CHAPTER I

DUE PROCESS OF ARBITRATION

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To speak of "due process of arbitration" is to risk a seeming confusion of terms. For "due process" is a symbol borrowed from the lexicon of law, and therefore suspect in this shirt-sleeves, seat-of-the-pants, look!-no-hands business of arbitration.

A calculated risk, this usage should not obscure the humble origins of this paper. They lie in no desire to find a conceptual content in labor arbitration, but rather, I suspect, in something as simple as a pang of conscience felt one day in the middle of a discharge hearing, itself now long forgotten. I realized that I wasn't listening to what the grievant was saying—because it had already become obvious that an award of reinstatement without back pay would be "acceptable" to both the company and the union.

There are other cases—no one person's, but commonplace:

> Employee A, with fifteen years' seniority, is discharged for stealing $15 worth of tools from the plant. His failure to testify is a factor in the arbitrator's upholding the discharge.
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> Employee B was promoted to a higher paying job, but is now ousted from it because an arbitrator upholds Employee X's competing claim after a hearing at which B wasn't even present.
>
> C is luckier. His call-in pay grievance is the only borderline

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case in a batch of eight that went to the arbitrator. Not even the arbitrator knows how much difference it made in C's case that the company won all the others.

D is less fortunate. The Union missed a crucial argument in the processing of the grievance at the earlier steps; and the arbitrator refuses to consider it.

E is the employee whose bench work is above reproach, but whose homework is disturbing to the F.B.I.'s "usually reliable Informant K9."

F's claim to Labor-Day pay is based on the statement he brings the arbitrator from Dr. Krapowski explaining that F was in his care the preceding Friday; but Dr. Krapowski isn't present at the hearing.

Grievant G has told the arbitrator he wants his case presented by his own counsel instead of by the Union. The request is denied.

And then there is H. His three-grade demotion has been upheld by the arbitrator despite a seeming bar in the contract. He doesn't know that the Union President and the Industrial Relations Manager told the arbitrator in advance that H was a trouble-maker and that they both wanted an award upholding the demotion. And the arbitrator doesn't know that H had been talking about running for the Union presidency.

Are these "due process" problems?

Not, to be sure, if due process means a particular set of legal, evidentiary, or Constitutional rules and regulations.

Due process has, however, a broader sense, in which it is not a set of rules at all, at least not any particular set of rules, and is much more than a "legal" doctrine. I think of "due process" as being the exercise of any authority with a "due" regard to the balancing of the two kinds of interests, individual and group interests, that are involved in every situation arising in a complex society.

Yet group interests are of course only collections of "individual interests." The very creation of authority is an investment by individuals of some of their immediate freedom of individual action for an equity in the common enterprise. It is a group function to represent individual interests in their conflicts with other individual interests similarly group represented. The preservation and efficiency of the group is essential to the se-

curing and enjoying of individual interests, and there is necessarily a price for this in terms of some measure of individual liberty.

There remains, nevertheless, in our thinking about due process a particular emphasis, even in the face of institutional interests, upon the individual's own, independent, even entirely self-serving interest. The degree or forms of this emphasis may even be democracy's distinguishing characteristic. We insist that institutional, group, governmental interests be recognized as only means to serve individual ends. And "due process" is respected as being in important part an injunction on those who exercise authority over the affairs of others—at least in passing their laws, acting for them, deciding their disputes—that institutional security, operative efficiency, even the will of the majority, are not *in themselves* complete or sufficient excuses for disregarding certain independent individual interests.

To define due process so broadly is of course to make the whole of collective bargaining one big due process issue. Its very business is the working out of relationships and controversies between group-represented entrepreneurs and group-represented employees. Every contract negotiating session or weekly grievance meeting presents new questions of balancing immediate independent individual interests against longer term interests of the group, the enterprise or "the relationship."

Yet it doesn't necessarily follow that even this broad definition brings these due process considerations within the province of the arbitrator, at least as matters calling for the exercise of his own initiative. For the point is pressed strongly that this balancing of interests, and with it the protection of the independent individual interest against the group interest, is exclusively up to the parties.[1] The arbitrator's business (the griev-

[1] The term "parties" will be used throughout here to refer to the company and the union. When there is reference to the "interests of the parties," or some like phrase, it will be with the understanding that these are collective individual interests. And references to "independent individual interests" or just to "individual interests" will be to those interests which the individual (usually the individual employee) asserts or holds apart from those interests asserted by the group (usually the union). Each of these usages assumes quite a lot, but is perhaps permissible to serve the need for enough conversational shorthand to cover a three-hour subject in thirty minutes.

ance arbitrator, that is)[2] is by this view simply and solely to apply what the parties have decided—in their contract and as reflected in their presentation of the particular grievance cases.

Here, if there were time for it, would be fitting subject for the shattering of the lances of logic against each other.

Harry Dworkin puts one side of the case most persuasively:

> "Arbitration usually results from a voluntary agreement of the parties in which they bind themselves in advance to observe the terms of the award. Thus, whether the result be good, bad, or indifferent . . . such effects are calculated risks which the parties have seen fit to assume. . . . The decision is not unfair where it results from the application of standards agreed to by the employee's duly authorized collective bargaining agent.... Everything has been handled according to due process, including the award in which the employee is 'thrown to the wolves' since it results from the employee's voluntary action."[3]

And others suggest, in various forms,[4] that the parties—the company and the union—possess the full representative authority for the individual interests involved, that they assume the full responsibility for balancing and protecting the various interests, and that when they employ an arbitrator it is only to have him serve the standards they establish. Authority, it is insisted, cannot rise above its source.

Yet these seem almost echoes of the arguments a century and a half ago that courts, appointed by the executive and confirmed by the legislature, could not conceivably have the power to review or overrule the actions of the other two departments of government. Those arguments were accepted so far as review of general policy considerations was concerned.

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[2] It is only grievance arbitration which is referred to throughout here, except where there is particular reference to something else.

[3] See Footnote 6.

[4] *E.g., Herbert Blumer:* "I suspect that the very nature of the bargaining relationship in industry between two collectivities invariably relegates the individual members of both collectivities to a circumscribed role so far as retaining due process privileges is concerned." And *Philip Marshall:* "The fundamental question is what do the parties expect of the arbitration process? I believe that they have the right to get what they expect and that if what they expect does not conform to the niceties of 'due process', it is not the arbitrator's function to alter their voluntary arrangement in the absence of any applicable law which demands otherwise."

But not so where basic issues of individual liberties and rights, "due process," were involved. There the ultimate responsibility became recognized as vested in the judges.

The analogy is to be sure not complete, and therefore can cut either way. There are competing forces within the legislative and executive bodies of the collective bargaining relationship that may arguably supply the essential check-and-balance element. There is, furthermore, no written constitution in the plant—only the contract, which is like legislation. And in the British system of government, operating without a written bill of rights, it is in the parliaments rather than the courts that individual rights and liberties find their ultimate guardians.

There are other analogies, other syllogisms, and surely none of them conclusive; for the premises of pluralism are still much foggier in our thinking than those of monism. It is by no means clear yet whether in the theory of sound private government of the industrial community there is less reason, or even more, for endowing the umpires of controversy with the obligation and authority to look, in the protection of certain individual interests, to standards that are unaffected by the individual's election of representatives and by the actions of those representatives.[5]

Enough, however, of the lances of logic and the windmill of theory. Although ours is a young jurisprudence, still in its knee pants, our disposition is already to trust our experience more than our premises. If there is a meaningful concept of "due process of arbitration," the place to look for its testing is not in syllogisms but in the cases we have encountered.

I have accordingly, in the preparation of this paper, written a number of the members of this Academy, inquiring as to cases in their experience where this kind of balancing of interests problem may have arisen in one form or another. The rest of what is said here is built around the responses to these inquiries, although the conclusions which are drawn are of course

[5] I tried to probe some related questions a little further in the Edward Douglass White Lectures at Louisiana State University in 1952. See "Government by Private Groups," 13 *La. L. Rev.* 440 (1953).

nobody else's responsibility and are indeed quite contrary to those which some of this group of correspondents would draw.[6]

One essential and significant limitation developed in the course of this inquiry. The law subdivides the due process concept into "substantive" due process and "procedural" due process. I have concerned myself here only with procedural due process. This is partly because the broader area of inquiry proved more than I could hope to handle in the allotted time. It is partly because procedural due process—the idea of a fair hearing, a day in court—is the more traditional part of this concept. It is partly, too, that I strongly suspect that there may be a much greater difference between the significance and meaning of these two phases of due process in a jurisprudence based on private contract than there is in one based on a written public constitution.

