CHAPTER 3

DUE PROCESS AND FAIR PROCEDURE IN LABOR ARBITRATION

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In the last five years shop talk among arbitrators has tended increasingly to drift into an area vaguely and uneasily identified as "due process." The tone of the conversations became more urgent after the *Lincoln Mills* decision [1] (and before the Steelworkers' trilogy from the Supreme Court in the summer of 1960),[2] for it appeared then that the courts would henceforth play a greater role in labor arbitration, and that arbitrators had better tidy up the house to receive company.

Willard Wirtz brought the issue into sharp focus with his paper on "Due Process of Arbitration," delivered at the Eleventh Annual Meeting of the National Academy of Arbitrators in 1958.[3] Shortly thereafter Messrs. Wirtz, Aaron, and Fleming received a grant from the Labor Project of the Fund for the Republic to be used in investigating arbitral practices in certain sensitive areas. This paper is in the nature of an interim report on that project.

A word about methodology is necessary at the outset. We were interested in cases which would raise problems of notice, appear-

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Professor Fleming's paper was presented at the Academy Meeting by W. Willard Wirtz.

1 *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

2 *United Steelworkers of America* v. *American Mfg. Co.,* 80 Sup. Ct. 1343, 1363, 34 LA 559, 572 (1960).

United Steelworkers of America v. *Enterprise Wheel & Car Corp.,* 80 Sup. Ct. 1358, 1363, 34 LA 569, 572 (1960).

United Steelworkers of America v. *Warrior & Gulf Nav. Co.,* 80 Sup. Ct. 1347, 1363, 34 LA 561, 572 (1960).

3 Wirtz, "Due Process of Arbitration," in *The Arbitrator and the Parties,* Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators (Washington: BNA Incorporated, 1958), pp. 1-36.

ance, and a fair hearing. Also, we were more concerned for the moment with what arbitrators *were* doing than what they *should* be doing. To find out we devised a series of problems keyed to actual experiences one or more of us had had. We then divided these problems into several categories to facilitate the discussion.

Thereafter, we held a series of six seminars in Boston, Chicago, Detroit, Los Angeles, Philadelphia, and New York. Obviously not all of the able and qualified arbitrators in those cities could participate without having a group of unmanageable size. This problem was resolved by limiting the actual discussion groups to about a dozen members, and then summarizing our findings and asking the members of the National Academy of Arbitrators to express either agreement or disagreement.

In advance of each of the seminars those who were going to attend had received the mimeographed materials and had done some thinking about parallel cases of their own. Our conversations were directed at finding out how their cases were handled. Careful notes were kept and these, plus the later invaluable comments of Academy members, now constitute a gold mine of information. From all this we are preparing a book, the publication of which has been assured, and which we hope will be out in 1961.

In an effort to give some perspective, both as to the range of problems and reactions, the present paper deals with four areas. They are: (1) notice and appearance, (2) surprise, (3) confrontation, and (4) the agreed case. The dimensions of each will emerge in the course of the analysis.

Notice and Appearance

In the area of notice and appearance four model situations were set up to test arbitral reaction. The first, by sheer coincidence, proved to be the counterpart of the situation which the Wisconsin Supreme Court subsequently had before it in *Clark* v. *Hein-Werner Corp.*[4] X had been a production employee of the company for 15 years. He was then promoted to supervision. Later, during a recession, he was bumped back into the production ranks. The union took the position that X had lost all his senior-

[4] *Clark* v. *Hein-Werner Corp.*, 8 Wis. 24 264, 99 N.W. 2d 132, 45 LRRM 2137 (1959).

ity, while the company claimed that he retained at least what he had at the time he left the bargaining unit. When Y raised the question of relative seniority rights on lay-off the dispute was carried to arbitration. Although X's rights were being litigated, in the sense that his ultimate seniority status would be determined by the proceeding, the grievance was filed by Y, and X neither received notice of nor was present at the hearing. The question was what arbitrators did with cases of this kind.

On this question, the reaction of arbitrators was uniform. They were not disturbed by the absence of X, or the fact that he might not have received notice. They gave several reasons for this. The most important single reason was that they regarded the contract as basically one between the company and the union, subject only to the union's obligation to represent its members fairly. They were quick to point out that every seniority case pitted one union member against another, and that very often there were a series of other individuals who, at some step in the grievance procedure prior to arbitration, might very well have been adversely affected.[5] From this point of view there was no particular reason to single out X in terms of one's concern about notice and appearance, since A, B, and C might have been affected equally at an earlier stage. Finally, it was said that rarely would there be a likelihood that X, if present, could make any different argument than the company was already making for one in his position.

Because the reaction among arbitrators was so uniform, it is worth pausing to examine the Wisconsin Supreme Court's attitude toward an almost identical situation. In the *Hein-Werner* case the ex-supervisors sought to persuade the circuit court to vacate the arbitrator's award, not because of their absence from the arbitration proceeding or lack of notice of it, but because they claimed he had exceeded his jurisdiction. For reasons of its own, the circuit court ignored the petitioner's request, but enjoined the enforcement of the award on due process grounds, pointing out that petitioners had not been present nor had they received notice of the hearing before the arbitrator.

On appeal to the Supreme Court the respondent sought once

[5] Sayles and Strauss, "Conflicts Within the Local Union," 30 *Harv Bus. Rev.* 84 (Nov.-Dec. 1952).

again to have the award vacated on the original ground. Again the court ignored the basis of the plea and affirmed the ruling of the circuit court simply on the ground that "courts of equity traditionally have the power to grant relief in situations which offend the court's sense of justice and fair play." [6] Though the decision did not rest squarely on due process grounds, what was it that offended the court's sense of justice and fair play? The answer, said the court, was that:

> . . . where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation.[7]

It is doubtless fair to say that practically all the arbitrators who have considered the *Hein-Werner* decision believe that it is wrong. By "wrong" they mean primarily that it is an unrealistic view of the collective bargaining process. A wide range of grievance problems requires the union to favor one member over another. Not to do so is to expose the union to the charge that it is failing to act in a responsible fashion. The test, therefore, would seem to be not whether there may be a conflict of interest among union members on any given grievance, but rather whether in deciding which view to espouse the union has fulfilled its fiduciary duty of fair representation.

Nevertheless, it is on this very issue of fair representation that the court and the arbitrators parted company, for both say that they subscribe to the test of fair representation. However, the court believes that *as a matter of law* there can be no fair representation where the union espouses the cause of one group or one individual against another. In reaching this conclusion it relies on *Hansberry* v. *Lee*,[8] a decision of the United States Supreme Court which it describes as "the leading case on due process as applied to class representation," and the interpretation of that

[6] 99 N.W. 2d at 138.
[7] 99 N.W. 2d at 137.
[8] *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

case by Professor Lenhoff in an article which he wrote entitled, "The Effect of Labor Arbitration Clauses Upon the Individual." [9]

One wonders whether the *Lee* case necessarily requires the result which the Wisconsin court reached. After developing the law of class suits, the court says in the *Lee* case: "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are *in fact* (emphasis added) adequately represented by the parties who are present. . . ." [10] Since there was no contention in the *Hein-Werner* case that the absent ex-supervisors were not *in fact* adequately represented, and there was an affirmative allegation that their arguments could not have differed from those presented by the company, it would seem that they were bound within the terms of the *Lee* decision.

