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Michael Jedel
Helen LaVan, *DePaul University*
Robert Perkovich, *DePaul University*

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An Analysis of Factors Present in Challenged and Vacated Labor and Employment Arbitration Awards

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A random sample of court decisions in labor and employment cases is studied to identify factors present in the legal challenge and in the cases where the award was vacated.

BY MICHAEL JEDEL, HELEN LAVAN, AND ROBERT PERKOVICH

Michael Jedel, D.B.A. and Helen LaVan, Ph.D are professors of management, and Robert Perkovich, J.D., is an assistant professor of management, at DePaul University. To reach the authors about this article, email hlavan@depaul.edu.

Arbitration has become, to a large extent, more expensive, slower and less final than it once was. Party challenges to arbitration awards in court are partly responsible for this. Certainly, these challenges reduce the certainty that the arbitral decision is final and binding, as had been negotiated by the parties. The purpose of this article is to identify the characteristics of labor and employment arbitration cases in which the losing party has challenged the award, and in particular, those cases where the award was eventually vacated, usually based on an act or omission by the arbitrator.

This study adds to what we already know about awards that are vacated in that it considers more variables than earlier studies did.

Methodology

To obtain a random sample of cases for this study, we searched the LexisNexis database of litigated labor and employment law cases for cases decided between 2003-2007 that involved challenges to awards.[1] The search yielded 573 cases, from which we randomly selected 101 cases to study.[2] We extrapolated conclusions from the random sample, believing that they are representative of the 573 cases from which the sample was drawn.

We examined five variables in each case in the random sample: (1) the type of case, (2) the type of employer, (3) whether the plaintiff alleged one or more procedural defects, (4) whether the plaintiff alleged that the award violated the law or public policy, or other types of arbitrator misconduct—such as nondisclosure, refusal to postpone the hearing or to hear evidence, and (5) the court's rationale for vacating the award.

Type of Case. There are two types of cases in the sample: labor and employment cases. In labor cases, a labor union is either a plaintiff or a defendant. In employment cases, there is no union involvement; the parties to the dispute are the employee and the employer. Most of the cases in the sample were labor cases.

Type of Employer. There are two types of employers in the sample cases: private employers and employers in the public sector, for example, schools, libraries, police and fire departments. Both types of employers can be involved in labor and employment cases, although for the most part, public sector employers are involved in labor cases.

Court Differences. What we mean by court differences is whether the court involved is a state or federal court and whether the reviewing court is a trial court or an appellate court.

A challenge to an arbitration award usually can be brought in state court if the parties' arbitration agreement allows for enforcement in any court with jurisdiction and does not require the action to be filed in another court.

A new study by Michael H. LeRoy suggests that whether a federal or state court hears a challenge to an arbitration award is a significant factor in the result.[3] He examined data in 426 federal and state court employment cases and concluded that federal district courts confirmed 92.7% of arbitrator awards, while state trial courts confirmed 78.8% of awards, a statistically significant difference. (He also found a statistically significant difference in the confirmation rate of awards at the appellate level: federal courts, 87.7%; state courts, 71.4 %.)[4]

To give an idea of the difference between trial and appellate courts, we only looked at the trial and appellate decisions in the federal courts.

Out of 101 cases in the random sample, 33 alleged a violation of a statute. Most of these cases involved a state or local statute, such as a civil rights law, an overtime-pay statute, or a municipal code provision.

