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Robert J. Rabin
Syracuse University School of Law

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ROBERT J. RABIN*

I see a common and very fundamental issue in both articles. It has to do with how we view the workplace. Do we see it through the eyes of the worker on the shop floor (or teacher in the classroom, or violist in the symphony orchestra), or from the perspective of those who manage the enterprise? Are we concerned with how it feels to be a worker, who must cope with stress and deal with uncertainty, or do we think more about the ability of the enterprise to compete and the investor to secure a profitable return?

Let me begin with the Atleson piece, and offer some observations from my own experience. I see the foul language cases, as I think he does, as part of a larger bundle of cases that come under the heading of insubordination. For some reason, these cases have provided substantial grist for my own modest arbitration mill. While my "study" isn't as systematic as Atleson's, I've probably looked at as many cases.

I have attempted in these cases to uphold the honorable rule of "obey now, grieve later." But many times I have balked at the result because it is so harsh. The pattern is familiar: A worker has an honest disagreement with his boss over an assignment. Perhaps he feels he has drawn a rotten task too many times, or he believes his foreman is riding him excessively. He complains to his foreman. He attempts, at first in a conversational manner, to suggest why he is correct. Maybe the language escalates to obscenity. Eventually the foreman, also under pressure, pulls the plug: "Do this. It is an order. Refusal is insubordination." The stakes suddenly change enormously. By simply uttering the magic words,

*Professor of Law, Syracuse University College of Law. In keeping with the informal style of these comments, I've tried to hold down the footnotes. Where I thought the reader might appreciate some references, I've grouped them at a couple of points in the text. I haven't provided citations to my own awards that I refer to, as they are unpublished and the parties may wish me to preserve confidentiality.

the foreman places the employee in peril of termination.

How do these incidents come to such a head? As I listen to the grievant's story, I usually realize that he is only trying to preserve his own sense of dignity and self-worth. He rails against an order that demeans him. Let me give some examples.

I saw the "obey now, grieve later" rule urged with a vengeance in a recent case involving a firefighter. The employer intoned solemnly at the hearing that the department was a quasi-military organization that could not tolerate deviation from command. I trembled as I pictured the grievant refusing to climb the ladder into the towering inferno. What was it that he had refused to do? His superior officer had commanded him to remove a day old pot of soup from the refrigerator at the end of his shift. The grievant protested—a waste of perfectly good soup; his buddy on the following shift would eat it. The officer repeated the order. The firefighter, unable to believe this silliness, and unwilling to take it, simply walked out. Discipline was imposed.

In another case, a supervisor asked for volunteers for Saturday work. The job that the grievant had heard described was not burdensome. But when the grievant showed up on Saturday he found that he had been assigned to a hard, dirty job. He balked. It was not what he had agreed to do. When he was ordered to do the work and grieve later, he protested again. Words were exchanged, the talk became heated, and the refusal more firm. What was the employee doing? In my judgment he was making a statement that his self-worth was more important, at least for the moment, than merely being a cog in a production machine. Also, if he had thought about it, he would probably have concluded that he couldn't really preserve his dignity later in some distant arbitration.

I think something like that is going on in many of the foul language cases. David Mamet's play, *Glengarry Glen Ross*, gives us a slice of workplace language that makes the workplaces described by Atleson seem like church. I believe the language in Mamet's play expresses the powerlessness and frustration of salesmen in their workplace. Driven to meet a sales quota, and thwarted by the refusal of invisible managers to provide them with decent leads, they lash out through language at the unfairness of their plight. Interestingly, salvation appears to some of them through the hope of entrepreneurship.

If we understand what moves a worker to defy authority, and if we sympathize with his plight, why do we so readily accept the "obey now, grieve later" rule? At the very least, why do we not look into the underlying reasons for the refusal to obey or the foul language, and why do we so readily accept the severe magnitude of the punishment?

This has puzzled me. As an arbitrator, my bread is equally buttered on both sides. There is no need for me to accept a rule that comes down so hard on the employee. Curious, I took another look at Katherine Stone's article on Industrial Pluralism.[1] When I first read it I said to myself that this cannot be right. She says that the traditional model of labor relations, which she describes as "industrial pluralism," does not work as warranted. This model, she claims, does not account for the imbalance of power between the worker and employer. She says that by driving problems into private mechanisms, or "privatizing" them, we take them out of the public eye and ignore them. Thus, she concludes, society fails to tackle important workplace problems.

As one weaned under the traditional model, I railed at her conclusions. Unions do provide effective representation, a proper balance is drawn, and arbitration is a sound system for securing these rights, I thought. While I agreed with many of Stone's observations about such topics as the scope of bargaining, I thought that her observations about the imperfection of arbitration were wrong.