Despite the criticism which arbitrators have heaped on *Hein-Werner,* it has been a sobering experience to at least this arbitrator to find that his faculty colleagues, unversed in the labor field, are undisturbed by the court's decision. Does this suggest that it is the arbitrators who are out of step, and that if the court was not wholly right neither was it wholly wrong? Perhaps we exaggerate the difficulties which are involved in giving adequate notice to affected parties.

The second of our model situations involved a refusal by the union to take a grievance to arbitration. The individual grievants then hired a lawyer and sought to persuade the company to arbitrate despite the union's opposition. For understandable reasons, few such cases have come up, and there was little experience to draw upon. One arbitrator reported working under a transit contract in which individuals were permitted to take grievances to arbitration upon fulfilling a contractual requirement that the union be notified. However, this was because many of the claims were highly individualized and were of no interest to the union.

In another State Board case, in which the union was unwilling to take a discharge to arbitration, the woman in question sought to have her own lawyer bring an action. The Board took the position that the contract was between the union and the com-

[9] Lenhoff, "Arbitration and the Individual," 9 *Arb. J.* (n.s.) 3, 22 (1954).
[10] 311 U.S. at 42.

pany, but it persuaded the union to authorize the woman's lawyer to represent both the union and the woman, provided the woman paid the bill. With this kind of an arrangement the case then proceeded.

Professor Summers had pointed out that there are a number of cases in which unions have refused to process perfectly plain contractual claims of members.[11] Often such cases involve conflicts within the union such as favoring men over women, or discriminating against a defeated union officer. These disputes frequently end up in the courts with mixed results, and raise a very legitimate question of the adequacy of present methods for dealing with them. Nevertheless, by the very nature of the situation, such cases seldom reach an arbitrator.

Our third and fourth models involved variations of cases in which individuals sought to intervene in an arbitration proceeding. The third was specifically directed at the kind of case (admittedly rare) in which after the hearing has been held the individual contacts the arbitrator and says that he was not advised of the proceeding nor given a chance to appear and that his rights are being adversely affected. What, we asked, did arbitrators do about this kind of case?

The responses to this question were accompanied by a caveat. Unlike the typical seniority case, on which every arbitrator has ruled countless times, and which may involve and affect an absent member, few arbitrators had had actual experience with the situation in which, after the hearing, someone claims to have been prejudiced by a lack of notice or a chance to be heard. Therefore, the answers tended to be much more what the arbitrator thought he *would do,* rather than what he *had done.*

Insofar as there was actual experience with this kind of a case, arbitrators reported that they had quite uniformly advised the individual to get in touch with the immediate parties to the dispute (the company and the union). This view appeared to be consistent with the general position of arbitrators that the contract is between the company and the union. However, it was noteworthy that many arbitrators were uneasy about this result

11 Summers, *Individual Rights in Collective Agreements—A Preliminary Analysis,* in New York University Twelfth Annual Conference on Labor 63-88 (1959).

and suggested possible modifications. One would be to advise both parties of the individual's statement and ask for their comments before deciding whether it might be wise to reconvene the hearing and give the individual an opportunity to be heard.

Since the above model involved a situation in which an individual sought, *after* the hearing, to bring information before the arbitrator, it is interesting to compare it with the fourth model in which an individual seeks, in one manner or another, to intervene *at the hearing* against the wishes of the parties. Consistency would suggest that the individual would still be advised that the contract was between the company and the union and that his rights were dependent upon them. In theory this was, as a matter of fact, the view which most arbitrators took. But there was considerable evidence that they did not act in accordance with the theory.

Over and over arbitrators would say, after bowing in the direction of their theory, that they "worked something out" to take care of the issue. This required a further exploration of what "working something out" meant. Invariably it meant that the arbitrator did, in fact, persuade the parties to permit intervention in a way which was acceptable to all of them.

Examples were plentiful. In a discharge case the individual appeared at the hearing with his own attorney, claiming that he was on the outs with the union and would not be properly represented by it. The arbitrator took a recess while the individual's lawyer and the union lawyer worked out a joint representation scheme which was acceptable to both of them and to the company.

In another case the grievant was discharged for filing a false unemployment compensation claim. When the company insisted on having a court reporter at the hearing, the individual refused to proceed unless his personal lawyer, who was handling his defamation suit against the company, could be present. The union did not care to have the outside lawyer present. The arbitrator worked out with the parties an arrangement under which the outside lawyer remained in the hearing with the understanding that he could ask for an adjournment at any time to confer with the union representative who was presenting the case.

In still another case the arbitrator persuaded both parties to

permit the American Civil Liberties Union to appear on behalf of an individual, though there was no evidence that intervention was needed.

This is not to say that there were no cases in which arbitrators denied the right of an individual to special representation at the hearing. It is to say, however, that most arbitrators were much more inclined to try to find a mutually satisfactory solution to the problem than to deny the individual's right to intervene. In part this practice is probably due to a desire to avoid a court test of the validity of the proceeding. But there are also other reasons. Most experienced arbitrators are likewise experienced mediators and they have confidence in their ability to resolve disputes of this kind to the mutual satisfaction of the parties. Finally, there is among arbitrators a genuine concern both for the individual and for the image of the arbitration process as one in which every individual may have his day in court.

In New York the practice in intervention cases appears to be somewhat different than in the rest of the country. A test of the individual's right to intervene is reasonably accessible through the courts. Thus it is possible to adjourn the arbitration hearing pending a court test by the individual, and this is apparently often done. However, even in New York there appears to be a disposition to find a solution which will not involve a court appeal.

By way of summary, perhaps one could say the following with respect to the notice and appearance cases before arbitrators:

1. There is a clear difference in point of view between arbitrators and the Wisconsin Supreme Court as to the necessity of notice and appearance in those cases in which no contention is made that the union has failed to fairly represent its members. This, in turn, leads to two questions:

   a. Is there a real possibility that other courts will adopt the view of the Wisconsin court on this subject, and if so, do members of the arbitration fraternity have an obligation to mobilize against it?
   b. May it be that arbitrators and the parties have given less attention than they can and should to the question of notice and appearance? One arbitrator reports a case in which five individuals filed a grievance asking that their

seniority be restored following a strike. Since restoration of their seniority would affect other employees, the company notified all such employees. The union at first objected to any such employees being present at the hearing, but agreed on urging of the arbitrator. In fact no such employees appeared, though they did file a brief which was received. May it not have been better that the affected employees did receive notice? Need we necessarily conclude that notice will be so disruptive of the established bargaining process, even in those cases where there is no dispute as to fair representation on the part of the union, that it ought not to be given? Perhaps without agreeing with the result in *Hein-Werner,* more thought should be given to questions of notice and presence to see whether better practices can be developed.