What is presented here, therefore, is a kind of illustrative cataloging of grievance arbitration problems or situations that seem to present interesting, possibly difficult, perhaps signifi-

[6] Some thirty-five inquiries were made, and thirty-three responses received. No pattern was followed in deciding whom to write to, except that I tried to make about as many inquiries of full-time arbitrators as of "moon-lighter" arbitrators—those of us who divide our efforts between arbitration and something else, usually teaching. These letters are the most interesting documents I've seen in a long time, and I regret greatly the impossibility of more fully reflecting their content here.

There are, however, a number of references in what follows (and see footnotes 3 and 4, above) to these letters. They are identified only with the name of one or another of my creditors, as follows: Herbert Blumer, Berkeley, California; Leo C. Brown, St. Louis, Missouri; David L. Cole, Paterson, New Jersey; David A. Wolff, Ann Arbor, Michigan; Archibald Cox, Cambridge, Massachusetts; G. Allan Dash, Jr., Philadelphia, Pennsylvania; Harry J. Dworkin, Cleveland, Ohio; Alex Elson, Chicago, Illinois; I. Robert Feinberg, New York, New York; N. P. Feinsinger, Madison, Wisconsin; R. W. Fleming, Champaign, Illinois; Lewis M. Gill, Philadelphia, Pennsylvania; Paul R. Hays, New York, New York; James C. Hill, New York, New York; Elmer E. Hilpert, St. Louis, Missouri; Jules J. Justin, New York, New York; Peter M. Kelliher, Chicago, Illinois; Charles Killingsworth, East Lansing, Michigan; John Day Larkin, Chicago, Illinois; Bert L. Luskin, Chicago, Illinois; Douglas B. Maggs, Durham, North Carolina; Philip G. Marshall, Milwaukee, Wisconsin; Whitley P. McCoy, Washington, D. C.; Joseph S. Murphy, New York, New York; Harry H. Platt, Detroit, Michigan; Eli Rock, Philadelphia, Pennsylvania; M. S. Ryder, Ann Arbor, Michigan; Ralph T. Seward, Washington, D. C.; William E. Simkin, Philadelphia, Pennsylvania; Russell Smith, Ann Arbor, Michigan; Saul Wallen, Boston, Massachusetts; Bertram F. Willcox, Ithaca, New York; Edwin E. Witte, East Lansing, Michigan.

cant, issues relating to the arbitrator's procedural rule-making responsibilities. They are questions that involve in one way or another the issue of the existence or scope of the arbitrator's function in this area, as distinguished from a function of the parties. They present, or so it seems to me, illustrations of the arbitrator's discharge of this rule-making function on the basis of a "due process" balancing of group and individual interests. And some of them, more than others, also seem to pose the issue of whether, in this balancing, there may under some circumstances be an obligation in the arbitrator to consult, consider, and possibly to protect (but all in the procedural sense only) independent individual interests which the representative parties do not assert and may even deny.

In a less analytical and perhaps quite different sense, some of these cases seem to pose the question of the extent to which "acceptability to the parties"—the company and the union—is legitimately considered an ultimate test of the arbitrator's exercise of this procedural rule-making function. The possible alternative tests are less easily labelled. They may not always involve the element of consideration of "individual" interests as against those institutionally represented. There may be, as M. M. Ryder points out, a possible concept not just of due process for the individual but rather of "due process for the handling of a case." What, for example, if the procedures the parties seem to favor in a particular case appear to impede the way to a complete factual discovery? Yet it had best be recognized at the outset that the very fact of the uncertainty about what the alternatives to "acceptability to the parties" may be is a significant factor in this whole equation.

Let's be clear, too, in talking about this idea of "acceptability," that it has nothing whatsoever to do with the idea of "compromise." The "acceptability" phrase is only short-hand for the principle that it is the parties and not the arbitrator who should make the rules. That principle may be right or wrong, but to identify it in any way with the question of "compromise" would be to miss the whole point.

Now for the cases. They can be most meaningfully set out in three groupings.

I

There is first a grouping of situations that are necessarily noted as part of clearing the underbrush from around the central point of inquiry. They come close to it, seemed to me at first to be part of it, and do in fact have a certain relevance. But they involve distinguishing characteristics that it is essential be marked.

There is, to begin with, this related question about the arbitral function in connection with deciding certain *substantive* issues. It can hardly be doubted that where the contract rule leaves great leeway, as in the "just cause" disciplinary cases or where the nearest contract provisions don't really cover the grievance controversy, the arbitrator's award may very likely turn on a balancing of group, or enterprise, or relational interests on the one hand and individual interests on the other. A case in point is the increasing questioning in the decisions of the supremacy of institutional interests reflected in the off-with-his-head principle of disciplinary penalties for stealing, employee-fighting, and "insubordination." The security cases present similar considerations.

But that is another speech. Those cases involve areas of policy-making and decision-making in which the parties have at least purported to act in their contract. Our concern here is about the arbitrator's function in the area of *procedural* rule-making, where the parties have *not* acted.

The second relevant but distinguishable kind of case is one involving procedures, but procedures actually prescribed by the parties in their contract for their own handling of certain situations. An employee is discharged for cause but without giving him the hearing, or the union the notice, provided for in the agreement.[7] Or the employer promotes the right person to

[7] *Cf.* Variety Stamping Corporation and United Electrical, Radio and Machine Workers of America, Local No. 735 (March 27, 1956; Dworkin, Arbitrator). This was a case involving the discharge of an employee who had unquestionably stolen gasoline from the Company pump. But the contract contained a specific provision that in cases of discharge "The Company shall, as soon as possible, give written notice of the discharge to the union, through a member of the Committee." No such notice had ever been given. The arbitrator, remarking his "understandable reluctance," reinstated the employee, noting that the "obvious purpose of [the written notice provision] is to accord due process to an employee who has been discharged . . . and where the contract so provides these procedures must be adhered to."

a new job, but skips some of the procedural requirements in the seniority clause.[8]

These cases do have a certain relevance here. It is significant that these contract procedural rules are usually enforced to the letter by the arbitrator, often with supporting opinions explaining that even where the result does violence to equity the arbitrator's conscience may not be substituted for the parties' contract where they have spelled out rules to protect employees' rights. Would there be greater justification, in another case, for the arbitrator's imposing his own rules of procedure where the parties have evolved outside the contract (by practice or by less formal agreement) the procedures to be followed in handling and even arbitrating a particular case? Is the parties' agreement to be conclusive where the result is to give an individual employee a windfall of protection but not where the result is something less than broad equity might seem to warrant? Perhaps so.[9] Yet if the conclusion were to be that the arbitrator would in every case honor any rules the parties might *by contract* establish *covering the arbitration hearing*, then that has a bearing surely on the question of his function when they make such a determination less formally.

Yet the answers to these questions are not clear, and the issues they present are significantly different in their practical implications from the question before us. What the arbitrator does in applying the parties' contract rules governing their own actions in according the individual employee "due process" is a different matter from that of the arbitrators' responsibility for the establishment of rules—not fixed by the contract—governing his hearing of the case.

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[8] *Cf.* Southern Bell Telephone Co. and Communications Workers, 8 ALAA 70, 335 (1957).

[9] There are of course innumerable cases where the award is affected by the company's failure to accord the employee some form of fair treatment (in the procedural sense) dictated not by the contract but by some broader concept of equity or due process. Yet Harry Dworkin suggests that for the arbitrator to adopt a standard of procedural safeguard not required by the contract may be to contemn the injunction upon him not to "add to, subtract from or in any way modify the terms of this agreement." Is this basically different, though, from reading a status quo rule into the agreement, as a bar to the Company's unilateral change of some term or condition of employment not covered specifically in the agreement or the negotiation?

There is also relevance in those cases in which the arbitrator is specifically called upon to resolve what are basically inter-employee controversies. This would include the arbitration of jurisdictional or representational disputes or of controversies regarding the merger of two or more seniority rosters.

