CHAPTER 11

AN APPELLATE JUDGE'S VIEW OF THE LABOR ARBITRATION PROCESS: DUE PROCESS AND THE ARBITRATION PROCESS

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As your program states, I am to speak to you on "An Appellate Judge's View of the Labor Arbitration Process," and, as I shall point out, I am particularly interested in the impact upon the arbitration process of judicial due process. But, lest you take my observations too seriously, let me tell you the story told recently by retired Supreme Court Justice Charles E. Whittaker. It seems that in the course of argument of a case before the United States Supreme Court, a lawyer repeatedly cited as precedent the judgments of Mr. Justice Peffley. Finally the Chief Justice leaned over and said, "Counsel, the Court does not readily identify Mr. Justice Peffley. Would you please tell us who he is?"

"Why," replied the attorney, "Mr. Justice Peffley is the Justice of the Peace of the Fifth District of Kaw Township of Jackson County, Missouri."

Thereupon the Chief Justice said, "Well, now, counsel, the Court does not care to hear any more references to Mr. Justice Peffley. He is not considered to be persuasive authority here."

Whereupon the lawyer retorted: "That is a coincidence. Only last week I heard Mr. Justice Peffley make an identical statement about the judgments of this Court."

Power of the Arbitral Process

I start with the observation that the arbitral process presents both an extended sweep and an unusual depth. As you know,

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the courts have now accorded to it a wide horizontal range; it likewise in itself entails an inherent vertical power that in our juristic concept of the settlement of disputes is at the least unusual.

As to the sweep of the process, our court recently followed the precept of the famous United States Supreme Court trilogy and gave wide application to the arbitration agreement. Citing *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*,[1] we said, ". . . the arbitration clause covers the grievance in the absence of manifest exclusion." [2]

As to the depth of the process, arbitration is in itself unique because it normally concentrates in the arbitrator the primary function of fact-finding, which is performed by the trial court, and the secondary function of review, which is confided in the intermediary and final appellate court system.

Moreover, courts have generally adopted a hands-off policy toward arbitration awards. Courts will usually defer, and quite properly so, to the expertise of the arbitrator. They will not permit interlocutory review of arbitral rulings.[3] Even an arbitrator's mistaken view of the law will not provide ground for setting aside an award.[4] The arbitration statutes generally permit a court to nullify an award only for such matters as actual or constructive fraud, misconduct, corruption, refusal to hear pertinent evidence, abuse of the arbitrator's powers, or failure of rendition of a final and definite award.[5]

Protection of Individual Rights

These deep and wide powers of the arbitrator assume a great potential in the context in which they are exercised. One of the most important functions of arbitration lies in the definition of the individual worker's right to his job. Innumerable cases call upon the arbitrator to decide if the employee has been suspended

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1 363 U.S. 574 (1960), 46 LRRM 2416.
2 *O'Malley* v. *Wilshire Oil Co.*, 59 Cal.2d 482, 491, 53 LRRM 2159 (1963).
3 *Luff* v. *Ryan*, 128 F. Supp. 105 (D.D.C., 1955) (holding the Declaratory Judgment Act inapplicable).
4 *Raytheon Co.* v. *Rheem Mfg. Co.*, 322 F.2d 173 (9th Cir., 1963).
5 See *Lundblade* v. *Continental Ins. Co.*, 74 F. Supp. 795 (N.D.Cal., 1947).

or discharged for just cause; the arbitrator must often determine if the worker is entitled to reinstatement and to damages for the loss of the job. And, of course, discharge constitutes a fatal tragedy to the worker; it has been said to be the equivalent in the industrial setting to capital punishment in the criminal. Moreover, as Arthur Ross has pointed out, even if the worker wins reinstatement, his troubles are not over; he may be exposed to post-discharge tribulations.[6]

Indeed, the predicament of the individual worker in this era of massive organization is peculiarly acute. If the employee works in a plant covered by a collective bargaining contract, he is entirely dependent upon the union to vindicate his rights. Yet as Professor Jones has pointed out, "On many occasions . . . the intercession of the union is withheld, either as a bargaining tactic or because the union is expediently acting like a prosecuting attorney who cannot possibly prosecute everything and so must assess the respective merits of citizens' complaints." [7] In this event the union worker is relegated to more difficult and hazardous remedies.