2. Individuals normally may bring grievances to arbitration only with the consent and support of the union, except in rare cases where the contract specifically provides otherwise.[12] Arbitrators rather uniformly take the view that any effort on the part of the individual to persuade the union to process his case against its judgment is a matter for determination by the courts. A persuasive argument can be made that this is an inadequate solution. If it is, should the parties be considering efforts to accommodate the claim of the individual within the arbitration process? In this connection Clyde Summers has said:

> The most obvious . . . (suggestion) . . . is to permit the individual to obtain review of his claim before an arbitrator—a design new to us but long accepted in other democratic countries. In Sweden, for example, the principle of autonomy of labor union and employers' associations is even more deeply rooted than our own and the parties have even greater freedom of collective bargaining. For thirty years the Swedish law has provided that, if the union refuses to carry an individual's claim to the labor court, the statutory tribunal for arbitrating grievances, the individual could appeal the case in his own right. This individual right has been used, chaos has not developed, and the grievance procedure has not been disrupted.[13]

[12] *NLRB* v. *North American Aviation,* 136 F. 2d 898, 12 LRRM 806 (9th Cir., 1943).
[13] Summers, *supra* note 11, at 86.

3. There appears to be a discrepancy between arbitral theory and practice with respect to those cases in which an individual or group seeks to intervene in a hearing. In theory, arbitrators say that the contract is between the company and the union; therefore, intervention will be permitted only insofar as this is agreeable to the parties. In practice, arbitrators find a way to accommodate the diverse interests. One of the reasons they do this is to avoid a court test of the validity of the proceeding. It is reasonably well known among arbitrators that there are cases like *In re Iroquois Beverage Corp.* in which the courts have ordered intervention in the arbitration proceeding.[14] Arguably the parties would be wise to recognize the possibility of legitimate intervention and authorize the arbitrator to deal with it. Is this something to which further attention should be devoted?

The Surprise Cases

Our inquiries in the "surprise" area covered four basic types of situations. They were: (1) the case in which the nature of the grievance is changed at the arbitration hearing, e.g., the man who has been given a one-week layoff for reporting to work under the influence of alcohol is suddenly charged with insubordination, (2) the case in which new evidence is presented at the arbitration hearing (though it may have been available earlier), (3) the case in which a post-hearing brief contains an argument not previously advanced, and (4) the case in which the arbitrator advances his own theory as a basis of decision though neither of the parties has been given a chance to assess this theory.

Two conclusions emerged almost immediately with respect to all four models. One was that none of them raised any serious questions in the minds of arbitrators insofar as insuring a fair proceeding was concerned. The other was that each of the hypothetical situations involved serious policy questions.

The reason arbitrators did not feel that a question of the fairness of the proceeding was involved in the surprise cases, was that they uniformly felt that surprise by one party must always be compensated for by an opportunity for the other party to prepare an answer. In practice this meant that adjournments would be

[14] *In re Iroquois Beverage Corp.*, 159 NYS 2d 256, 28 LA 906 (1955).

granted, or other devices utilized to insure adequate preparation in response to the new situation.

The policy question is quite different. Many arbitrators feel that since surprise is, by hypothesis, something new to at least one of the parties to the bargaining relationship, it is a mistake to proceed with arbitration until it is clear that the parties cannot resolve the matter through negotiation. They argue that to do so will be to undermine the collective bargaining process. Others feel that the effect which such a procedure will have on collective bargaining is a matter for the parties, rather than the arbitrator, to decide.

To a certain extent this difference of opinion is related to the context in which the issue arises. There is a feeling that within the framework of a permanent umpireship the normal procedure is to refer the issue back to the parties for consideration of the new charge, or the new evidence. In the typical *ad hoc* case there is less responsibility upon the arbitrator for the collective bargaining relationship. Naturally, there are many individual variations of either point of view, some controlled by the terms of the contract. There is not space here to explore these differences.

The most interesting of the so-called "surprise" cases, insofar as the views of arbitrators are concerned, relates to new arguments advanced in the post-hearing briefs or the new theory used by the arbitrator in deciding the case. They can be considered together since arbitrators invariably associated the two in their replies.

The kind of case in which one of the parties advances a new argument is illustrated by the following situation. In an industrial plant making packaging products one department handled the necessary printing. Apprentices regularly worked with the journeymen so that a supply of trained men would be available if and when expanded operations became necessary. At the outset of the training program the apprentices worked along with the journeymen during their regular hours. Then the company decided that it would be more efficient to permit the apprentices to continue to operate the machines during the half-hour lunch periods of the regular operators, and to take their own lunch period after the operators were back on the job.

When this change was ordered, the union promptly grieved,

claiming in the alternative that the apprentices were entitled to journeymen's pay for the half-hour period, or that the journeymen were entitled to an additional half-hour's pay since they "owned" the machines to which the apprentices were assigned. The dispute went to arbitration. In its brief the union, for the first time, advanced an argument which, while related to its original contention, and based upon the evidence in the record, had not previously been made. It asserted that the journeymen were entitled to the extra half-hour's pay because they were held responsible for the work of the apprentices during the period in which the latter operated the machines independently. It was true that the mark of each journeyman appeared upon his work and that any defect could be traced to him, though such defect might, in fact, have been caused by the work of the apprentice.

What should the arbitrator do with the new argument in this type of case? Is it enough that a copy of the brief is in the hands of the company and that it may respond if it wants to? Should the arbitrator undertake the affirmative task of requesting the views of the company? Should the new argument simply be ignored, though it may appear to be determinative of the result?

Because questions like the above have troubled them, some arbitrators have adopted procedures designed to protect them from such a dilemma. One arbitrator indicates that he asks the parties at the conclusion of the hearing to state the grounds on which they will rely in their briefs so that there can be no surprise. Another even goes so far as to suggest to the parties that they indicate at the hearing reported cases on which they will rely so that the other party may respond in its brief.

There is little uniformity in the answers which arbitrators give as to how they handle cases of this kind. As an abstract proposition some arbitrators take the view that there is nothing wrong with a new argument advanced in a brief so long as the other party receives a copy. Other arbitrators feel that whenever a substantial new argument is set forth in the brief, comment from the other side should be solicited. In either case, the point is soon made that without consultation with the parties arbitrators frequently rely on unargued contractual clauses or new theories of their own for purposes of a decision. How can these situations be distinguished?