These cases present some of the clearest instances of balancing of group and individual interests. The opinion, for example, of the Cole-Horvitz-Taylor Panel in the recent New York Transit Authority case,[10] includes the provocative comment that "We must constantly remember . . . that an institution predicated on collective action inevitably must give greater consideration to the needs of the groups than to those of the individual." [11]

But interesting and significant as these cases are, they bear only indirectly on our point. The arbitrators in these cases go into these balancings of interests because this is precisely what they are hired to do. Our question is about the existence of such a function or obligation in the absence of such specific assignment.

The last of these preliminary matters involves this question of whether the arbitration process is affected by the practice of presenting cases to an arbitrator in "batches" rather than individually. Some contracts provide specifically that no more than one case may be taken before an arbitrator at one time. Robert Feinberg was called upon last month to arbitrate this same question.[12]

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[10] See Report of the New York Transit Authority Fact Finding Committee to New York City Transit Authority, November 30, 1957.

[11] Panel Report, p. 20. This comment had of course a very particular context. It was in answer to a contention described by the Panel as follows: "Some members of [the groups which identify themselves as crafts] consider this right of separate representation to be so important that they would be willing to endanger the representation rights of the employees as a whole, rather than be included in a broad unit which covers skilled, semi-skilled, and unskilled employees." Panel Report, p. 14. The Report also includes (p. 22) the observation that ". . . it is the function of democracy to take care of the larger group interest as well as the particular interests of the separate employee groups." Again, at p. 15: "it is now commonly accepted as a sign of maturity and responsibility for labor organizations to screen grievances scrupulously and to rule out those which can serve only to irritate the parties *or satisfy individual desires rather than to give meaning to the labor agreement.*" (Emphasis added.)

(Footnote continued on following page.)

The relevance of this problem is of course that in one view of it there is a temptation, allegedly an inclination, on the part of the arbitrator handling a batch of cases to place considerations of "acceptability"—or his view of what package result is good for the relationship—above the "rights" involved in a particular case.

There would be quite a bit to be said about this if it presented the real question before us. Nor can I resist a passing observation on the obtuseness of those who would seek to guard so carefully against what is surely one of the minor shoals in a business solely dependent upon an arbitrator's resisting infinitely various forms of temptation. But this is all, of course, a matter of arbitral integrity and competence, and noteworthy here really only as distinguishing this element from the issue of sound procedural principles, which *assume* integrity and competence in their application.

II

A second grouping of cases includes the "garden variety" of procedural problems. Most of them are not vitally significant in themselves. They present, by and large, no alignment of

[12] Olin Mathieson Chemical Corporation and International Association of Machinists, Lodge No. 609 (December 5, 1957). The issue was whether the parties' contract compelled the Company to agree to present in a single arbitration proceeding seven different grievance disputes, unrelated except that they had all arisen during the same three-week period and had passed through the Third Step at about the same time. Included among the Company's arguments against a consolidated proceeding was the point, as summarized by the arbitrator, that "the consolidation of cases would place a premium on maneuvering and juggling which could not but work to the detriment of healthy labor relations." Arbitrator Feinberg held that the contract provisions, interpreted in the light of the parties' own grievance practices, arbitration practices in general, and certain precedents, compelled the Company to accept consolidation of the seven cases in a single arbitration proceeding. He commented that: "If the Company fears that an arbitrator may, when several cases are presented to him, 'split' his awards, or 'trade off' some of the cases, its remedy lies in refusing to agree to the designation of any arbitrator who may indulge in such a practice. If the Company fears that all arbitrators are so suspect, in effect it questions the efficacy or desirability of labor arbitration, and should not agree to arbitration as a method of settling its disputes." See also Armstrong Cork Co. and United Rubber, Cork, Linoleum and Plastic Workers, Local 363, 23 LA 13 (1954; Williams, Arbitrator); American Hardware Corp. and Int'l Association of Machinists, American Hardware Lodge 1137, 23 LA 588 (1954; Feinberg, Chairman, Board of Arbitration).

group against individual interests, and where there is such a conflict it is usually true that one party or the other will be asserting the individual interest vigorously. They are mainly the due-process-for-the-case rather than due-process-for-the-individual situations, although there is often an element of the latter involved.

What these cases do is to present, it seems to me, this question of the extent to which the arbitrator does and should bear the responsibility for exercising the procedural rule-making function, with the further question of the degree to which he must, in the exercise of whatever function he performs here, take into account this balancing of group and individual interests. It is worth emphasizing again that it is only procedures we are discussing, so that to talk about the arbitrator's considering either individual or group interests refers only to the providing of procedures for letting these interests be expressed. The degree to which these interests are balanced in the final award is a "substantive" rather than "procedural" matter.

There are to be noted first two facts so obvious that their significance becomes obscured. One of these is that the subject of rules for the conduct of arbitration hearings is not touched upon at all in most collective bargaining agreements. The other is that the substantial body of arbitration procedural rules, the elementary ground rules that are applied in every hearing, have been devised primarily by the arbitrators rather than by the parties.

In general, but excepting some of the permanent umpire arrangements, all that the companies and unions decided, and told the arbitrators, was that they wanted an informal, speedy, on-the-spot, and relatively inexpensive system for getting decisions on grievances they couldn't settle. They said nothing in their contracts about the details. I suppose most "first contracts," including arbitration clauses, have been drawn up by parties substantially uninformed regarding the practices of arbitration. And to have been in this business even a dozen years is to recall, in the typical ad hoc situations, scores of instances in which the arbitration practices in a particular plant started with the rule making of the first arbitrator who came in there.

This is not to suggest that this rule making has been done without regard to the views and inclinations of the parties. That isn't true, any more than it would be true that there is today *a* law of arbitration procedure, or even that a single arbitrator would handle hearings in different plants according to some inexorable code of his own. It has been a process of accommodation and remains one of infinite and essential flexibility.

Yet the fact remains (again excepting some of the permanent umpire setups) that the center of responsibility in developing the procedural ground rules for labor arbitration has been more in the arbitrators than in the parties. It is we, not they, who have established the pattern of ordered informality; performing major surgery on the legal rules of evidence and procedure but retaining the good sense of those rules; greatly simplifying but not eliminating the hearsay and parole evidence rules; taking the rules for the admissibility of evidence and remolding them into rules for weighing it; striking the fat but saving the heart of the practices of cross-examination, presumptions, burden of proof, and the like. It was we, with their invaluable advice to be sure, who drew up a Code of Ethics and Procedural Standards for Labor-Management Arbitration.*

Without stopping to test each of the today generally accepted basic rules of arbitration procedure, I suggest that the significant bulk of them have been devised (a) by arbitrators, and (b) on a basis of consideration and balancing not only of the company and union, the relational interests involved, but the more direct individual interests as well.

There is no point in laboring the obvious. But it is relevant, as we proceed to the harder cases, those presently controverted, to realize that the general history of procedural rule-making in arbitration is that this responsibility has been assumed and discharged primarily by the arbitrators.

Now what of the harder cases themselves, those in which there is today some uncertainty as to the arbitrator's responsibility? What do they suggest, in the quick cataloging which

* EDITOR'S NOTE: Text of the Code is reproduced in Appendix B of the volume, *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 151-163.

is all there is time for here, of the elements needed for an understanding of the extent of this responsibility?

Accepting one starting point as being as good as another, let's note first this matter of the permissible or proper extent of the arbitrator's participation in the development of the case at the hearing.

If you start with the assumption that the arbitration hearing is a trial between two parties, the company and the union, it is easy to conclude that the arbitrator should take the case as they present it, not questioning the witness himself, not suggesting the desirability of pursuing further certain lines of evidence, and so forth.

Yet the expressions from several of our epistolary panel indicate a strong evolution toward the idea that the arbitrator's obligation is to satisfy his own standard of what is relevant to the decision he has to make. Sometimes this does present the issue of consulting the "individual" interests, as where, for example, the arbitrator asks the grievant at the end of a discharge case whether he thinks there is anything further that should be developed. More generally, however, it is rather the broader question of whether it is up to the arbitrator or the parties to decide what should be explored and considered in laying a basis for his ultimate award.