The nonunion employee, or the employee who works in a plant which is not organized, is in an even more helpless position. In the absence of a collective bargaining agreement forbidding discharge without cause, an employee may be without any remedy despite arbitrary discipline or discharge based on unfounded or vindictive charges or indeed upon the mere whim of management.

Yet one of the dominant characteristics of our mechanized society has been its structuring of towering institutions in the form of huge labor, huge industry, and huge government, whose long shadows have fallen upon the lonely and often hapless individual. One of the great issues that confronts us is whether, in this computerized culture, we can save the productivity and the creativity of the common man. Will his individuality, his potential, his chance for self-expression, and even his basic rights of due process of law be crushed in the meshing of interrelated institutions?

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[6] Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement,* Institute of Industrial Relations, University of California (Berkeley), Reprint No. 94 (1957).

[7] Jones, "Compulsion and the Consensual in Labor Arbitration," 51 *Va. L. Rev.* 369, 375 (1965) (footnotes omitted).

The plight of the individual in this time, in my opinion, has engendered in the courts, particularly during the past few decades, a growing sensitivity to, and protection of, the basic rights of due process. Led by a vigorous and courageous United States Supreme Court, the courts of the land have hewn for the individual an armor of those constitutional rights that must be recognized and enforced in this highly integrated society.

Thus we have witnessed the development of rights of privacy based upon the Fourth Amendment and upon what the Supreme Court calls the "penumbra" of the Bill of Rights.[8] Evidence secured by unreasonable search and seizure may not be introduced in a trial; other areas of private conduct are placed beyond governmental intrusion. We have seen the expansion of the notion of the involuntary confession of crime encompass the inherently coercive atmosphere of the police station. The Supreme Court has thus called for warnings to suspects of their rights of counsel and silence.[9]

The Supreme Court has recently made binding upon the states the safeguards of confrontation of witnesses and opportunity for cross-examination which the Sixth Amendment applied to the federal courts.[10] Less dramatically, perhaps, but equally importantly, the courts have said that an accused, in order to be protected against surprise, should be entitled to discovery of evidence that the state intends to use against him.[11]

In the area of government employment, courts, even in the absence of specific procedural regulations,[12] have applied concepts of constitutional due process to hiring and firing procedures, requiring, for example, written specification of charges,[13] confrontation of accusers, and opportunity for cross-examination.[14] In the area of private employment, our court has held that an employee cannot be denied a job under a union-shop contract

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8 *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).
9 *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966).
10 *Pointer* v. *Texas,* 380 U.S. 400 (1965).
11 *People* v. *Riser,* 47 Cal.2d 566 (1956).
12 Civil Service Removal Statute, 22 Stat. 403 (1883), as amended 5 U.S.C. § 652, (1958); 5 C.F.R., § 752 (1964).
13 *Scott* v. *Macy,* 349 F.2d 182 (D.C. Cir., 1965).
14 *Greene* v. *McElroy,* 360 U.S. 474 (1959).

because of race,[15] nor can an otherwise eligible employee be arbitrarily excluded from membership in a labor union.[16]

These rulings of the courts protect the individual when he is subjected to the loss of employment by arbitrary action of the union or government, and when he is charged with crime; yet the rulings of the arbitrator, when the individual is faced with the loss of his job, are just as important and sometimes more so. The charge of a felony, which could mean only a year's confinement, or, indeed, only probation, may be far less serious to the worker than the loss of livelihood which could stretch into permanent unemployment.

Due Process: Effect Upon Arbitration Decisions

Should, then, these rulings of the courts, which can be summarily covered under the rubric of due process, affect the arbitration that will decide the worker's right to his job? Should the arbitrator *follow* these court decisions? I think the impending development of constitutional protection presages the likelihood that these basic questions will inevitably arise in the arbitration proceedings.