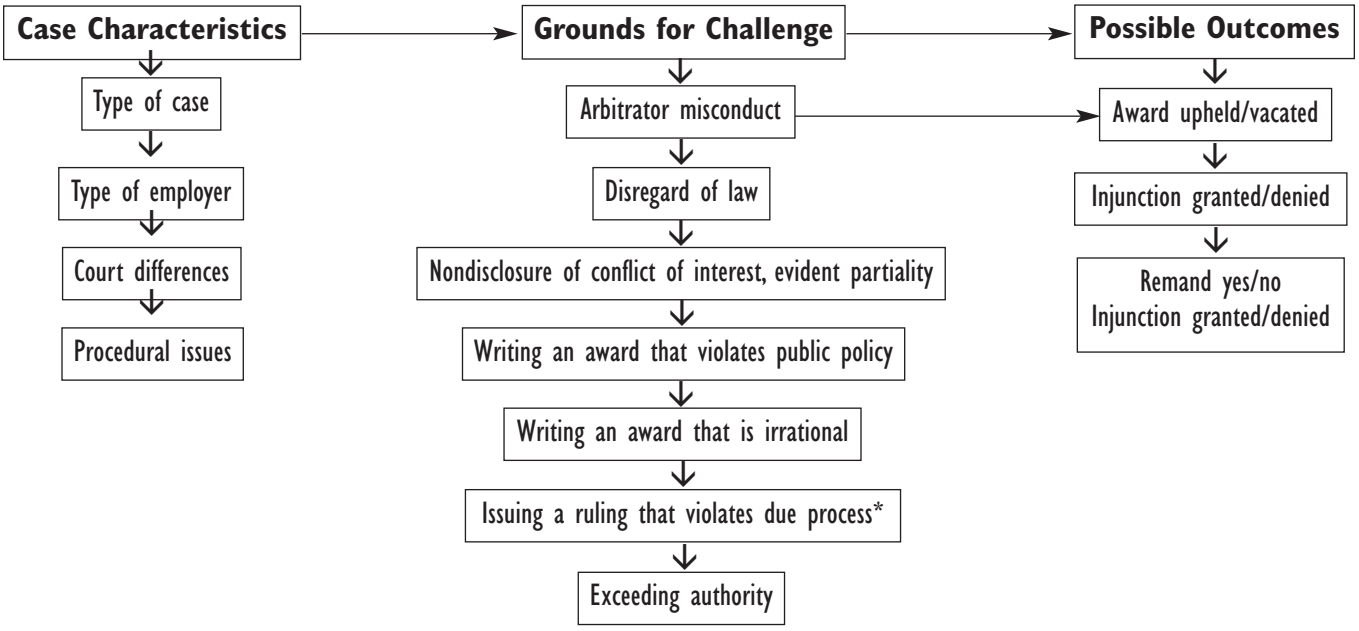
Procedural Defect Alleged. This refers to cases in which there is a claim before the reviewing court that the lawsuit violated a rule of procedure, for example, the claim that the action was not timely filed, or was filed in the wrong district.

Violation of Law Alleged. This refers to cases in which the claimant in the arbitration alleged a violation of statutory law (for example, a federal civil rights law) and claimed arbitrator misconduct (i.e., manifest disregard of the law) in the case before the reviewing court.

Public Policy Violation Alleged. A violation of public policy is a recognized ground to vacate a labor arbitration award in many, but not all, jurisdictions.[5] Some courts have vacated labor awards based on this theory when the arbitrator reinstated a terminated employee who held a safety sensitive position. Some commentators have criticized the public policy rationale for vacating an award as a means for courts to substitute their judgment for those of arbitrators.[6]

Arbitrator Misconduct Alleged. The arbitration cases indicate that acts and omissions by the arbitrator are often stated as the ground to vacate an arbitration award. Indeed, arbitrator conduct underlies many of the statutory and common law grounds to set aside an award. For example, the statutory grounds to vacate an award in Section 10(a) of the Federal Arbitration Act[7] include (1) "evident partiality or corruption in the arbitrators,"[8] (2) arbitrator misconduct "in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced," and (3) exceeding arbitral

Figure I—Depiction of Case Characteristics, Grounds for Challenges to Awards, and Possible Outcomes of the Award Challenge



* Refusal to postpone hearing or to hear evidence, without good cause

powers, or imperfectly executing them so that a "mutual, final, and definite award upon the subject matter submitted was not made."

Arguments have long been made that collective bargaining agreements and private employment agreements are excluded from the purview of the FAA because Section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[9] Courts have tended to construe Section 1 narrowly, thereby applying the FAA to these cases.[10] Even if the FAA were held not to apply, courts may apply FAA standards to their analysis.

Many of the cases in the random sample alleged that the arbitrator exceeded his or her authority by ruling on a matter beyond the arbitrator's jurisdiction.

An example is *187 Concourse Associates v. Fishman and Service Employees' International Union, Local 32B-J.*[11] In this case, the grievant participated in a physical altercation with a supervisor. The arbitrator reinstated him based on his good employment record. The company challenged the award, arguing that the arbitrator exceeded his authority in reinstating the grievant because he was guilty of the alleged misconduct.