We have all accepted the view, in general, that we will admit whatever either party deems relevant. The emerging recognition that there is equal warrant for the arbitrator's pursuing any line of inquiry he deems important sheds interesting light on his relationship to the proceeding. There is at least incidental relevance here, although perhaps not great significance, to the broader question of the arbitrator's ultimate responsibility for the rule-making function in arbitration.

What, next, of this question of the handling at the arbitration hearing of evidence or argument not introduced at earlier steps of the grievance procedure?

There are obvious interests, from the standpoint of the parties' continuing relationship, in keeping such matters out. It is important to the efficient functioning of the grievance procedure that the company and the union representatives do their job below. The Industrial Relations Manager insists properly

that he must, as a matter of operating efficiency, be in a position to rely on what the union committee has found out and decided at least by the third step meeting, and the committee has a commensurate interest in being fully informed by that time of what the basis is for the company's position. The grievance procedure will work better, furthermore, if any practice of saving the best ammunition for the hearing before the arbitrator is discouraged.

Arbitrators have responded to these considerations, to the extent that the "general rule" is usually stated as being that new evidence or argument will not be admitted at the arbitration hearing unless some special reason is shown for its not having been brought out before.

Yet I find a good deal of concern expressed about this rule, about its basis in fact, and about the possibility of its working more injustice in particular cases than the broader relational elements either require or demand. Ralph Seward points out that the truth of the matter is that many lower-step grievance meetings "are informal and deal with the surface of a problem without in any sense taking real evidence." The grievant employee usually isn't present. The company, for its part, may very reasonably not have made the thorough investigation it will properly consider warranted if the union ultimately decides to take the case seriously enough to go to arbitration. Whitley McCoy adds that "The parties go to arbitration to have determined the question of whether the grievant should have got the promotion or not; not whether the union advanced the right evidence, the right argument, or the right contract section in the third step." [13]

The reports and the reactions of others suggest strongly that unless some deliberate attempt to mislead the other party is disclosed, and particularly if the "new" evidence or argument appears substantially material, most arbitrators will be disinclined to rule the matter out of the proceedings. The tendency seems to be to state the "general rule" against accepting the new matter and then to make some provision or another for

[13] *Peter Kelliher* notes that "frequently the parties who handle the matter in the earlier steps do not have a full understanding of the contract and they often lack the ability of an advocate."

letting it come in. The arbitrator may return the case to the parties for their further consideration in the new light or recess the hearing for the other party to prepare or revise its defense. Some note the natural inclination to discount the value, even the validity, of "after-thoughts." But the indications are that at least in the typical ad hoc proceeding, especially in a relationship where there are only infrequent arbitrations, some procedure will usually be worked out for meeting this problem with due regard to both the immediate interests involved in the particular case and those of the grievance procedure in general.

The rights and wrongs of the handling of this "new evidence" problem are not themselves the issue here. It is relevant rather as another instance of a procedural question involving the balancing of two types of interests in which the arbitrators are casting the balance.

This is interestingly and perhaps significantly not true in the handling of the related problem of whether to receive at the arbitration hearing evidence regarding offers of settlement or compromise made at earlier steps of the grievance procedure. The arbitrator would usually welcome such information as being at least helpful in assaying the value of the evidentiary ore. Yet it is almost invariably insisted that admitting such evidence would tend to restrain the parties in their negotiation of future cases. I suspect that there is also reflected here at least an element of lack of complete confidence in the arbitrator's ability to resist the temptations of compromise. But in any event, the general practice of rejecting such evidence unless both company and union agree to have it brought in, would be an illustration of arbitral deference on this procedural issue to the views of the parties and their longer range relational interests.[14]

A number of arbitrators refer to the troublesome matter of handling "absentee evidence." The employer dismisses an em-

[14] My brother *Hill, J.*, suggests that adherence to principle here does not necessarily foreclose all possibilities of improving whatever opportunity presents itself: "Objections to any reference to offers of settlement or compromise made prior to the arbitration proceeding should be sustained, preferably *after* they have been improperly mentioned in the arbitrator's hearing."

ployee on the basis of customer complaints, but is unable for obvious reasons to produce the customers for cross-examination; or a truck driver wrecks the company truck while driving it cross-country, and the employer tries to support his discharge action with a police report and photostats of eye-witness affidavits; or an employee submits a medical certificate of illness and the employer argues that it should not be admitted unless the doctor is produced.[15]

Put beside these cases the problem of what do where lie detector results are produced, or where an employee has been discharged for refusing to take such a test. Compare, too, the recent case (which didn't quite get to arbitration) of a company installing television cameras and training them on a loading dock where an epidemic of pilfering had broken out. The union protested that this put the employees under constant strain, that it "invaded their privacy," and presented an industrial law equivalent of wire-tapping.

Both of these types of situations present clear "due process" questions, not constitutional or legal due process, but obvious demands that individual and enterprise interests be balanced in working out the industrial equation. The awards in these cases show an almost infinite variety of treatment. Perhaps they permit the generalization that the traditional ideas of fair-hearing, facing the accuser, cross-examination, and so forth, are invoked here to protect the individual interest *unless* the enterprise interests are exceedingly strong. But this doesn't say very much, and the rulings in most of these cases are at least made to appear to turn on some element other than the challenged evidence.

Here again, however, it is not the decisions that are reached that are important to the present inquiry. What is completely clear in every one of these cases is that the key procedural or evidentiary issue is squarely up to the arbitrator. He decides it, not the parties; and there is no basis for that decision except his own balancing of the interests involved. Nor is it just a matter of employer interests against employee interests. Your

[15] *Cf.* Brotherhood of Sleeping Car Porters and Chicago, Milwaukee, St. Paul and Pacific R. R., NARB, Third Division, Award No. 7812, Docket No. PM-7384 (1957; Referee, Larkin); same, Award No. 7813.

strong suspicion, furthermore, is usually that this "absentee" or otherwise discolored evidence is probably correct. The problem is essentially the infinitely complex due process problem of determining how great a concession should be made in any "trial" to the idea or ideal that any individual charged with transgression or shortcoming by the community (or enterprise) is entitled to special procedural protections.

There seem to me more specific conclusions to be drawn regarding a related matter of getting into the hearing one type of obviously available but frequently absent information in certain kinds of disciplinary cases. I mean the testimony of bargaining-unit members which may be adverse to the grievant.

This is no easy problem. Yet I venture the view (a) that the tradition against the company's calling bargaining-unit witnesses does more than any other single element to prevent reliable fact determination in these cases, (b) that there is no legitimate reason or justification for this tradition, and (c) that the arbitrators could meet this problem if they chose to. The view that the arbitrator does not have the power to call other employees as witnesses [16] seems dubious, at least as a practical matter. It is a closer question whether getting the truth by calling such witnesses is worth the strain.

It seems to me, however, that recognition of the scope of the arbitrator's procedural authority established in other cases urges strongly his assumption of responsibility for determining, otherwise than by ignoring it, the issue of whether we should hear from bargaining-unit witnesses other than those called by the union. There are, of course, instances in which the arbitrator has assumed this responsibility; [17] and there have been

[16] *Elmer Hilpert:* "It is my view that absent an arbitration statute, I have no power to call such employees as witnesses. . . . Moreover, I do not think we are yet ready to empower arbitrators to do this. The parties are not yet ready to have foremen, etc., called as witnesses at the behest of the Union or other employees called at the behest of the Company."

[17] See *e.g.,* United States Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 101 (1955), a case in which Umpire *Charles Killingsworth* interviewed a number of employees in the bargaining unit, and found their testimony crucial to the decision of the case. Killingsworth notes, by way of comment on this case: "This experience makes

(Footnote continued on following page.)

at least experiments with the devising of procedures for meeting some of the obvious difficulties that are presented.[18]

The matter of the "privilege against self-incrimination" should of course come into this picture of "due process of arbitration." Yet its relevance is a very special one. For there is a fairly clear consensus in the arbitration opinions that this privilege, established in the criminal law, has no place, at least as such, in the arbitration of grievance cases (invariably discharge or disciplinary cases).[19] The importance of this point is accordingly, as an illustration of the fact that "due process of arbitration" is a distinct concept, similar in its approach and purposes to "due process of law," but entirely independent in the conclusion it reaches.

