prime hired Plaintiff as an employee truck driver. Nevertheless, the plaintiff brought a putative class action against New Prime for minimum wage violations, breach of contract and unjust enrichment. New Prime sought to compel arbitration per the terms of the Agreement. The plaintiff responded that the Agreement was an employment agreement and thereby exempt under Section 1 of the Federal Arbitration Act. He also argued that a judge, not an arbitrator, should decide the issue of arbitrability. The trial court denied New Prime's motion to compel arbitration and ordered the parties to conduct discovery on the issue of the plaintiff's employment status and the applicability of the Section 1 exemption. New Prime appealed. The Court of Appeals held that the district court had jurisdiction to determine arbitrability and also that the Section 1 exemption applied to the Agreement. New Prime sought cert, and the Supreme Court granted the petition to consider two questions: should questions about the applicability of the Section 1 exemption of the Federal Arbitration Agreement be decided by a court or an arbitrator; and does the Federal Arbitration Act apply to indepdendent contractor agreements? *New Prime Inc. v. Oliveira,* 138 S.Ct. 1164 (Feb. 26, 2018). ■