The court agreed and vacated the award. It ruled that the award did not draw its essence from the collective bargaining agreement. The court based its conclusion that the arbitrator exceeded his authority on the fact that the award acknowledged that the grievant had committed the alleged infraction, and that the employer "had no option but to terminate him." The court found that this finding "could not be read as having any meaning other than a finding of just cause for termination." Accordingly, it ruled that the arbitrator's reinstatement of the employee contravened his authority under the agreement.

Arbitrator action also underlies two non-statutory grounds for vacating an award. One is writing an award that violates public policy and the other is manifestly disregarding the law.[12]

Findings

Our findings are summarized in Tables 1, 2 and 3. Findings with regard to the characteristics of the cases in the random sample appear in Table 1. Column 2 indicates the number of cases in the sample with the stated characteristics. Column 3 indicates how the stated characteristics apply to the cases in which awards were vacated. Column 4 does the same with regard to cases alleging disregard of statutory law. Column 5 shows the characteristics of the cases alleging that the arbitrator exceeded his or her authority. Column 6 presents the characteristics of cases challenging an award because it is irrational.

Table 2 shows our findings with regard to the outcomes of all cases in the sample, and Table 3 contains findings by type of employer.

The Random Sample

More than three quarters (79%) of the cases in our sample were labor cases. The rest were employment cases. More than a majority of the cases in the sample involved a private sector employer (68%).

With regard to the type of court, 32.7% of all cases in the sample were decided by state courts and 67.3% were decided by federal courts (40.6% at the trial level and 20.7% at the appellate level). In most cases, there was only one plaintiff. Multiple plaintiffs were involved in only 5.9% of the cases.

Out of 101 cases in the random sample, 33 alleged a violation of a statute (i.e., manifest disregard of the law). Most of these cases involved a

Table 1: Characteristics of 101 Randomly Selected Labor and Employment Cases

Column 1 Case Demographics		2 All cases N=101	3 Cases vacated N=30	4 Cases alleging statutory law violation N=33	5 Cases alleging exceeding authority N=65	6 Cases alleging irrational award N=17
Year	2002	2.0	6.7	3..1	3.1	0
	2003	29.0	33.3	28.1	29.2	35.3
	2004	20.0	6.7	21.9	16.9	5.9
	2005	21.0	30.0	28.1	21.5	23.5
	2006	11.0	6.7	6.3	13.8	11.8
	2007	17.0	16.7	12.5	15.4	23.5
Labor cases %		79.2	90.0	63.6	93.8	88.2
Employment cases %		20.7	14.3	38.1	19.0	9.5
Multiple plaintiffs %		5.9	3.3	6.1	0	0
Public sector cases %		31.6	34.4	34.4	71.9	28.1
Private sector cases %		68.3	63.3	51.5	64.6	47.1
Courts %						
State		32.7	43.3	48.5	38.5	58.8
Federal district		40.6	33.3	21.2	44.6	29.4
Federal appeals		26.7	23.3	30.3	16.9	11.8
Law violation found %		20.8	20.0	100.0	3.1	0
Law governing arbitration %						
Federal Arbitration Act		6.9	3.3	21.2	4.6	11.8
Laws allegedly violated						
National Labor Relations Act		5.0	1.0	15.2	3.1	0
Title VIKI		4.0	0	12.1	1.5	0
Americans with Disabilities Act		1.0	0	3.0	1.5	0
State laws		21.8	21.7	66.7	16.9	23.5
Whistleblowers Act		0	0	0	0	0
Court rationale %						
Unjust award		2.0	3.4	0.0	0	0
Refusal to postpone hearing		2.0	3.3	3.3	1.5	5.9
Arbitrator nondisclosure		1.0	0	0	0	0
Evident partiality		8.9	6.7	9.1	7.7	5.9
Refusal to hear evid/x-exam		11.9	6.7	18.2	10.8	17.6
Exceeding authority		65.0	83.3	50.0	0	88.0
Manifest disregard, arbitrary		27.7	20.0	69.7	26.2	35.3
Irrational award		16.8	26.7	18.2	23.1	100.0
Public policy violation		12.9	6.7	27.3	7.7	17.6
Timeliness Issues		8.9	6.7	9.1	6.2	5.9
Other procedural issues		24.8	16.7	42.4	13.8	11.8
Ruling made on motion to vacate		28.7	100.0	21.2	36.9	47.1

state or local statute, such as a civil rights law, an overtime-pay statute, or a municipal code provision.

