

# PROFESSIONAL ETHICS IN RAIL ARBITRATION

---

ANDREW MAMO

UNIVERSITY OF CINCINNATI COLLEGE OF LAW



# SCENARIO I

---

- You are hearing a rules case involving a basic day claim for 51 employees. The Organization's position is correct and the claims are meritorious. In its brief and during the hearing, the Carrier did not argue that the requested relief was excessive or inappropriate should the claim be sustained.
- During the Executive Session, the Organization member parrots what the presenter argued during the hearing. The Carrier member, looking apprehensively at his counterpart, asks him to tell you the rest of the story. The Organization member asks, "What story?" "About what we agreed to tell the arbitrator," the Carrier member responds. "I don't know what you mean," the Organization replies.
- You now realize there likely was an understanding between the parties concerning the remedy from which the Organization is backing out. That the Carrier put up no defense concerning the remedy only makes sense if it were relying upon a previously agreed-to result obviating that argument.
- Now what do you do?

# SOME GOVERNING PRINCIPLES (CODE FOR LABOR-MANAGEMENT DISPUTES)

---

- 1.C.1.:An arbitrator “must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.”
- 2.A.2.:An arbitrator has a “responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.”
- 2.G.1.:“An arbitrator must assume full personal responsibility for the decision in each case decided.”
- 2.I.1.:“Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.
  - a.:“Before complying with such a request, an arbitrator must be certain of understanding the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.”
- 5.A.1.:“An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.”

## SCENARIO 2

---

- You are reading the parties' submissions to prepare to hear a docket of 25 rules cases. Now you discover that 20 of these cases, each filed individually, are identical in every respect except the date of the occurrence giving rise to the claims. It is obvious that the parties should have filed one lead (precedent-setting) case, but did not. Should you write and submit 20 awards? After all, it wasn't your fault the parties did what they did.



# SOME GOVERNING PRINCIPLES (CODE FOR LABOR-MANAGEMENT DISPUTES)

---

- 2.J.2.c.:“An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.”
- 2.K.1.:“An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of arbitration work. An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.”

## SCENARIO 3

---

- You have 50 Section 3 cases approaching the time limit for submission to the NMB. Fortunately (or not), you have several concurrent outside industry cases to write that will generate significantly higher fees than the railroad work. You decide to farm out the railroad work to a friend who is just starting an arbitration practice. Is this ethical?

# SOME GOVERNING PRINCIPLES (CODE FOR LABOR-MANAGEMENT DISPUTES)

---

- 2.H.1.:“An arbitrator must not delegate any decision-making function to another person without consent of the parties.
  - a. Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.
  - b. If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.”
- 2.J.1.:“It is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner.”
- 2.J.3.:“Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed.”
- See also NAA Opinion #12.

## SCENARIO 4

---

- You recently returned a proposed Award to the NRAB. A short time later you get a phone call from an irate partisan Board Member who, in a profanity-laced diatribe, wants to know how you could write such ridiculous trash. You would like to continue working in this industry. What should you do?



# SOME GOVERNING PRINCIPLES (CODE FOR LABOR-MANAGEMENT DISPUTES)

---

- I.A.1.:“Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters. An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.”
- I.A.2.:“An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.”
- I.C.1.:“An arbitrator must uphold the dignity and integrity of the office”
- I.C.3.:“An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator’s impartiality.”

# PROFESSIONAL ETHICS FOR THE REAL WORLD

---

- Ethics guidance can feel “preachy”
  - It doesn’t need to be!
- The goal is usually to identify a more “enlightened self-interest” – not to be saints!
- The rules generally accord with what we know we should be doing:
  - Stay neutral!
  - Abide by the rules!
  - Exercise your best professional judgment, considering the governing rules and the record!
  - Be efficient and avoid waste!
- The challenge is in following the rules when we have incentives not to.

# THE HARD QUESTIONS: UNSETTLED ISSUES

---

- What are the genuinely hard questions, where we really *don't know* how we are supposed to practice ethically?