When the question arises as to the use by arbitrators of a new and unargued theory of decision, arbitrators rival the most conservative of managements in their defense of the prerogative. And for once they are able to turn to the courts as an example of the propriety of this procedure. This may show more recognition of what the courts do than what legal scholars think they should do, for a furious controversy has raged down through the years as to whether courts should go beyond the arguments presented by the parties. In his materials on jurisprudence, Professor Fuller makes this comment:

> The moral force of a judgment of decision will be at a maximum when the following conditions are satisfied: (1) The judge does not act on his own initiative, but on the application of one or both of the disputants; (2) the judge has no direct or indirect interest (even emotional) in the outcome of the case; (3) *the judge confines his decision to the controversy before him and attempts no regulation of the parties' relations going beyond that controversy;* (4) the case presented to the judge involves an existing controversy, and not merely the prospect of some future disagreement; (5) *the judge decides the case solely on the basis of the evidence and arguments presented to him by the parties;* (6) each disputant is given ample opportunity to present his case. (Emphasis added).[15]

There are some other differences between the role of the judge and the arbitrator which may also bear on their respective justifications in using theories of their own in deciding cases. The judge is a public official, while the arbitrator is a private umpire. The judge is frankly bound by precedent while the arbitrator says he is not. A decision of a judge is appealable (and a rehearing is possible even in a court of last resort), while the award of the arbitrator is final.

That the parties frequently resent a decision based upon the arbitrator's theory of the case is a familiar fact of life to most arbitrators. The following friendly but tart post-decision letter from a company is probably fairly typical of the views of the parties on such an occasion:

> We do not expect to receive an award on a position or argument we have not made; nor do we anticipate that the arbitrator will slide around the table and make the Union representatives' case

[15] Fuller, *The Problems of Jurisprudence* 706 (Temp. Ed. 1949).

> for them. We do believe the case decided by the arbitrator should be the same case argued by the parties at the final local level prior to arbitration—and not a new one conceived by him.[16]

Despite the criticism to which they have been exposed, arbitrators quite generally defend the practice of making decisions upon whatever bases appeal to them as sound and within their authority. Would it be better if they were to forego this pleasure? Should it depend on the type of case and the experience of the parties? Does the answer depend upon one's theory of the nature of the arbitration process? Significantly, these are questions of policy rather than of fair procedure. Cases will arise in which the element of surprise is so great as to raise a question of fair procedure, but these cases are likely to be infrequent.

The Confrontation Cases

There are several types of arbitration cases in which one or both parties wish to offer evidence originating with persons who will not be witnesses and will therefore not be subject to confrontation and cross examination. Such cases always leave arbitrators uneasy lest the decision be prejudiced by unreliable evidence. Yet arbitrators know that there are strong practical reasons why confrontation and cross examination may not be feasible. Three familiar factual situations will illustrate the point:

1. X, who is a customer of a supermarket, reports to the company that one of its checkers repeatedly overcharges him. Or, X, who is a customer of the local power company, complains that one of its servicemen made improper advances to her in the course of a business call. In neither case is X willing to appear at the hearing and testify against the employee. Even if the subpoena power is available (and in most states it would not be) the company is reluctant to call X for reasons of customer relations. The suggestion may therefore be made that the arbitrator talk privately with X and that this evidence be used in making a decision as to the appropriateness of the disciplinary penalty given the employee.
2. X employee is discharged for slugging a foreman. X insists that he was provoked by profane and abusive language from the foreman. This the latter denies. There is one employee who witnessed the fracas, but he is a fellow union member with X.

[16] Letter from Company Vice President to R. W. Fleming, February 1, 1960.

The company is reluctant to call one employee against another, but suggests that the arbitrator talk privately with said employee and use the information so gained in making his decision.

3. The transit industry, being unable in any other way to check the honesty of its drivers or operators, hires "spotters" to ride the buses and watch the way in which the drivers handle receipts. A driver is then discharged for dishonesty and the company wishes to introduce in the arbitration hearing the anonymous report of its hired spotter without either producing or identifying him. It points out that to identify him or subject him to cross examination would ruin his future usefulness.

Courts have, of course, had similar problems. They have tended to look upon the confrontation issue as divided into two parts, one having to do with cross examination, and the other with the actual opportunity to scrutinize the witness while testifying in order to get some feel for the truth or falsity of his testimony. And while the federal constitution, and that of practically all the states, gives constitutional status to the confrontation requirement only in criminal cases, the fundamental fairness of the rule has become so ingrained in our culture that it has a considerable carry-over into the civil area. As Wigmore has said:

> Even for the various administrative boards created by modern statutes it is common to provide (where any interest of a citizen may be affected adversely by the board's ruling) that an opportunity to hear the evidence shall be given. In short, however radically the jury-trial rules of Evidence may be dispensed with, this one at least remains as a fundamental of fair and intelligent investigation of disputed facts.[17]

There is an interesting analogy between the "spotter" cases which appear in labor arbitration, and government discharges for security reasons. In each case the employer has argued that it must be free to dismiss employees on receipt of derogatory information without giving the employee an opportunity to confront or cross-examine his accuser. The rationale is different, in that the government is acting to protect its very structure from being undermined, and it has long had the right to dismiss employees at will. But a private employer will insist that it too must employ unidentified informants in order to protect itself from dishonesty and incompetence even though its power to dismiss may be conditioned on a showing of just cause.

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[17] 5 Wigmore, *Evidence* 144 (3rd ed. 1940).

Counsel for government employees who have lost their jobs under security rulings have long argued that such employees were deprived of due process of law in that the right of confrontation and cross examination is fundamental in our society. In the only case which has squarely met the point, the Supreme Court split four to four, thereby allowing the opinion of the United States Court of Appeals for the District of Columbia, which denied that due process had been violated, to stand. In that case the Court of Appeals said:

> In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would process be? To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right.[18]

Since an employee in private employment under a collective bargaining agreement may hold his employment subject only to the company's right to discharge him for just cause, he is not, like his governmental counterpart, subject to dismissal at will. In any event, there is a recent case in which the Supreme Court reversed an administrative decision which had resulted in a denial of clearance to an executive in a company doing business with the Navy, on the ground that neither Congress nor the President had authorized the procedures whereby the security clearance had been denied. At one point in the opinion the Court observed:

> The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interferences comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . .[19]

The use of the above language caused Mr. Justice Clark to write a biting dissent in which he said:

> While the Court disclaims deciding this constitutional issue (due process), no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy.[20]

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[18] *Bailey* v. *Richardson,* 182 F2d 46, 58 (1950), a'ffd. per curiam 341 U.S. 918 (1951).

[19] *Greene* v. *McElroy,* 360 U.S. 474, 492 (1959).

[20] *Id.* at 524.

Any serious contention that an employee whose discharge was sustained in an arbitration had been deprived of constitutional due process would necessitate a showing that this somehow involved state or federal action, and whether this could be done would be questionable.[21] For the purpose of the present paper this is not the reason for suggesting the analogy between the court and arbitration cases. Rather, it is to point out that the underlying problem of unfairness has troubled both courts and arbitrators.

Inquiry among arbitrators as to how they handle cases of this kind brings to light some ingenious compromises which appear to have satisfied the parties. A grocery chain and the union involved have authorized the umpire to receive identified customer complaints in the absence of the witness provided the union is then given an opportunity to check privately with the customer with the understanding that if any discrepancies appear the arbitrator will insist on calling the customer to the stand (the subpoena power being there available).

In a spotter case the arbitrator agreed to proceed only after an arrangement was made to produce the informant and place him behind a screen where he would be visible only to the arbitrator and counsel for the respective parties. The informant was permitted to remain anonymous and his address was not revealed.