By looking at Atleson on Obscenities and Gross and Greenfield on Health and Safety, however, I begin to see that Stone's observations may be closer to the mark. Indeed, I read Atleson to suggest that arbitrators accept value judgments that reflect the interest of the dominant power in the work relationship.

But I believe that there is more to it, and that something can be done about it. One explanation for why arbitrators follow the "obey now, grieve later" rule so slavishly is that we have a hard time ignoring a rule of such long standing. If we did ignore it, both union and management would say of us that we are not in the mainstream, have turned our backs on a rule accepted for

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1. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L. J. 1509 (1981). That venerable journal refers to her article simply as "Industrial Pluralism" in the heading atop the pages.

generations, are unpredictable, and thus are unacceptable. Indeed, as we write these very words, some of us may jeopardize our own acceptablity as arbitrators. This reality is one of the limitations upon scholarship dealing with arbitration.

Another explanation for acceptance of the rule is that it has been around for so long that we have lost sight of its origins. When we don't pay attention to a rule's foundations, we don't have the luxury of knocking it down through intellectual analysis. The seminal "obey now, grieve later" arbitration award of Harry Shulman is referred to at length in both of the articles. Curious to learn more, I read the original case.[2] Here is what happened:

Significantly, the grievance arose during World War II. Shulman says "it was desirable to keep the supercharger going in that building . . . because of the great need for that product in the war effort . . . ."[3] He refers at the outset to the "blockade of Gates 9 and 10, . . . incident to the memorable disturbance in the aircraft building."[4] This language is indicative of the cryptic nature of the decision (an inevitable price for the welcome brevity of Shulman's awards) so we're not sure exactly what was up. We can infer that, however, there was a special situation at this plant: work had been disrupted, and production was needed during wartime. Contrary to what one might think when reading an account of the abitration award, it was not a rank and file worker who was disciplined here. Rather, it was a committeeman who had instructed other workers not to work outside their normal duties.

It was against the background of the war and other disruptions that Shulman delivered his stern lecture to the bargaining unit. He addressed the assumption that a committeeman could countermand orders: "That assumption is wrong. And it should be clearly understood that it is wrong."[5] The famous sermon about an industrial plant not being a debating society followed. In dictum, he extended his position to rank and file workers as well as committeemen. I think Shulman's position should be understood as a firm rebuke for an act that was unacceptable given a special situation. Even at that, the committeeman received only a four-day suspension, although the mildness of the penalty may

2. Ford Motor Co., 3 Lab. Arb. (BNA) 779 (1944) (Shulman, Arb.).
3. *Id.*
4. *Id.*
5. *Id.* at 780.

have been influenced by the company's past treatment of others for the same type of conduct.

I wondered how far Shulman intended to take his rule. I needed to look no further than the very next case in the reports.[6] In that case, which came up two years later, after the war, glaziers had refused to accept a painting assignment because they claimed that it would make them ill. The glaziers were discharged. Shulman did not treat the refusal as a health and safety issue. Rather, he assumed that they refused the new job because it was not within their job description. Shulman reinstated the grievants with full back-pay! He said that his prior award should not be applied to skilled craft employees when the assignment clearly took them outside their regular classifications. In language presenting a stark contrast to today's insubordination cases, Shulman said: "[N]or was there any emergency or unusual reason for the assignment . . . . And supervision persisted in making the assignment over a period of time despite the aggrieved's protests and despite the clear difference in the two classifications."[7]

Stunned, I did further reasearch and found that Shulman himself read other exceptions and qualifications into his own "obey now, grieve later" rule. In one case, for example, the union had called three of its alternate committeemen to attend to a particular matter. Their supervisor ordered them to remain on the job. Shulman upheld their right to walk off the job to take care of union matters, but he did observe that their absence would not interfere with production.[8] In another case, he refused to find that workers had engaged in a strike when they delayed their start of work for an hour and disputed management's work assignment. "The cause of the delay," said Shulman, "was plainly a failure in Management's duty of communication to the employees on a matter of considerable importance to them."[9]

I didn't read any further. Perhaps some scholar, intrigued by these clues, will dig some more. But surely the wee evidence I've found indicates that the origins of the rule running through the modern cases are not nearly as pervasive and inflexible as today's arbitral awards suggest.

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6. Ford Motor Co., 3 Lab. Arb. (BNA) 782 (1946) (Shulman, Arb.).
7. *Id.* at 783.
8. Ford Motor Co., 10 Lab. Arb. (BNA) 213 (1948) (Shulman, Arb.).
9. Ford Motor Co., 10 Lab. Arb. (BNA) 148, 150 (1948) (Shulman, Arb.).