The reason for this difference, so far as "self-incrimination" is involved, is of course, as James Hill puts it, that the typical disciplinary case is "a matter not to be viewed primarily as a question of penalty for misconduct, but as a problem of whether or not, all things considered, the individual has proved an unsatisfactory employee."

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me feel that in some situations an arbitrator should insist on the calling of witnesses that both sides may be reluctant to present. Of course, there are obvious dangers in this procedure, especially in ad hoc proceedings, but there seem to be some situations which require this if 'due process' is to be had. Perhaps company and union people might well be urged to get away from the widespread taboo on the use of hourly employees as witnesses against other hourly employees."

[18] *Ralph Seward:* "When I first went to General Motors in 1944, I found that they were accustomed—in certain discharge cases where the company was afraid to call members of the bargaining unit as witnesses for fear of what might happen to them—to have the arbitrator interview such witnesses in private. I changed the rule a bit by requiring some showing of danger to witnesses who testified openly at the hearing, but with this change I went along with the procedure for a time. This made me of course, an independent investigator as well as a trier of the facts. I now think it was an unsound and dangerous procedure even though I am sure that it enabled me to get closer to the truth in some cases than I could otherwise have done. I don't know whether this sort of procedure is used elsewhere. If it is, I think that it is highly dubious."

[19] *N. P. Feinsinger* points out, however, "My evaluation of a discharged employee's not testifying has depended on the circumstances. For example, it may be simply the case of a hot-headed employee who would make an unfavorable impression on the arbitrator and so cook his own goose if he testified. Or, the evidence may be undisputed and the question may be one simply of argument as to the application of the established rules of discipline. I don't think one can generalize here."

This was graphically illustrated in a case Saul Wallen decided a year or so ago.[20] An employee had been indicted for allegedly stealing tires from his employer's plant. Suspended pending trial, the employee was acquitted of the theft charge in court, but was nevertheless discharged by the company upon the rendering of the verdict. Arbitrator Wallen upheld the discharge, on the ground that although the legal technicalities of necessary proof of a crime of larceny had not been satisfied, the court record sustained the fact that the individual involved had—by refusing to explain his admitted possession of the tires—failed to satisfy his obligations to his employer to cooperate in stopping thievery from the plant that he clearly knew about. The interesting feature of the case was that the individual's decision not to testify about the incident—which was part of his due process of law right in court and very possibly saved him from conviction of larceny—was itself an element in the finding of just cause for his discharge.

It is probably less clear whether in arbitration, as in most courts, the record of a previous offense is improper evidence on the factual issue of whether a similar offense has again been committed. I think, for example, of a recent case [21] in which the key issue was whether the grievant was intoxicated when she reported for work on the morning of September 14. She and the plant guard disagreed about this, and the company offered to support its claim a record of two previous, and recent, acknowledged instances of the grievant's reporting "under the influence."

Most courts would have excluded this record, except in connection with a subsequent fixing of penalties, if other evidence resolved the issue of fact against the defendant. Bert Luskin, reflecting similar views expressed by others, indicates a strong feeling that the same position is proper in the arbitration proceeding. "The use of records of similar offenses as evidence of the commission of a current offense is, in my opinion, poppy-

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[20] General Tire and Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 312 (1956).

[21] United States Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 101 (1956; Wirtz, Arbitrator).

cock," he states "and . . . should not be admissible for that purpose."

This was the position I took in the case just referred to. But I'm not, frankly, at all sure about it. In the arbitration setting, this matter of a "previous offense" comes very close to such other considerations as the grievant's past record, the amount of his seniority, and the whole business of the Case of the Last Straw. Although we all can and do separate on the paper of our opinions the items of the fact of commission and the fixing of the penalty, we would not be inclined to assert strongly an equally clear distinction in our thinking.[22]

Yet once again the question is not what the proper rule is in this particular instance. This is simply another case of the arbitrator's clear responsibility, unguided by any instruction from the parties, for making a procedural ruling which may well determine the disposition of the grievance. Like the self-incrimination point, it illustrates the necessity of an industrial community "due process" balancing of interests which may or may not warrant the rule adopted by courts which are casting a different balance.

This second grouping of cases could be extended to include at least as many more of our present procedural uncertainties as have been listed here. Some of these others were discussed in the conference session this morning. A good many of these

[22] I find substantial reflections of my own doubts in *Allan Dash's* self-styled "confession of an arbitrator": "The use of a record of a prior similar offense as evidence that the grievant has committed the one at issue before me is, I suspect, a procedure of which I have been guilty on a number of occasions. It seems to me that an employee who has been warned or disciplined on a number of prior occasions for the use of violent, insubordinate or threatening language is prone to continue in that vein in the future (somewhat like a person whose ordinary speech is punctuated by frequent oaths). Thus, if there is a denial that a grievant before me has made a certain insubordinate or threatening statement, I believe that I am somewhat persuaded by his past uses of such language as evidence of his guilt in the immediate case. I feel that I am also sometimes persuaded in doubtful cases that an employee with slipshod work habits has been responsible for the most recent one of which he is accused if his record shows unprotested warnings and prior disciplinary actions for the same type of improper work habit. Thus, if there is a question as to which of two employees has been responsible for bad work that has led to disciplinary action against one employee, I suppose I have resolved the question of doubt against the employee whose past record shows evidence of bad work."

matters seem to warrant, as perhaps separate and distinct problems, that fuller kind of consideration which we stated there, and which there has been no pretense of offering here.

These cases are important to the present development only for their illustration of what seem the cardinal facts that the setting of arbitration procedures has emerged in actual experience as being primarily the responsibility of arbitrators, that the parties (the companies and the unions) have supplied really very little guidance in the exercise of this function, and that it becomes an exercise for the arbitrator in the kind of balancing of individual and group interests that is the essence of "due process." Indeed this now seems to me so obvious that I am kept from apology for laboring it only by three additional facts. One is the recollection of the question about this that I had to begin with. Another is the assertion by a number of the arbitrators I wrote to that there really isn't any problem here for us—that it is the parties' problem. The third fact is the group of cases we now come to.

III

In the cases considered so far, it is usually true that one party or the other, the company or the union, asserts the interest which is in a sense also the individual interest. So the arbitrator's consideration of this interest reflects no voluntary assumption of responsibility on his part. Those cases don't put to the hard test the question of whether there is an independent responsibility in the arbitrator, one he is obligated to discharge regardless of whether either party presses it on him. Neither do they pose, in its sharpest form, the possible conflict between the arbitral standard (in connection with procedural rule-making) of acceptability to the parties on the one hand and responsibility to some broader principle of individual rights on the other.

These harder tests are offered, and the sharper conflict between institutional and individual interests presented, in a final grouping of cases. I have included three illustrations.

First, the seniority cases. Typically, in a seniority case, only

one of two competitors for a job is represented. The Union is presenting A's claim. If it is upheld, B, who is on the job now, will lose it. Yet B is not represented at the hearing.[23] Of course the Company's position may support B's claim. Yet this is a strange set of representational affairs; and if the Company attitude is primarily one of simply wanting the seniority question straightened out, one way or another, B's "rights" may get exceedingly short shrift.[24]

Frequently the interests of a whole group of employees—not represented at the hearing at all—may hinge on the outcome of an arbitration case. I had the experience several years ago of having a seniority arbitration hearing interrupted because the plant was struck by a whole department of employees who were striking *because* this case was being brought to arbitration. If the Union won the case, they would lose their jobs.

Similar considerations are frequently present in cases involving work assignments, the distribution of overtime work, the establishment of rules for filling temporary vacancies in higher-rated jobs.

Various rationales of this process of decision without representation are suggested: that the purpose of the arbitration process is to interpret the contract for the parties (rather than to provide equity for individual employees); that the individual or minority interests involved here are not dealt with "any more cavalierly by arbitrators . . . than the parties themselves

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[23] *Ralph Seward:* "Almost all such cases involve the rights of at least two employees: the one who got the job and the grievant who thinks that under the seniority provisions of the agreement he should have gotten it. The company is often in the position of a stakeholder. In my experience it is very rare that the man whom the grievant is trying to oust from the job has any real representation whatsoever. The union represents the grievant and the company represents its own interests, which may or may not coincide with those of this non-represented employee. Usually he doesn't even appear at the hearing, if indeed he knows about the proceeding at all. I have been worried about this situation and felt that in upholding the union and ousting some man from his job I might have been dealing unfairly and ruling on the rights of someone who had had no chance to be heard."