In other cases arbitrators have agreed, on the urging of the parties, to interview absent witnesses privately, but only if they could then report back to the parties the information which was so received. But if there have been cases in which some device has been found which seemed fair to all concerned, there have been many other cases in which the arbitrator was left with no choice but to receive or deny the evidence. Some arbitrators have flatly refused to accept such evidence, and others have said that, "The system may be odious, but there is no practical alternative." [22]

One could perhaps summarize the views of arbitrators on these questions as follows:

1. More arbitrators than not believe it is appropriate to conduct private investigations so long as this is authorized by both

[21] *Cf.* n. 2, *Clark* v. *Hein-Werner Corp.,* 99 N.W. 2d 132, 137, 45 LRRM 2137, 2139 (1959).

[22] *Los Angeles Transit Lines,* 25 LA 740, 741 (1955).

parties. Not all of the arbitrators who accept such an assignment believe that it is necessary to report one's findings back to the parties.

2. Practically all arbitrators will accept almost any kind of hearsay in lieu of calling one employee to testify against another. They explain this is part of the theory that if what is reported via hearsay is false the opposing side may volunteer the testimony of the employee who was the primary witness and who has not been called. One arbitrator reports that he goes so far as to *refuse* to permit one employee to testify against another, but that he compensates for this by permitting very wide latitude for hearsay witnesses to state what the employee would have said.

3. Arbitrators hold no uniform view of how to handle the spotter cases. Some labor contracts, like the one in 1953 between the Philadelphia Transportation Company and the Transport Workers Union of America, Local 234, provide:

> In case any testimony by a secret investigator of the Company is offered it shall be given only before the Chairman with no one else present and such witness shall be referred to only by number so that his identity shall not be disclosed.

Presumably such an agreement as the one set forth above, or indeed a private investigation authorized by the parties, is perfectly legal even before the courts, since it has long been held that the opportunity for cross examination can be waived.[23] However, Wigmore, in examining legal and policy reasons why certain judicial proceedings, e.g. juvenile hearings, are held in private, concludes that "no court of justice can afford habitually to conduct its proceedings strictly in private." [24] He contends that the public nature of the hearings contributes to the truthworthiness of the testimony received.

There is simply no way of eliminating the question of elemental fairness from those cases in which testimony is received from witnesses who are not available for cross examination and confrontation. In the last analysis a decision has to be made as to whether the "practicalities" of the situation outweigh the chance of error from such a procedure. This decision will, in turn, be affected by the image which the arbitrator holds of the arbitra-

[23] McCormick, *Evidence* 482 (1954).
[24] 6 Wigmore, *Evidence* 343 (3rd ed. 1940).

tion process. Some believe that to remain viable it must be flexible and uninhibited by rules which have bound the courts, but which do not meet the needs of the marketplace. Others believe that at least in the customer-complaint and spotter cases a more palatable compromise can be found than simply accepting at face value the judgment that there is no alternative.

The Agreed Case

There are situations in which an arbitrator is made aware before, during, or after a hearing, but prior to a decision, that the company and the union are in agreement on the outcome of the case. Such a case wears many different cloaks. In industries which frequently resort to arbitration for the purpose of settling wage demands under the new contract, the result may represent an agreement which one or both of the parties feel unable to announce except through a third party. In the permanent umpire situation it may represent what is considered a statesmanlike and constructive hint to the beleaguered umpire as to the proper outcome of a tough case. It may come in a perfectly candid and frank approach by company and labor representatives long known to the arbitrator as men of integrity. It may come as a broad hint during the hearing, a side-remark during a recess, or via the grapevine once the hearing is concluded. It may come from people of unimpeachable integrity to an arbitrator who is, naturally, likewise of unimpeachable integrity. Or it may come from less reliable parties. Good or bad, moral or immoral, there is one common denominator about all such cases, and that is that someone who will be affected by the result does not know that the arbitrator has been made aware of the result which the immediate parties to the contract have agreed upon.

Asking an arbitrator how he handles an agreed case is a little like asking him whether he has ceased beating his wife, since the very question suggests that there is something unsavory about the matter. It is a tribute to the arbitration profession that in making his answer no one felt compelled to defend his integrity. One must, argued most arbitrators, divide such cases into at least two broad categories: (1) wages, and (2) contractual grievances.

With respect to wage cases a large number of arbitrators feel

that a perfectly sound argument can be made for taking such cases without being uneasy about it. They note three reasons for this. First of all, the award can quite legitimately fall within a given range, just as it would if the parties were bargaining. Secondly, wage arbitrations in this country tend to be in marginal industries which are hard pressed financially, and which can be kept going only by a high degree of statesmanship between the parties. Finally, wage boards are almost invariably tripartite in nature, so that the arbitrator is by definition not an independent authority. Within this context many arbitrators argue that whole industries have often been saved for an area by an agreed arbitration award which could not have been sold to the membership, but which the leadership knew was all that was feasible. Moreover, every arbitrator pointed out that his acceptance of such a role was always contingent upon a reservation of judgment as to whether the evidence supported the finding that had been agreed upon.

Within the wage category, perhaps a majority of the arbitrators questioned felt that it was entirely appropriate to take such a case, provided only that one reserved a right to dissent if the evidence did not support the result. There was much more ambivalence with respect to the grievance cases. Some arbitrators felt very strongly that there was no honorable role that an arbitrator could play in an agreed grievance case. Others felt the practice could be condoned if the arbitrator made it clear in advance that he would not be bound by the result if he could not independently subscribe to it. To this the critics responded that it was unrealistic to suppose that parties who had reached an agreed result would put in the record of the arbitration hearing material which would conflict with the desired end. Some arbitrators thought that the grievance case was different in an umpire context than in an *ad hoc* case, principally on the ground that the umpire had come to know the parties in the umpire situation and to trust their integrity. At this point a still, small voice rose to inquire whether integrity was necessarily to be equated with umpire systems.

Perhaps it should be said, before going further with an analysis of the agreed case, that it does not represent a significant percentage of the total of arbitration cases. There were areas of the

country in which arbitrators reported they had never had any experience with such cases. In a substantial portion of the grievance cases the arbitrator did not know of an agreed result at the time he took the case, and became aware of it only through innuendo in the course of the proceeding.

Much of the ambivalence which arbitrators reflect with respect to the agreed case might be resolved if there were accepted theories as to the nature of a collective bargaining contract and the arbitration process. The immediate parties to the contract, the company and the union, are in agreement on a desired result whenever the agreed case arises. Individuals who may be affected are not privy to this understanding, nor do they know of it. And because both arbitrators and the courts have had difficulty in articulating an acceptable theory of contract which encompasses the interests of the company, the union, and the individual members of the union, they are at sea in cases of this kind.