Sixty-five cases alleged that the arbitrator exceeded his authority, and 17 alleged that the award was irrational.

Only 1% of the cases alleged a failure to disclose a perceived conflict of interest; 11.9% alleged that the arbitrator refused to hear pertinent and material evidence or failed to permit cross-examination; and 2% alleged a refusal to postpone the hearing for good cause.

Procedural issues were alleged in just over one-third of the cases: 9% had an issue related to timeliness of filing the lawsuit and 24.8% alleged other procedural issues.

Findings Regarding Case Outcomes

Table 2 shows tart nearly 21% of all cases were remanded either to the trial court or back to the arbitrator. it also shows that the union prevailed in 35.6% of all cases, while employers prevailed in 46.5% of them.

Table 3 shows that the employee prevailed in 15.9% of the private sector labor cases and in 40.6% of the public sector labor cases. The employer win rate in these categories of cases was 42% and 56.3% respectively.

In employment cases (i.e., those in which the employee was at will or had an employment contract with the employer) involving a private sector employer, the employee prevailed in 15.9% cases.

About 11% of the cases gave some relief to both parties.

Findings Regarding Vacated Awards

Close to one third of the cases in the sample were vacated (29.7% or 30 out of 101). This percentage is higher than we expected, given the supposed finality of arbitration awards, but it is within the reversal range found in LeRoy's study, which was from 8% or less to 56% in the studies he examined.[13] In 43.3% of the cases in our sample, the reversal ruling was made in a state court, while 56.5% were made in a federal court.[14]

Looking at court level differences, 33% of the vacated awards (i.e., 9 awards, which is about 9% of all awards in the sample) were vacated by a district court while 23% (i.e., 6.9% of all awards in the sample) were vacated by a federal appeals court.[15]

With regard to the type of employer, 63.3% of the vacated awards involved a private sector employer; 34.4% involved a public sector employer.[16]

The rationale for vacating the cases included: manifest disregard of the law, an arbitrary and capricious award (20% of the vacated cases), and public policy violations (6.7% of the vacated cases).[17] While public policy was not a major issue, it remains a tool for courts to use to give the losing party to a labor dispute a second chance at prevailing.

A refusal to hear pertinent evidence was not a common cause of vacatur. This was a reason for vacating the award in only 6.7% of the vacated cases.[18]

The most common reason for vacating an award was that it was not linked to the contract or that the arbitrator exceeded his or her authority (83.3% of the vacated cases). Another rationale that the courts used was that the arbitrator issued an irrational award (26.7% of the vacated cases).[19] These are substantial figures, even though courts are supposed to give great deference to arbitral rulings.

Summary and Conclusions

What lessons can be learned from the results of this study? In union cases, management and union split the results, management winning 46% of the time and the union winning 45% of the case outcomes. This does not mean that the award was vacated, but that each side frequently had its viewpoint upheld.

Table 2: Case Outcomes for All Cases in which Vacatur Was Sought

Column 1 Case Demographics	2 All cases N=101	3 Cases vacated N=30	4 Cases alleging statutory law violation N=33	5 Cases alleging exceeding authority N=65	6 Cases alleging irrational award N=17
Injunction issues %	0	0	0	0	0
Remanded %	20.8	23.3	24.2	16.9	17.6
For management %	46.5	80.8	48.5	47.7	52.9
For union %	35.6	0	36.4	40.0	23.5
Split %	10.9	13.3	6.1	9.2	23.5
For employee %	10.9	10.0	12.1	6.2	5.9
Award vacated %	29.7	100.0	21.2	38.5	47.1

There were more litigated private sector cases than litigated public sector cases. This could be due to public sector employers having few resources, or to the fact that they may have more internal mechanisms to address employee conflicts.