At the threshold I point out that the arbitrator is not constitutionally *bound* to follow these court rulings. These due-process rights flow from the protections afforded to the individual by state and federal constitutions against governmental, or state, action. Since the arbitrator decides questions raised under collective bargaining contracts between employers and unions, he does not, except in rare instances, face the question whether the government has violated the Constitution. But the emerging doctrines of due process may well serve as persuasive analogies in arbitral proceedings. Judge Hays points out that the courts, in enforcing awards, may insist in the name of public policy that the arbitrator at least notify an involved employee of his right to appear at the hearing.

I cannot prescribe a simple answer to the question whether a particular due-process safeguard should apply to a particular situa-

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[15] *James* v. *Marinship Corp.*, 25 Cal.2d 721 (1944), 13 LRRM 738.
[16] *Directors Guild of America, Inc.* v. *Superior Court*, 64 Cal.2d 42, 61 LRRM 2255 (1966).

tion in an arbitration case. To do so we must analyze the interests there involved; the interests we confront in the *arbitration procedure* necessarily differ from those in the *criminal procedure.* In words that Willard Wirtz used before this Academy in 1958, I allude to "the necessity of an industrial community 'due process' balancing of interests which may not warrant the rule adopted by courts which are casting a different balance." [17] Thus, in each case, we must examine such factors as the purpose of the due-process rule, the practicality of its application, and the effect of its application upon the individual worker, the union, and the employer.

Let us consider the application of the due-process right to counsel, which, as we have noted, has recently been emphasized by the United States Supreme Court. In the case of an employer's questioning of an employee, should the right to the presence of a steward or a union representative be analogized to the right to the presence of counsel announced by the cases? Should an incriminating statement obtained from the employee, without counsel, be barred from the arbitration proceeding on analogy to the confession illegally obtained in the criminal proceeding?

The nature of the answer to these questions must lie, as we have suggested, in the nature of the problem which confronts the arbitrator. Suppose the employer or his representative questions an employee about increasing plant efficiency through changing work schedules or reallocating personnel. I would doubt that the employee's statements must be excluded from the arbitral proceeding because the shop steward had not been present at the interrogation. Weighing the purpose of the rule in relation to the interests of management, the union, and the employee, the arbitrator might very well recognize that management has a strong on-going economic interest in production efficiency. Yet the employee could claim no protective interest in concealing the details of his work. I doubt that the purpose of the due-process protection should overcome the interests of management.

Let us now assume a case in which the employer's representative questions an employee about matters which the employer contem-

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[17] Wirtz, "Due Process of Arbitration," *The Arbitrator and the Parties,* Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Incorporated, 1958), pp. 1, 21.

plates may justify the discharge or discipline of the employee. Should we apply here the analogy of the decisions entitling one to counsel? Is the employer to be considered somewhat in the position of the prosecutor preparing his case against the accused?

Once the employer has marked the worker for disciplinary action, does he step into the shoes of the prosecutor, who, to use the analogy of *Escobedo,* now engages in the process of questioning for the purpose of eliciting incriminating statements? In that situation the courts forbid the introduction of the self-incriminating statement obtained without counsel. Surely a stronger argument can be presented for the application of due-process protections in this contemplated discharge case, which directly involves the basic interests of the employee, than in the case regarding the rescheduling of work.

To test these applications of due process even further, may I submit two cases for contrast. First, let us assume a foreman has received numerous complaints from passengers that a bus driver appeared drunk on the job; second, let us assume that a female customer has complained to the foreman that a route man has tried to molest her in her home. Assume that in both cases management attempts to introduce into the arbitral proceedings, as part of its proof, an affidavit or hearsay statement to show the guilt of the employee. This effort raises the issue of the worker's right to confront his accusers—a right that, we have noted, was recently made applicable to state proceedings reiterated in *Pointer* v. *Texas.*[18]

In the first case, involving the drinking offense of the bus driver, management can demonstrate a high and important economic interest, not only because of the loss of passengers but because of the possibility of Interstate Commerce Commission fines and indeed because of the higher probability of an accident. In the molestation case, however, the economic interests of management are on a much lower scale: it faces only the probability of the loss of the good will of the particular customer who has made the accusation against the route man, or of others who may have heard about the incident. Hence, management would suffer little in the case of the route man and a great deal in the case of the bus driver.