Much the same thing must be said with respect to a theory of the arbitration process. Some view it as an extension of collective bargaining, in which case it is an act of statesmanship for the arbitrator to help the company and the union arrive at a mutually satisfactory solution. Others believe it is more nearly a judicial proceeding, in which case the rules of due process familiar to the courts apply. Doubtless this distinction can be overdone. As a matter of fact, a refreshing note in one of our seminars came when one arbitrator reported that when he was approached to handle an agreed case he declined to do so, but referred the parties to a municipal judge who promptly took it! There are a host of court matters in which the judge accepts the advice of counsel for the two sides as to an acceptable solution, though this fact is not always known to the clients of the respective counsel. Divorce suits, juvenile proceedings, mental health cases, and other examples could be cited.

Arbitrators justify the agreed case, insofar as they do, by clothing it with integrity. In other words, though the company and the union have reached an agreed result and this is known to the arbitrator, the proceeding is nonetheless honorable and fair because the arbitrator has insisted upon reserving his right to an independent judgment and requiring that the evidence support the result. If this basic premise is accepted it becomes much

harder to label the proceeding unfair, for one must then assume that an objective analysis of the facts will support the agreed result, and that any complaint arises solely out of the fact that some individual was not fully informed, though this could not have changed the result.

Much remains to be said on the subject of the agreed case, and at a later date we hope to say it. For the moment perhaps it is enough to say that if talking with arbitrators about these cases is any criterion of what the future holds, it is likely that they will continue to experiment in this area. Invariably the right to an independent judgment will be reserved, though there is no tendency to discount the limits within which this operates. A certain amount of succor will be drawn from the cases in which to help the parties to do the necessary thing will constitute an act of industrial statesmanship. Meanwhile, perhaps we should ask whether due process thinking applies at all to this particular problem. Arbitration is still in its swaddling clothes, and experimentation is highly desirable.

Conclusion

If one takes as a starting point an interest in labor arbitration cases which will raise problems of notice, appearance, and a fair hearing, the areas which have been examined in this paper give some idea of the range of the total spectrum. Moreover, they tend to emphasize two conclusions which emerge with ever increasing clarity.

The first is that labor law still lacks an agreed and coherent theory of the nature of the collective bargaining agreement. Thus the cases which have been described as involving notice and appearance are not cases in which there has been any deficiency in the notice or opportunity to appear on the part of either the company or the union. Rather the question is whether certain individuals are entitled to notice and to an opportunity to appear separately and apart from their chosen representative. And this comes back to the question of the nature of the collective bargaining agreement.

The second clear conclusion is that there is wide disagreement among arbitrators as to the nature of the arbitration process.

How one views an agreed case, for instance may depend largely upon how one views the arbitration process. If he thinks of it as an extension of collective bargaining, the agreed case becomes largely a question of his basis for relying on the integrity of the parties to do what they mutually feel is best for the total enterprise. If, on the contrary, he views it as a judicial process, he finds it much harder to accept an agreed result which will be binding on certain persons who do not know of it, no matter if that agreement appears completely fair to an objective observer.

An interesting aspect of the surprise cases turns out to be that the finger which was originally pointed at the parties for practices in which they sometimes indulge ends up squarely directed at the arbitrator for his practice of evolving his own theory of decision—though his rationale may not have been argued by the parties and may be suspect by them.

Confrontation cases evoke constitutional considerations with a civil liberties flavor. Perhaps this is why they leave even those arbitrators who readily accept the "extension of collective bargaining" theory of the arbitration process a little uneasy with the end result.

Finally, one cannot fail to be impressed with the willingness of arbitrators to experiment, and to abandon their theories in favor of practices which will tend to accommodate the diverse interests which are involved. This, plus the fact that arbitrators have been concerned with due process problems at all, augurs well for a future in which arbitration will suffer neither from the imposition of excessive legalisms which are without substantive meaning in the new context, nor from a failure to observe the rules of fairness which have come to appeal to those steeped in the Anglo-American tradition.

Discussion—

DAVID ZISKIND *

As Mr. Wirtz has indicated, the Fleming report is significant in revealing a profound self-confidence among arbitrators. Regardless of the problems posed and regardless of differences in proce-

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dure, every arbitrator was confident he had found a way to hold a fair hearing. Self-confidence is a noble trait; but the diverse practices may call for some explanation.

I believe it is inevitable that different procedures will be followed in any group of arbitration cases. That flows from real differences in the facts, even in seemingly similar situations, and from differences in the temperaments, philosophies, attitudes and training of arbitrators.

I doubt further that it is possible to add "yes" and "no" responses to such questions as, "Have you ever allowed a worker, who claimed his seniority would be affected by your award, to intervene in an arbitration proceeding?" or, "Have you ever accepted an agreed position, privately proposed by both employer and union representatives?" The "yes" and "no" answers must be explained with relation to specific circumstances to be made comparable or addable. Mr. Fleming and his associates may have elicited such clarification in their study; but the written report does not so indicate. In any event, to draw conclusions as to whether the arbitrators did follow due process, it seems necessary to have more knowledge of the situations they dealt with than appears in the report.

The diversity of practices among arbitrators points up the need for a critical review of what constitutes due process or fair hearing. If we were like the witches in Macbeth that would be very simple. We could say as they did, "What is fair is foul and what is foul is fair," and proceed with our pot-boiling. But we are not perverse and malignant spirits. Most arbitrators are endowed with sweet reasonableness. Perhaps some have a touch of the Godly. All have an irresistible impulse to separate the fair from the foul.

That is difficult but possible. At least certain aspects of the task are feasible. If we recognize that we lack omniscience and prescience, we shall not attempt to catalogue all factual situations, nor shall we seek to classify all possible procedural rulings. We shall not speak categorically on cases reported with scant facts. We can, however, study arbitration practices intensively, and we can set forth guides and correctives that will give arbitrators reasonable assurance of abiding by due process and fair hearing.

As a beginning, we must acknowledge principles of due process to which all arbitrators must be committed. We can agree rather readily upon some such principles. Each of the four situations dealt with in the Fleming paper refers to a commonly accepted standard of due process. The cases of notice and appearance acknowledge at least two standards: (1) Due process requires notice of any proceeding that may affect one's interests adversely; (2) due process requires an opportunity to defend one's interests.

The cases of surprise acknowledge another standard. Due process requires a statement of adverse claims in order that there be an opportunity to know what defense is necessary. The cases of confrontation refer to another standard. Due process requires an opportunity to hear and cross examine adverse witnesses. The cases of agreed awards acknowledge that due process requires an impartial and unbiased decision and an award based on all the evidence.

These are basic notions of due process which we promptly recognize as implicit in the cases studied. We might phrase them differently. We might add to those I have mentioned. My only point is that arbitrators must commit themselves to such due process principles as an inviolable code of practice.