Maybe it is time to take another look at the foundations of the "obey now, grieve later" rule. By piecing together the exceptions and qualifications that have developed over the years, as I've done with just a few of Shulman's awards, we might arrive at a very different understanding of the rule. We would probably continue to agree with the general proposition that orders must be obeyed. We would get nowhere if each participant had to calculate whether the grounds of the refusal are more weighty than the need to get the job done immediately.

But by studying past decisions, perhaps a more detailed set of rules would emerge. Just as we say that health and safety cases are an exception to the obligation to obey now (although we may pay no more than lip service to this notion), we might be able to catalogue other exceptions, as Shulman did. We might say, as Shulman suggested in his decision involving the one-hour delay,[10] that it is not proper to order a worker to carry out a task until he has an opportunity to say his piece, and that no penalty may be imposed until the employee has a chance to consult with a union representative. We might want to limit this exception to cases that do not seriously interfere with production. We might want to consider the events leading up to the refusal, and whether management provoked it.

We should also think about the flip side of the equation, whether the employee's rights can be adequately vindicated if he obeys now and grieves later. I heard a case in which a skilled tradesman had refused to continue digging a ditch, and the evidence showed that his task was useless and foolish. What remedy could an arbitrator impose if the worker complied and grieved? Order his supervisor to dig a ditch? One solution is to use a schedule of liquidated damages for employees who obey improper orders.

As with so much of the good work that exposes the frailties of the present assumptions of workplace law, Atleson's article doesn't provide a helpful vision for the future. We need to develop a model that gives due recognition to individual worth, yet harmonizes individualism with the basic need to get the work done.

When I get to Gross and Greenfield I'm more puzzled. In

10. *Id.*

these cases the arbitrator has a well-established rule to work with to protect the grievant—the health and safety exception to "obey now, grieve later." Some generous standards outside the arbitral forum give the worker considerable leeway in determining the health and safety of his environment. For example, the Secretary of Labor promulgated a rule under the Occupational Safety and Health Act authorizing an employee to refuse work because of a reasonable apprehension of serious risk;[11] this standard was upheld by the Supreme Court in the *Whirlpool* case.[12] In *Washington Aluminum*,[13] the Court held that a walkout to protest cold working conditions was protected under section 7 of the NLRA regardless of the reasonableness of the workers' decision. And section 502 of the NLRA provides that the "quitting of labor . . . in good faith because of abnormally dangerous conditions for work" does not constitute a strike.[14] Yet, as Gross and Greenfield observe, the standard that has emerged in arbitration is much more restrictive of worker rights.

I heard an arbitration case in which telephone line technicians had refused to go up on their poles when the temperature was below zero. I asked the parties how anyone could know when it is too cold, and found that one has to go by a subjective feel, at least when there is some objective evidence to support the feeling. But why in the cases mentioned in Gross and Greenfield's article do the arbitrators impose a much tougher standard on the worker?

Gross and Greenfield tell us that the arbitral values mirror those suggested by Professor Atleson: "This value judgment is rooted in conceptions of the rights of private property [that] . . . encourage industrial undertakings by making the burden on entrepreneurs as light as possible." Are arbitrators fully conscious of upholding this philosophy? Do we really think that decisions favoring health and safety will impair efficiency? Or have we simply been lulled by habit into intoning phrases? I prefer to think it

11. 29 C.F.R. § 1977.12(2) (1985).

12. Whirlpool Corp. v. Marshall, 455 U.S. 1 (1980).

13. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

14. National Labor Relations Act § 502, ch. 120, 61 stat. 162 (1947) (codified as amended at 29 U.S.C. § 143 (1982)). I realize that the context of the latter two rules is somewhat different—the scope of protected activity under section 7 and the right to strike. The point is that in all three settings the worker is given reasonable scope to make his own assessment of the situation.

is the latter. I hope that articles like Gross and Greenfield's will make arbitrators, commentators and workers realize the enormous hazards of work, see that risk sharing does not belong solely to the worker, and recognize that self-help advances further the important societal value of keeping workers healthy and alive.

These values are reflected in two recent statutes, as Gross and Greenfield point out: OSHA and the Rehabilitation Act. The discussion of the second is especially poignant. Apparently the news that our society expects employers to make reasonable accommodations for its less able workers has not yet reached arbitrators. I hope these values eventually take hold.