Table 3: Case Outcomes by Type of Employer

Column 1 Case Demographics	2 All Cases N=101
• Private sector outcomes %	
Management/employer	42.0
Split	11.6
Union	33.3
Employee	15.9
Award vacated	24.6
• Union case outcomes %	
Management/employer	46.3
Split	11.3
Union	45.0
Award Vacated	32.5
• Public sector outcomes %	
Management/employer	56.3
Split	9.4
Union	40.6
Employee	0
Award vacated	34.4

A surprising proportion of vacated awards involved the failure to apply the law. This suggests that when challenging a labor or employment award on the ground that the arbitrator failed to apply substantive state law, a court may substitute its judgment for that of the arbitrator.

To address the risk of exceeding authority or issuing an award that cannot be tied to the contract, labor and employment arbitrators should be proactive and take the steps necessary to ensure that their awards draw their essence from the collective bargaining agreement. They should also make explicit that the awards are directly tied to the terms of those agreements.

For example, in "just cause" discipline and discharge cases, the award should determine whether the employer provided due process to the employee, whether the employer proved that there was adequate evidence of employee misconduct, and whether the penalty was appropriate for the proven offense. However, the collective bargaining agreement may preclude the arbitrator from reducing the penalty if it provides that the arbitrator may not change an employer decision that has just cause.

In any event, the basis of the arbitrator's decision must be readily ascertainable from the award and clearly linked to the contract, so that the chances of the court vacating the award because the arbitrator exceeded his or her authority will be less. ■

ENDNOTES

[1] The search term we used was "vacate and arbitration."

[2] Random sampling is used to draw a small, but carefully chosen sample used to represent the population. The sample reflects the characteristics of the population from which it is drawn. There is no clear determinant of sample size; the researchers wanted to be conservative in drawing the random sample. The names of the randomly selected cases are available from author Helen LaVan (hlavan @depaul.edu).

[3] M. H. LeRoy, "Misguided Fairness? Regulating Arbitration By Statute: Empirical Evidence of Declining Award Finality," 83(2) *Notre Dame L. Rev.* (2008).

[4] LeRoy and authors he cites concluded that courts vary in how much deference they give arbitration awards. However, these studies suffer from some major shortcomings. The most significant of these is that the time period covered by these cases is too large. Thus, the results could be skewed by periods in which courts were more hostile to arbitration than they are today. In addition, many of the prior studies focused on a single type of case, for example, those alleging statutory violations, such as discrimination under the civil rights laws.

[5] For example, in *Misco Inc., v. United Paperworkers Int'l Union*, 484 U.S. 29 (1987), the company filed a lawsuit in district court, seeking to vacate the award. One ground it asserted was that reinstating the grievant, who had allegedly possessed marijuana while on the plant premises, was contrary to public policy. The district court agreed and set aside the award. It found that reinstatement was contrary to general safety concerns about operating dangerous machinery while under the influence of drugs and contrary to state laws against drug possession. The court of appeals reversed but the U.S. Supreme Court reversed that decision. The Court limited the public policy exception to when the award would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

But public policy may not constitute a ground to vacate an award where the company is covered by the Railway Labor Act. *Netjets Aviation Inc. v. International Bhd. of Teamsters* (S.D. Ohio June 2, 2006) (public policy not a basis for review of an award under the RLA, since it mentions only three grounds for review: (1) failure to comply with the RLA, (2) exceeding jurisdiction, and (3) fraud or corruption). On appeal, the 6th Circuit (486 F.3d 935, 2007), affirmed, but it declined to decide whether the RLA permits federal courts to set aside an award on public policy grounds, finding no public policy violation in this case.

[6] D. J. Petersen & H. R. Boller, "Applying the Public Policy-Exception to Labor Arbitration Awards," 58(4) *Disp. Resol. J.* 14 (Nov. 2003-Jan. 2004).

[7] July 30, 1947, ch. 392, sec. 1, 61 Stat. 669. 9 U.S.C. Sec. 1 *et seq*.

[8] *Consolidation Coal Co., v. Local 1643, United Mineworkers of Am.*, 48 F.3d 125 (4th Cir. 1995) (alleging a failure to disclose resulted in a biased award; the trial court vacated the award and the 4th Circuit reversed). *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F. 3d 1309 (11th Cir. 1998) (holding that the district court erred in vacating an award for evident partiality"; evident partiality" cannot be established absent actual knowledge of a real or potential conflict).