[24] There is the especially painful predicament of the foreman who in some way runs into trouble with the company in the course of his at best difficult descent back into the bargaining unit. *E.g.,* Textile Workers Union of America and Bigelow-Sanford Carpet Co. (1951; Cole, Arbitrator).

deal with such rights and interests at the bargaining table;" [25] that the "edge of the potential due process problem is dulled by the fact that the issue before the arbitrator is not to determine whom, of all possible claimants, he would pick for the job, but whether the employer, who must have some range of discretion, has been arbitrary, discriminatory, capricious (or as Ben Aaron would add, whimsical) in exercising that discretion." [26] An even stronger objection is pressed on the ground that the arbitrator has no power to call other employees as witnesses or to "insist that they be made parties." [27]

These are not inconsiderable arguments, particularly as they confirm and support an almost universal practice. Yet they leave untouched the hard fact that what we do here is sometimes to adjudge the competing interests of individuals or groups of individuals, their job rights, without even hearing one side of the case.

The argument that seniority cases present only abstract issues of contract construction hardly accords with the facts of experience. I have yet, I guess, to see the first case (in the absence of "political" considerations) in which a union contends, regardless of the form of the contract, for the interests of a junior employee against one with greater seniority. Nor is this argument wholly consistent with the suggestion that the seniority question for the arbitrator is only as to the quality of the employer's exercise of his discretion.

The strongest argument in support of the present rules would appear to be the manifest difficulty, as a practical matter, of devising satisfactory alternative procedures.[28] A general rule, for example, that all interested individuals may appear for themselves in any seniority case would not only obstruct needlessly the essential purpose of primary union responsibility for representing employee interests in administering the contract; it would also present obvious complications so far as the conduct of the hearing is concerned.

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[25] *Philip Marshall.*

[26] *James Hill.*

[27] *Elmer Hilpert.*

[28] *Elmer Hilpert:* "I doubt whether the arbitrator would be giving the 'other employee' much by way of 'due process' if he insisted on his being at the hearing when his union brethren had chosen not to call him."

There would seem good sense, however, in recognizing a discretionary authority in the arbitrator—and a responsibility—to take special precautionary measures where the particular facts seem to warrant it.[29] More often than not there *is* adequate representation in these cases, and it isn't too difficult to sense the situations in which there may be a problem. If it is recognized that the limiting considerations, so far as the arbitrator's role is concerned, are considerations of practicality rather than of power or authority, then he can devise procedures that will meet the demands of the particular case. I would make here only the point that there is nothing in this situation that constitutes a limitation on the arbitrator's authority to insist on representation of any interests that will be affected by his decision and appear to be unrepresented. There seems to me rather an obligation on him, as part of his general responsibility for making the procedural rules, to consider this problem and to take such steps as appear to him to be warranted. It is of course the thesis of this paper that this responsibility runs not just to the parties but to the possibly affected individuals as well.

A second problem of this same general type may be only briefly mentioned. It is the problem which arises when the grievant insists that he be represented by counsel of his own choosing rather than by the union that is party to the contract. There has been a schism, or a craft severance, or perhaps it is simply a case of a minority union trying to assert itself.

Our attitude has been relatively uniform. We have denied the grievant's request, offering him at most the Hobson's choice of moving to stay the arbitration proceeding entirely.[30]

It is with full appreciation of the practical reasons for this position, and with nothing specific to suggest as an alternative, that I question our position on this. It cuts too deeply across the grain of people's belief in a person's right to his own counsel and in the ultimately personal, individual quality of a right.

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[29] The Railroad Adjustment Board has recently decided several cases involving this problem of third party notice. There is apparently division on it among the referees.

[30] This is apparently the current position of the New York State Board of Mediation, but with the New York courts expressing increasing concern. See *Soto v. Lenscraft Optical Corp.*, 28 LA 279 (Sup. Ct., N. Y. Co., 1957).

This is at least arguably a situation in which our attitude has been too strongly influenced by the comparative safety and easiness of going along with the parties.[31] And I strongly suspect that if we don't devise a different rule, the courts will.[32]

We come finally to those lurid situations that seem, at least on the surface, to illustrate most graphically and dramatically the problem of the arbitral handling of cases involving a disparity between individual and institutional interests, or at least positions.

There are calls (never letters) to the arbitrator from representatives of both the company and the union. After some beating around the conversational bush they get their message across. There is a discharge grievance pending. By the employer's report, the grievant's employment—a surprising ten years ago—was the worst mistake the company ever made; his trouble-making has brought the shop to the verge of revolt and the company to the brink of bankruptcy. The union representative indicates that, although he has to take this case to arbitration and will argue vehemently in the grievant's behalf at the hearing, he knows the discharge is justifiable and won't be able to face his grandchildren if he doesn't say so in private. Their question is in form whether the arbitrator will take the case. But there is no mistaking its substance: they both want to be sure of a death warrant award.

There are of course other forms and infinite variations of what its critics call "the rigged case," its friends, "the informed award." Though not common, they seem to occur now as part of the course of expected events in the practice of labor arbitration.

It would have been easy for me, two months ago, to reject this whole business completely on moralistic grounds. Corre-

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[31] *Russell Smith:* "Is the arbitrator so completely the 'creature' of the parties (the Union and the Company) that he is powerless to do anything, or does he have responsibilities, akin to those of a court, to take account of the total picture?"

[32] This of course gets into the area which Archibald Cox has covered much more completely, and with a basically different emphasis, in "Rights Under a Labor Agreement," 69 *Harv. L. Rev.* 601 (1956).

Peter Kelliher suggests, in connection with this problem, consideration of "whether there is desirability in having the Grievant execute a submission agreement, along with the Union."

spondence with a dozen arbitrators whose morals I respect at least equally with my own makes it perfectly clear that this isn't a question of morals at all. I call your attention, furthermore, to the fact that the Code of Ethics and Procedural Standards specifically recognizes the propriety of at least some forms of this kind of procedure.[33]

There are, to begin with, at least two, perhaps half a dozen, different varieties of this unusual species.

The most extreme case is the one where the arbitrator is asked—and agrees—in advance to go through the motions of hearing a discharge case, with the union going apparently all out for the grievant, but with a prior understanding that the arbitrator will uphold the discharge regardless of what may be said or develop at the hearing.

My understanding of the theory on which such jurisdiction is accepted and exercised is that (a) "the bargaining relationship between the parties may properly override the individual's interests, at least where the case is relatively close," and (b) the grievant in these cases is invariably a trouble-maker anyway—so if somebody needs garbage carried out it's all right to do the dirty work. And, as one of our oldest hands puts it, "I am always grateful, as most arbitrators are, for frank, off-the-record appraisal by the parties of their own case."

On this first case, I remain completely unconvinced. It may be pure prudishness.[34] I would like to think it rather a concern that even if justice—blindfolded here in the very image of the statue—is served in every one of these individual cases, they nevertheless will have weakened the structure of confidence on which the whole institution of arbitration essentially is based.

Suppose, however, that the arbitrator accepts the appoint-

[33] Part III, Section 10: "If the parties reach a settlement of their dispute but desire nevertheless to have an award made, they should give the arbitrator a full explanation of the reasons therefor in order that he may judge whether he desires to make or join in such an award."

[34] But the sentiments of those who are critical of this practice are for the most part strongly expressed:

—"The process is a Machiavellian one."

—"I have adopted the practice of refusing to render a 'fixed' award."

—"My view is that this clearly violates the guarantee of 'due process' of the grievant . . . Participation therein, I believe, involves a breach of ethics by the arbitrator."

ment of the congenial but shy negotiators, but on the expressed understanding that he will insist on making an independent determination of the equities of the parties' agreement and will retain full independence to decide the case according to this determination.

Some report that adherence to this policy, coupled with an urging of the parties to complete their agreement themselves, has resulted invariably in nothing more ever being heard of the matter.[35] Others report, however, a usual acceptance of their willing-if-able proposition. And they indicate that if there is any difference between their handling of these and the more typical situations it is that, having been put on notice of possible skullduggery, they are more than usually inclined to doublecheck against it.