The article performs a valuable service by articulating two factors that influence these decisions—considerations that might be buried in a more casual reading of the cases. The first is the shift of the burden of proof to the employee. The second concerns the substantive tests. Arbitrators might reassess their decisions if they realized how the burden is turned around in these cases, and how the tests used in arbitration are starkly less tolerant of the worker than those under external law. It is shocking that the OSHA standard—that a worker may refuse work upon a reasonable belief that it is unsafe—was used to effect reinstatement in only one arbitration case of the more than 500 canvassed! It was used as a criterion in one-third of the cases, but only to mitigate the penalty. The other two-thirds used standards of objective proof and reasonably objective proof.

Paradoxically, the worker covered by a collective bargaining agreement may have less protection than his unrepresented counterpart. This is because of the various doctrines that drive conflicts into arbitration and then insulate them from judicial review. For example, the truck driver in the well known *City Disposal* case[15] was protected under section 7 of the Act when he refused to drive a truck that he "honestly and reasonably" believed to be unsafe. If he filed such a charge today, he would find the Board

15. NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984) (holds that an employee who refuses to drive a truck that he reasonably and honestly believes to be unsafe is engaged in protected concerted activity under section 7 of the NLRA, and may not be discharged for this activity). The decision is limited to those cases in which the employee is covered by a collective bargaining agreement, for then it can be presumed that he is acting in concert with fellow employees.

deferring his case to arbitration under *United Technologies.*[16] He might lose under the majority approach reviewed in the Gross and Greenfield article. The Board would then accept that decision under *Olin Corp.*[17] It is unclear whether the employee would get a second bite at the apple under OSHA, depending on whether the Supreme Court treats these cases under *Gardner-Denver,*[18] and allows a de novo look, or concludes that the arbitration award is dispositive.[19]

Gross and Greenfield parallel Atleson's analysis when they observe that the health and safety cases are really treated under an insubordination rubric. The only difference is that in these cases the employee is given the opportunity to show that his otherwise unacceptable refusal fits an exception. Yet, as the authors note, the burden then shifts to the employee.

Gross and Greenfield unearth an irony in the cases. While health and safety yields to efficiency when the employee refuses to work, they are paramount where the issue is whether management may promulgate a rule. This suggests that the conflict isn't between health and safety and efficiency so much as it is between worker and management control. The same values are at work in public sector cases holding that safety demands regarding such things as crew size are not mandatory subjects of bargaining because they really go the direction of the enterprise.

Another parallel between the two articles is in their analyses of credibility. Atleson tells us why arbitrators believe management. Gross and Greenfield report the same thing when they observe the arbitral presumption that management acts out of con-

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16. United Technologies Corp., 268 N.L.R.B. 557 (1984) (where an employee files a charge with the NLRB under sections 8(a)(1) or 8(a)(3), asserting interference with his section 7 rights, that claim must be deferred to arbitration and resolved in the first instance under the collective bargaining agreement).

17. Olin Corp., 268 N.L.R.B. 573 (1984). The opinion concludes that the Board will not entertain any further charge if: (1) the contractual issue in arbitration is factually parallel to the unfair labor practice issue; (2) the arbitrator was presented generally with the facts relevant to the dispute under the Act; and (3) his or her award is not "clearly repugnant" to the Act, or "palpably wrong."

18. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The decision allows an employee to process a claim under Title VII even though the same issue has been presented in arbitration. However, the Court states that the arbitration award may be given "great weight" in the Title VII proceedings. *Id.* at 60 n.21.

19. It is unclear how far the rule of *Gardner-Denver* will be extended to contract claims that are parallel to claims under other statutes.

cern for safety rather than to thwart individual or collective rights.

I wonder why arbitrators buy into this system. I've tried to suggest that we're not prisoners of an economic system. I thought that it was habit. Perhaps the hierarchical vision just hasn't been replaced with a different model of work—one of cooperation and sharing. When Gross and Greenfield conclude that discharge is imposed on workers for refusal to work "as lessons designed to discourage other employees from challenging management's orders," one thinks of workers as children, or worse, as prisoners. This is a rotten notion of work. The family analogy is promising, but families can also be hierarchical and autocratic, rather than sharing and open. Why do we think of work this way? Is it because there is no other model? Do arbitrators unconsciously accept a role in the hierarchy of management and worker? Do we see ourselves as fathers and mothers telling our children how to behave, and setting examples so that other miscreants, tempted to steal, will think again?

The articles expose the underlying values behind the existing arbitral approach to both the obscenity and health and safety cases. Gross and Greenfield suggest some alternative value systems for the latter. They are found in the legislative purposes behind OSHA and the Rehabilitation Act. I'm less sure how to identify the values that would let us rethink the obscenity cases, and I hope Atleson's article provokes more thinking along these lines.