In the words of U. S. Supreme Court Justices, the rules of due process are "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." [1] They are "immutable principles of justice which inhere in the very idea of free government." [2] They are rules of "ultimate decency in a civilized society," and to violate them is "repugnant to the conscience of mankind." [3] To fail to observe them is offensive to "man's sense of the decencies and proprieties of civilized life." [4] These are effusive words, lacking in specificity; but they are deliberately so. The U. S. Supreme Court regards due process as indispensable to our way of life, and we as arbitrators may not expect to substitute our own sense of justice for it; rather we must acquire so deep a conviction and commitment concerning its

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[1] Justice Fuller, *In re Kemmler,* 136 U.S. 436, 438.
[2] Justice Brown, *Holden* v. *Hardy,* 169 U.S. 366, 389.
[3] Justice Frankfurter, *Wolf* v. *Colo.,* 338 U.S. 25, 28.
[4] Justice Roberts, *Snyder* v. *Mass.,* 291 U.S. 97, 127.

preservation that if urged to abandon due process, we would feel personally abused.

Each of the four situations studied in the Fleming report suggests that some arbitrators may not have been imbued with that spirit. The study seeks to learn whether members of the Academy have departed from due process norms or have adopted special rules of their own. No one has confessed to an abandonment of due process, but the differences in reported actions indicate that further consideration should be given the subject. I submit that arbitrators are fundamentally and primarily bound to observe the customary rules of due process, and if we depart from any commonly accepted role of due process, no matter how slightly, we must justify our apparent deviation.

It is at times possible to justify a variant from a sound general rule. Rules are broad and variants do not necessarily violate their spirit. The important starting point, I believe, is a dedication to due process that requires a justification for every special procedure.

I suggest that an arbitrator may be able to justify a special procedure only by demonstrating that it enhances his ability to accomplish an acknowledged objective of arbitration. Those objectives may be stated as (a) a dispassionate evaluation of evidence and the ascertainment of ultimate facts, and (b) the reconciliation of conflicting claims or the satisfaction of deserving human interests.

The burden is on the arbitrator who departs from a commonly accepted procedure to demonstrate that the special procedure more readily assures the attainment of one of those objectives. In my opinion, he cannot do so merely by asserting that his award was just, regardless of his procedure. The end cannot justify his means. That road is certain to lead arbitrators—as traditionally it has misled judges, politicians and laymen—to pitfalls from which no amount of rationalization can extricate them.

I realize that my comments suffer from generalization. But I have tried to offer guide lines to take us through what Judge Hastie has called "the shadowland of judgment where the objectionable merges into the intolerable."[5] We must ever be mind-

[5] Sutherland, et al, *Government Under Law* 341 (1956).

ful that deviation from the general rules of due process may drift from the questionable to the objectionable and from the objectionable to the intolerable.

Despite the confidence of arbitrators in their own ability to do justice, it may be well to bear in mind that in the last analysis, the courts rather than arbitrators may decide what is due process. Some state statutes subject arbitration procedures to court review on any charge of unfair hearing. And the common law may require due process even in the absence of a statute. The Academy may be called upon to take a policy position favoring or discouraging the determination of due process in arbitration by our courts. Let us not be carried away by our self-confidence.

Courts have had valuable experience in the clarification and application of due process. Arbitrators may find it easier to follow judicial precept and example than to attempt to fashion their own rules. The enormity of the task of designing special rules of due process for arbitration hearings may be gathered from a description of the judicial process by Justice Cardozo. He observed that judges dealing with due process are required to exercise "discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to 'the primordial necessity of order in the social life.' "[6] Arbitrators are required to act similarly within their area of specialization.

If you found the quotation from Cardozo too erudite to swallow in one bite, you might be comforted by an incisive retort attributed to Justice Holmes. He is alleged to have said of such a statement, "If you strip away its lion's skin of legal language, you are confronted with the same jackass of a problem you had before." I hesitate to suggest that arbitrators have a greater affinity to jackass problems than judges. The fact that judges have dealt with problems of due process for years in connection with various judicial and quasi-judicial procedures, gives them a basis for judgment that commands respect. The rules laid down by courts, particularly in defining a fair hearing by an administrative agency, are germane to arbitration, and should be accepted by arbitrators.

This is not an affirmation of the infallibility of judges. We

[6] Cardozo, *The Nature of the Judicial Process* 141 (1921).

may even be tempted to share the skepticism of Judge Learned Hand who said that the problems of due process "demand the appraisal and balancing of human values which there are no scales to weigh." [7] But I prefer to think that judges and, through the principles established by court decisions, arbitrators can improvise such scales. The Fleming report has gathered raw data to be weighed and it has recorded the weights assigned to the data by arbitrators. I have attempted merely to suggest that in completing the study, Messrs. Fleming, Wirtz and Aaron may give further thought to laying down guide lines for weighing the fairness of a hearing or the due of a process.

Discussion—

IRVIN SOBEL *

One is hard put to find any substantial areas of disagreement with the paper written by Bob Fleming which, in essence, summarizes the "conventional" wisdom of the profession about a subject that has always occupied a central core of concern to arbitrators. The feeling is also inescapable that the problem will continue to be a significant one for the arbitrator, and he will undoubtedly in future meetings still second-guess himself, his own methods, and the "conventional wisdom" of the profession, in order to ascertain whether that nebulous will-of-the-wisp, "due process," is being approached.

Willard Wirtz, in his masterful 1958 presentation, defined "due process" not as a particular set of legal, evidentiary, or constitutional rules and regulations but more broadly as being the exercise of authority with a "due" regard for the balancing of the two types of interests, individual and group, involved not only in arbitration but in the broader societal arena as well.[1] While most arbitrators would agree with this definition, there are apparently deep-rooted theoretical and philosophical differences among arbitrators as to how these two interests are to be reconciled, and too, whether the protection of the individual's interest is exclusively up to the parties or whether the arbitrator has the obligation to

[7] Hand. *The Spirit of Liberty* 180 (1953).

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[1] Wirtz, "Due Process of Arbitration," *The Arbitrator and the Parties* (Washington: BNA Incorporated, 1958), p. 1.

go beyond the parties to protect individual rights. These differences involve distinctions in our evaluations of institutional as opposed to individual imperatives, the ultimate perceptions of our obligations to the collective bargaining process and the relations between the parties, and whether the arbitrator regards himself more as a servant of the entire process, of which arbitration is a part, rather than of the institutional parties and the ways they have chosen to play the game.

While on the theoretical and philosophical level, at least in our verbalizations, we may differ substantially, the actual variance between us in practice and in our day to day handling of problems is less distinct. Like all people we tend to polarize issues of principle while our practices tend to avoid this dichotomization. The discussion reveals a great deal more similarity than is apparent at the ideological level, for when confronted with a real situation whether institutionally or individually oriented, the great majority of arbitrators attempted to maximize, even by the use of ingenious expedients, those procedures which would insure that all individuals, even remotely and most tangentially concerned with the issue, were heard.

The ingenuity of the expedients was apparently most pronounced in order to assure that some form of confrontation and cross examination of secret witnesses prevailed. When the arbitrator suspected that institutional and individual needs were in conflict, an attempt was made to insure the individual his "due," or his day in court, even against the wishes of the institutions which the arbitrator ostensibly served. These basic similarities reveal that arbitration is still largely a process of playing by ear on a case to case basis, and that undoubtedly the arbitrator congenitally is more inclined to be a "civil libertarian" than the average member of the populace.