If this is the way this business actually works then the practice stands, logically, as not an instance of over-concession to institutional interests at all, but rather quite the opposite; for it means putting a check on the institutional authority in precisely those cases where there is the strongest suggestion of a possible abuse of that authority. Nor can there be any question but that this is the way some of the most responsible members of this profession do *in fact* meet and handle these situations.

I don't object. I do disagree. As a matter of purely personal policy this would be because of inadequate confidence in my own ability in such a situation to perform the necessary feat of what Professor Paul Freund once referred to as "bias against bias against bias." Beyond this is the perhaps conditioned reaction of the lawyer against a procedure which any reviewing court in the country would set aside in a minute if the grievant appealed the resultant award. That court would be speaking, furthermore, the sentiments of precisely 99 44/100% of the population, ill-advised or unsophisticated as they may be—but "pure."

There are still different considerations involved where this

[35] A typical comment: "In these types of cases I have always said that while I was willing to hear the case, I would not agree in advance to be bound by the indicated result unless I could concur in it. In each case I have urged the parties to settle the matter themselves, and whether as a result of this urging or fear of what I might do, I have never actually had such a case after this initial conversation."

situation develops in connection with new contract, instead of grievance, arbitration. The company and union representatives advise the arbitrator that their bargaining about a wage increase had narrowed down to a company offer of 6 cents and a union demand for 10 cents. The negotiators are agreed privately that the settlement should be at 8 cents, but one side of the table or the other has overstrained its relationships with its constituency. Will you, Mr. Arbitrator, after going through the appropriate hearing motions, render the agreed upon coup de grace?

How general this practice is there is no way of knowing. In one particular collective bargaining relationship it has been resorted to—with both upward and downward wage changes being involved—eight times in the past 20 years.

The arguments in support of this procedure are a good deal more convincing. The only goal of new contract arbitration, it is pointed out, is that the parties reach agreement. If agreement is actually reached by responsible representatives and will be facilitated by the use of an arbitrator's fiat, why not? And it is suggested, too, that in these new contract disputes there is no contract or other firm guide to the answer, so "acceptability" becomes actually "the major criterion."

I suppose there is more sentiment sometimes than sense in the popularity of the principle of open covenants openly arrived at. Yet I can't help questioning what this kind of procedure does to the concepts of "ratification by the membership" and "political accountability of union officers" as safeguards of union democracy. And similarly of the equivalent consideration on the corporate side. Is it only priggishness to inquire, too, whether procedures which grease the ways for responsible employee and employer representatives may become too easily corrupted into procedures for greasing the palms of those who are less responsible?

But the cases which seem to me to compromise almost inevitably the moral principles that some of us are inclined to assert in this area (despite the foreswearing of moralism) are those hybrid types which start out in broad daylight but end up in some corridor or hotel room.

You have just heard a particularly hard case, full of equities on one side and strong contract arguments on the other. You are sitting in your hotel room trying to find the solomonic clue in the wall paper. And then a representative of one of the parties drops by to tell you that in his judgment the best interests of everybody concerned will be served if his party loses this case.

"What do you do"—in Rodgers and Hammerstein idiom—"Spit in his eye?"

I suppose it depends on who the nocturnal prowler is, how well you know what he stands for, how good his reasons are, whether the circumstances indicate that he is interested in the merits of the situation or is, for example, playing the politics of relationships between the home and plant office or between the local and the international.[36] And maybe it matters what is at stake—dollars or job rights. Lewis Gill suggests even a possible dividing line between disciplinary cases in which the parties are agreed privately on reinstatement with a penalty ("that kind of case presumably does not raise any questions of prejudice to the rights of individuals") and cases where the parties want the discharges themselves sustained ("here the question arises in a very sharp form").

If there are those who find no lines between any of these cases, what then of the dozens of situations where, in the course of the hearing itself, some overt hint is dropped—by the international representative or the company man from the home office—making it clear that this is one of "those cases?" I suspect some permanent umpires come to depend quite materially upon their reading of signs, even silences, that are sometimes deliberately designed to reach them without the awareness or

[36] One spelling out of this: "At times when I felt definitely persuaded that the person who has spoken to me 'off-the-record' has been seeking to further his own position (with the Company or the Union) I have disregarded his comments and have ruled without respect to them. In most cases in which I have been in doubt as to the motive of my 'informer' I probably have resolved the doubt in favor of the 'informer' rather than the individual grievants or of the local plant management. When I have been convinced that political motives have been back of the privileged information that has been tendered to me (usually by the union side) I feel that I have studiously avoided finding as the 'informer' suggests."

full understanding of everybody in the room.[37] In fact it is relevant to note that this practice of informed or rigged awards appears, so far as can be told, more in the permanent umpire than in the ad hoc situations.[38]

The more general point, however, is that there are inevitably, because of the informalities and ordinary circumstances of arbitration, occasions when the arbitrator becomes advised that the representatives on one side of the table or the other are not fully convinced of the gospel they are expounding.[39] This is a

[37] A broader statement than this, made in the actual presentation of this paper at the Academy session, is hereby withdrawn because Harold Davey pointed out to me afterward that it was (a) broad to the point of error, and (b) unfair to at least some, if not all, permanent umpires. His point (a) probably applies to a number of statements in the paper, for although there has been no intentional commission of error it has seemed worth flirting at some points with what probably isn't entirely true in order to suggest more strongly what I believe is true. But unfairness with the truth is one thing, unfairness to arbitrators is another! Arbitrator Davey's own policy (and practice) regarding such matters as these was expressed to the Academy last year. See his article "The John Deere-UAW Permanent Arbitration System," in *Critical Issues in Labor Arbitration,* Proceedings of the Tenth Annual Meeting (Washington: BNA Incorporated, 1957), chapter IX, pp. 173-74.

[38] There has been no change made in this statement since its utterance, for I think it is factually correct, but here again subsequent comment prompts the explanation that the statement is not intended as an indictment of permanent umpireships (to several of which I am materially indebted). The point is rather the relatively obvious one that the approaches which lead to "informing," "rigging" or "pre-arranging" are not likely to be made to arbitrators who are strangers to the approachers. It is fairly clear, too, that the permanent-umpire relationship would give the umpire the basis (which a stranger arbitrator would not have) for assessing the basic good faith (or bad) of the approachers—an obviously essential element if the procedure is to be used at all.

[39] *Bert Luskin* reports the perhaps ultimate irony: where the Union member of the tripartite hearing board contributed in the executive session the advice that the Union had taken this case to arbitration only "as a matter of principle" and had no expectation of winning it. It seems a fair surmise that even those who would reject outright any proffer of a "rigged case" would not be inclined to disqualify themselves where, as in this case, one of the arbitration board members contributes the perhaps extreme degree of arbitral objectivity.

Nor would most of us feel anything but admiration for the technique *James Hill* adopted in "one of the few cases I've had where the witness denied everything and the foreman affirmed everything. There was absolutely no agreement on anything, and I felt that if I did not size up the two men accurately I couldn't make any decision at all. My impression of the employee was that he was too shifty, and too quick in responding to questions. The foreman, a Danish immigrant, was slow, proud of his craft, and seemed honest. I took a chance. I cleared the hearing room of everyone but the two counsels—the one

(Footnote continued on following page.)

different matter from, at the other extreme, the "rigged case"—with its pig-in-a-poke commitment. But even the strongest aversion for some forms of these procedures—which I am frank to confess as a personal matter—does not warrant disregard of the fact that some of the lines and distinctions that are involved get mighty fine. "There are," as James Hill puts it, "all shades and degrees of informedness."

It is not the purpose here to cast ultimate judgments about either the ethics or the net practicalities of these procedures. Nor is there need to labor the obvious relevance of the pre-arranged award procedure to the broader "due process" inquiry. It presents, perhaps almost in distortion, the sometimes conflict between the position of an individual and that taken by his representative. And it poses squarely the question of the lines of the arbitrator's responsibility, more specifically the question of whether he owes any responsibility to the individual which that individual's representative cannot waive." [40]

The variety of forms of the pre-arranged, or informed, award situation seem to me to warrant—from its critics—recognition that it cannot be fully or fairly appraised in terms of absolutes. It seems surely no less clear that the circumstances warrant equally from its friends and users recognition that this procedure finds no sanction in any absolute concept that what's all right with the parties is all right for the arbitrator.