[9] E.g., *Consolidation Coal*, *supra*, n. 8, states that the FAA does not apply to collective bargaining agreements, citing *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir.1993). See Lawrence Solotoff & Henry S. Kramer, *Sex Discrimination and Sexual Harassment in the Workplace* Sec. 2.02[12] (*Law J. Seminars Press* 1994) (noting a split in the circuits).

[10] Al Felieu, "Contracts of Employment: The Scope of the FAA's Exclusion," 2(1) *ADR Currents* (Winter 1996/1997).

[11] 174 LRRM 2670.

[12] In one case, the 2nd Circuit included manifest disregard of the facts as a ground to vacate an award. *Halligan v. Piper Jaffray Inc.*, 48 F.3d 197 (2d Cir. 1998). The Supreme Court decision in *Hall Street Assocs. v. Mattel* has called into question the vitality of manifest disregard of the law. See p. 4 of this *Journal*.

[13] See n. 3.

[14] We do not distinguish between trial vs. appeals courts because it matters not whether a given court case was appealed. What matters, for the purpose of this analysis, is the court's decision in the case before it. Because the sample is random, the appealed case may or may not be in the sample.

[15] See Table 1.

[16] See Table 3.

[17] See Table 1.

[18] *Id.*

[19] *Id.*

Arbitrating Before a Non-Attorney Construction Industry Neutral

(Continued from page 65)

Present Facts, Not Attacks

"Claimant was the victim of respondent's greed and avarice." "Claimant's statement goes beyond disingenuous and is preposterous. Its assertions fly in the face of the plain meaning of the contract language. The claim essentially is an exercise in sophistry and theater." "The evidence unequivocally demonstrates that the work was shoddy and riddled with defects, and that the contractor used ineffective, untrained labor and that there were not even enough workers after the first six months." None of these statements contains any facts. They are just conclusory arguments made by counsel in arbitration.

Industry arbitrators expect that the attorneys, as licensed professionals, will provide a credible opening statement. Too often, however, the opening statement is simply an attack on the other party, rather than a coherent presentation of why the arbitrator or panel should find for the attorney's client. In the last statement quoted above, counsel had not even seen the project until the panel made a site visit. How could an attorney could make such conclusory statements on hearsay alone?

Be Respectful/No Offensive Language

When I am the sole arbitrator, I ask the attorneys during the preliminary conference to warn their clients against attacking each other. When the proceeding deteriorates to this level, I stop taking notes. If it continues, I call for a five-minute break.

Understanding the dynamics of construction projects explains why industry construction arbitrators might react as I do when the litigants do not behave in a respectful way.

It takes a long time from the inception of a construction project to reach substantial completion. The architect and engineer work closely with the GC and the subs. Their work is interdependent. In addition, contractors have long relied on the architect to fairly evaluate their requisitions for payment and to mediate disputes between themselves and the owners, so they do not want to offend. No single construction specialist can afford to offend another.

Industry arbitrators understand the difference between being offensive and ratcheting up the tone and intensity on cross-examination because the latter is a legitimate tool that furthers the understanding of all of the arbitrators. Take this example involving an architect who was terminated because the owner claimed he was impossible to work with. The architect's counsel kept the questioning to specific facts and the architect answered precisely, civilly and respectfully. Opposing counsel skillfully structured a cross-examination to provoke the architect. During cross, the architect lashed out in anger at the owner and its attorney. He resumed his calm after the break but his outburst was imprinted on the panel.

A Final Word

Sometimes because of the presence of a specialist on the panel, the direction of the award is driven by that person. The panel on a matter involving the alleged poor performance of an HVAC system in a high rise consisted of an attorney, an architect, and the head of HVAC for a major construction firm. The HVAC arbitrator sat silently throughout the hearing until the HVAC experts testified for each side. He asked only one question about a specific valve, its selection, capacity, and installation. The answers to these questions determined his view of the resolution of this case and he persuaded the other arbitrators to his viewpoint.

The lesson is that every arbitrator on the panel is important, whether an attorney or not. ■