However, quite beyond our concern with techniques and procedure, there should be a great deal of continuous soul-searching about the broader implications of the results stemming from our efforts. One can argue for the maximum of involvement by the individuals affected by arbitration on the same grounds of "Industrial Democracy" we employ to justify collective bargaining to our classes, namely, the right of the individual to participate and

be represented in any decision which might affect his working life. If arbitration is an integral part of the bargaining process itself, then this same principle of participation might be extended, even when we suspect the individual might contribute nothing but redundancy, increasing complication, and verbiage to the proceedings.

Intervention especially against the wishes of one or more of the parties is always a vexing problem because an outsider, the arbitrator, becomes involved in the internal policy of the groups concerned. In addition, what frequently and quite rightfully ensues is the implication that the grievant's interests are not being protected by the way the parties are using or manipulating the grievance procedure itself.

The arbitrator is frequently caught in the middle, and the fact that something can be worked out generally is indicative of situations where the institutional parties had no reason to fear outside intervention. Should the arbitrator attempt to dissuade the individual concerned from employment of outside intervention, where it is certain that the individual's fears are baseless, and he has been adequately represented in the bargaining process? Either to insist on intervention as a general rule, or to allow it in all situations when it has been requested might create hazards which I feel would be sometimes disruptive to rational decision-making and intelligent handling of grievances.

The denials of due process in intervention situations are conceivably less a matter of the inadequacy of arbitration procedures than the failure of the bargaining process and grievance settlements to afford basic protections. Unions and managements may trade off certain grievances which may adversely affect an individual member, the union may not adequately process a legitimate grievance of one of its "outs," and it might permit and collude in the discharge of a so-called "troublemaker." These and many basic abridgements of "due process" unfortunately do not reach the arbitration stage.

Small unions or financially weak firms may be "arbitrated to death" and thus legitimate interests of individual workers or managers may be bargained away because of lack of funds to process cases. That this is happening, frequently by design of the

financially stronger party, is evident from many sources in our profession. Where permanent umpireships exist, there is some entity to whom appeals for intervention can be addressed; in the *ad hoc* situation the individual's interests, when the grievance procedure has not protected his rights, are almost impossible to protect. But this problem is actually one of denial of due process in the bargaining procedure itself. Nevertheless, from time to time one hears of practices in arbitration proceedings which are subversive of individual rights and which are not excused by the fact that worse abridgements prevail at other stages.

One type of arbitration case which can be loosely defined as one involving new information is the situation where one or the other of the parties (actually the representatives thereof) finds that the real facts governing the issue being decided were not in his possession. For instance, the company representative's case may be based on information supplied via the foremen, superintendents, and production managers, to the industrial relations man who may have neither the authority nor the opportunity to ferret out the facts in the case. In fact both unions' and managements' upward communication channels are highly imperfect in that there tends to be a selective filtering-out process of everything that may be adverse to the participants at given levels. In such situations, the knowledge upon which either the Industrial Relations Manager or the higher-level union official, will base his conduct through the grievance procedure will be highly imperfect.

What should the arbitrator do when the facts, which may constitute surprise or "new information" to one of the participants, are revealed? If he suspects that had the facts as revealed been known to the parties, they either would have or could have settled the case at some lower stage of the grievance procedure, he could recess the case, anticipating a settlement by the parties. In the great majority of such situations this is unnecessary, since the party which finds its information to be erroneous and its case nonexistent generally requests a recess and settles.

Arbitrators do, and I feel justifiably, sometimes make decisions based on arguments, issues, and contractual provisions not raised by the parties, but the great bulk of decisions generally do not involve such innovations. The more general case is that in which

certain arguments and issues which have been only incidentally or tangentially raised by the parties, come to be considered crucial by the arbitrator.

A related issue involving due process is that situation in which due to ineptitude, lack of preparation, or agreement, a weak case is presented, and facts which could conceivably (and the arbitrator suspects they would) cast the situation in a different light, are not brought out. This is especially a problem in discharge cases, where the loss of job, and the concomitant loss of property rights and equities in it which may be worth thousands of dollars, may constitute industrial "capital punishment" for the worker over 40. Should the arbitrator, to protect "due process," ask questions which might involve the danger of his independently making a case, or should he remain silent and neutral. Are silence and neutrality always protective of due process?

The agreed-on and confrontation cases frequently involve putting the "best face" upon essentially vexing situations in which one is frequently damned either way.

In the confrontation cases, one could argue for that treatment which allows for the greatest possible checking of the witness and cross examination and unless there are extraordinary circumstances (such as the young lady exposed to sexual indignities, who might be reluctant to relive the events before large numbers of people) one should argue for confrontation as the basic rule.

The arbitrator is especially hard pressed to deal with the "agreed-on" cases where all the evidence presented justifies the particular decision leaked to the arbitrator. In this case, unfortunately, the bodies are buried before they reach the arbitrator, especially the *ad hoc* one, and no amount of procedural vigilance can solve this problem. When the evidence does not justify the "leaked" decision (and it is hard to conceive of that situation) the arbitrator might take his professional life in his hands and rule contrary to the agreement. He could indicate his displeasure to the parties especially when the decision is revealed to him during or after a hearing. The arbitrator can especially indicate his displeasure when he is told that he can have the case only if he will deliver the agreed decision. I feel that acceptance of an agreed-on case is an especially unethical practice in discipline

cases. In wage decisions in marginal industries, there may be some basis for acceptance of an "agreed" decision.

Although here and there arbitrators may deny procedural "due process," arbitrators usually err on the side of the angels. All too frequently, especially in *ad hoc* situations, anyone with the remotest connection with a given case, testifies or is at the proceedings. Three union officials stipulate the same fact or give the same argument, five witnesses either corroborate the same story down to the minutest detail or try to air all their complaints whether relevant or not, and what is true of the union is true of the management group as well. The parties seem to have some quantitative conception of the meaning of either "weight of evidence" or burden of proof. The fictional prototype of the strong, silent, laconic, inarticulate American worker or foreman who economizes his words is infrequently encountered. The arbitration process is seen by the parties as providing additional status, ceremonies, and a unifying influence. If anything, arbitrators tend to lean over backward to avoid denial of due process, and all too frequently wind up with a large proportion of time consumed by superfluous trivia not germane to the issues involved.

While this paper is restricted to "due process" as related to arbitration procedures, let me again indicate that the worst denials of "due process" take place at other points in the collective bargaining process. Such situations as trading of legitimate grievances by the parties, arbitration to death, poor preparation, failure to represent dissident groups or so-called troublemakers, inadequate representation of minority groups, and interminable delays and postponements which may mean that the case is heard a year or more after the events and all positions and recollections are frozen, amount to a denial of individual rights which the arbitrator cannot resolve through procedural reform.

However, this caveat should not be interpreted to mean that since our transgressions may be comparatively minor we should be oblivious to them. But the general conclusion is that arbitrators, by and large, pragmatically, on a case by case basis, regardless of original differences in basic philosophy or in perceptions of their role, do evolve procedures which insure all concerned their just rights.