IV

These then are the cases. They are only illustrative, but they are enough to suggest the concept of "due process of arbitration," if indeed there is such a concept in any meaningful, practical sense.

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for the union and the one for the company—and I said to them, 'Gentlemen, the only thing that's clear to me about this case is that someone is lying. I think it's the employee.' The counsel for the union agreed, and the award went to the company."

[40] But compare the comment of one arbitrator: "By and large I would say that the 'informed award' has been constructive and I have never had reason to suspect that it is abusive of the individual's rights. In fact, I have been much more concerned over the possibility of error and injustice in many of the cases where attorneys engaged in formal battle before me."

What conclusions do they warrant?

One, surely, is that if these are the worst problems we face then the arbitration procedure must be working remarkably well. And it is. Developing in the manner both of Minerva and of Topsy, it has come quickly to a state of extraordinary acceptance. Acceptance, to be sure, by the parties—the companies and the unions. Yet you feel strongly, too, that on net there has been little damage at the arbitrator's hands to individual interests.[41] There are probably ten cases of over-protection of those interests for each one instance of under protection.[42] Surely they receive infinitely greater respect at the arbitration stage than at the collective bargaining table or in the earlier steps of the grievance procedure. I confess to having had at some stages of this inquiry the feeling of "barking at the heels of trifles."

Yet perfection rather than adequacy is the only worthwhile standard, especially in a system of adjudication dependent solely on confidence in the judges. I don't think these cases we have talked about show any basic or vital flaw in the present arbitration procedures. I don't think either that they indicate either the parties or the arbitrators have fully perfected these procedures, particularly as they involve this balancing, in certain especially difficult cases, of the institutional and the individual interests that may be affected.

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[41] *N. P. Feinsinger:* "My guess is that on the whole, whatever might be the case at the earlier grievance steps, the arbitration process works as justly as any human system could, as far as the individual is concerned. If it were otherwise, don't you suppose there would be more restlessness displayed within the unions on this score? I have known of cases where the union representatives have been changed because of lack of aggressiveness, and once or twice, I have heard suggestions that representatives have been displaced because of collusion with managment for their personal advancement, but on the whole I have seen no evidence of any widespread unfairness towards individuals at the arbitration stage."

[42] *William Simkin:* "I would say without any hesitation that the number of cases where the individual may be sacrificed in any way has been very small in my experience on a percentagewise basis. Quantitatively, there are undoubtedly a much greater number of cases where the practical effect of the union position is to give the individual some preferred treatment and I am afraid that our decisions don't cull out all of these cases. In other words, I would guess that, insofar as arbitration is concerned, there are more cases where an individual gets some preferred treatment than there are cases where an individual is treated less fairly than he deserves."

To suggest a concept of "due process of arbitration" is not for a moment to suggest that there is some formula for achieving perfection here. Perfection won't be achieved—and surely it isn't even approached by way of any formula. It may well be that each of the problems only cataloged here warrants entirely separate consideration—and even then on only a case-by-case basis. It may be too that whatever value there is in even discussing such problems lies only in assembling the grist of experience for each of the gods to grind as he will.

Yet some points of departure may be worth noting—as a framework for the consciousness of the elements that make up "due process of arbitration"—or whatever may seem a more appropriate label.

One is, for me, the marking of the procedure of arbitration as a distinct element in this decision-making process, not subject to the analysis which may apply to other factors. The conclusion that the parties, the company and the union, are the ultimate policy makers—in the "legislative" sense—does not foreclose the possibility that there may be great advantage in recognizing a different center of responsibility for establishing the adjudicative procedures.

It is part of this first point that the procedural element is not secondary or derivative. It is basic, fundamental. You will remember that seven years ago Ralph Seward said to this Academy that part of his understanding of arbitration is that "means are more important than ends." * He was speaking of the broader democratic ideal—and experience—that you can trust the *results* if only the *channels* of decision making and action making are kept clear and true and right.

A second point of departure, perhaps equally obvious, is the realization that the whole development of labor arbitration has been one of leaving the establishment of the arbitration procedures very largely to the arbitrators. They have shaped these procedures, to be sure, to the broadly expressed desires of the parties. Sometimes, especially in the few very large, well-organized relationships where permanent umpireships are set

* EDITOR'S NOTE: See Ralph T. Seward, "Arbitration in the World Today," in *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), chapter IV.

up, the parties go further in dictating the rules of procedures. In general, however, this development of the ground rules of arbitration has been by the arbitrators.

I have tried to develop here a third, less certain, proposition: that the discharge of the arbitrator's function of determining the ground rules for the arbitration proceeding requires a broad balancing of interests, including recognition of independent individual interests even where this means—in the unusual case—piercing the institutional, representative veil.

The case for this proposition rests, as I sense it, on a very broad base of democratic experience, written in Magna Charta, the Bill of Rights, the proviso to Section 9 (a) of the Wagner and Taft-Hartley Acts, *Steele* v. *Louisville & Nashville R. R.*,[43] the AFL-CIO Ethical Practices Committee's operations, the UAW's "good-house-keeping" committee device, uncounted Fourth of July orations, and uncountable homelier expressions. If it is in its more usual manifestation a principle of public government, it seems to find equal warrant in the equations of private government. If it respects the need for institutional security and efficiency, it nonetheless suggests that at every point in any chain of command or authority there is reason for special recognition of the independent individual interest.

In more immediate, perhaps more practical terms, there seems reason to suggest that the self interests of employer and employee representatives—and this means particularly the unions—will be more served than disserved by adding the check of independent arbitral determination to their own judgments of what is fair and adequate procedure in grievance cases. And at a time when judicial review of arbitration awards is plainly on the upswing, it may be suggested too that, if the arbitrator doesn't exercise this function, the courts are going to.[44]

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[43] 323 U. S. 192 (1944).

[44] Only the exigencies of time excuse, if indeed they are enough, the omission in this paper of any notice of the relationship of its thesis to the questions of judicial review of arbitration awards and judicial relief for disaffected grievants. This omission is especially unfortunate because of the danger that some things

(Footnote continued on following page.)

In more personal, professional terms I confess a feeling that the circumstances of the arbitrator warrant the restraint that recognition of some such responsibility would constitute. The idea of acceptability to the parties is by no means evil; it is a legitimate consideration; but it is no ultimate standard. I think of the feeling most of us (but not, interestingly, the labor unions) have about the weakness of an elected, rather than an appointed, judiciary. It isn't just that it is the companies and the unions who hire us. It is, beyond this, that all the circumstances—our desire to avoid difficulties or embarrassments at the hearing, our natural uncertainties about what is really involved, even our usual hurry to get away—contribute naturally to an inclination to let sleeping dogs, or smothered rights, lie where they are.

In conclusion—a brief personal note that may hopefully say better what I have tried to say here. I have found myself thinking, between pangs of this speech-birth, about a man whom some of you knew. Wiley Rutledge once taught here in St. Louis. I went to work for him when I got out of law school. He was a man who believed, perhaps sometimes to a fault, in the overriding importance of the individual. It was Mr. Justice Rutledge who wrote the opinion in *Elgin, Joliet & Eastern Railway* v. *Burley*.[45] The opinion in that case may have been wrong on the point of the grievant's continuing ownership of his grievance. It spoke the view, however, that the case for the supreme right of the individual rests neither on logic nor on the dictates of convenience, but on democracy's ideals.

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suggested here might seem to support an argument for enlarged exercise in these areas of judicial authority. That possibility warrants the flat statement that it seems to me there is much more to be lost than to be gained from the courts getting further into these areas. My argument is not for the recognition of rights which the courts should protect if the parties and the arbitrator fail to protect them. It is rather for the recognition and protection of these rights *by the agencies of the industrial community*—with one of the arguments for such recognition and protection being that failure on this score will increase the *danger* of an extension of judicial intervention. There is hardly need, before this Academy, to refer in this connection and more broadly with respect to the subject of the whole paper to Harry Shulman's "Reason, Contract, and Law in Labor Relations," 68 *Harv. L. Rev.* 999 (April 1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), Appendix A, pp. 169-198.

[45] 325 U. S. 711 (1945).