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[18] See text at fn. 10 *supra.*

Applying the *purpose* of the due-process protections we can say that the potential dangers of hearsay are less in the case of the bus driver than in the case of the route man. A single person could easily lodge false accusations against a route man involving sexual molestation; repeated false accusations of drunkenness of a bus driver by many persons are neither so easily made nor so likely to be unsupported.

Finally, factors of practicality play a role in both cases: although the presentation of a number of passengers as witnesses at the arbitration proceeding would be difficult, no such problem arises with the presentation of the complaining woman customer.

Perhaps, then, weighing these factors, the arbitrator in the case of the accused route man would refuse to admit the hearsay evidence or affidavit because the route man would thereby be denied his right of confrontation by his accusers. Yet, using the same tests, the arbitrator might be more inclined to admit the evidence as to the drinking driver.

The right to be confronted by one's accusers is indeed a due-process right which lies deep in American jurisprudence. Does it apply in the arbitration proceeding in which the employer in a discharge case does not, or cannot, produce for cross-examination the fellow employee or fellow union member who witnessed the facts? Does it apply if the employer does not, or cannot, produce the "spotter" whose report initiated the case against the employee? Judge Hays writes, "courts will be called upon to pass on the question of whether such evidence anonymously given is consonant with the requirements of due process." [19] Professor Fleming states: "There is simply no way of eliminating the question of elemental fairness from cases in which testimony is received from absent witnesses. In the last analysis a decision has to be made whether the practicalities of the situation outweigh the chance of error." [20]

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[19] Hays, *Labor Arbitration, a Dissenting View* (New Haven: Yale University Press, 1966), p. 107.
[20] Fleming, "Some Problems of Due Process and Fair Procedure in Labor Arbitration," 13 *Stan. L. Rev.* 235, 248 (1961).

Incorporating Due-Process Safeguards Into Arbitral Process

Having urged that some of the procedural due-process safeguards developed by the courts might be made part of the arbitral process—at least if a weighing of the interests of the individual, the union, and the employer in the particular circumstances shows this to be appropriate—I should suggest how this incorporation might take place. It could be done either case by case or by a single pronouncement of a body of rules. On the one hand, a body of rules might be promulgated by arbitrators, drawing upon experience, perhaps advised by representatives of labor and management. On the other hand, procedural rules could be developed on a case-by-case basis as the issues arise.

It is not merely my judicial background that induces me to recommend the case-by-case course. The kind of approach I have recommended is a highly particularized one, an approach sensitive to such interrelated issues as the purpose of a rule of due-process and the extent to which that purpose would be furthered, in the light of the interests of the parties, by its application to a specific set of facts. I should point out the disadvantage that arbitration law lacks some of the coherence of the common law because of its vast number of decisions and its lack of a centralized digest system which is available for judicial opinions. But, as Justice Felix Frankfurter wrote many years ago, "The stuff of these [due process] contests are *facts,* and judgments upon facts. Every tendency to deal with them abstractly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities. . . ." [21]

Summary

In brief summary, I recognize that the impact of the judicial world upon the arbitral world has long been a subject of concern and sometimes of alarm. Ever since the classic formulation of Harry Shulman that the arbitral process must be a purely voluntary one, many commentators have questioned the decisions of the United States Supreme Court which have expanded the process beyond the letter of the collective bargaining contract; they have

[21] Frankfurter, "A Note on Advisory Opinions," reprinted in *Constitutional Law, Selected Essays,* 126, 127-129 (1963).

urged too, that its ties to court enforcement be loosened. Whatever the merit of either side to this argument, the impact of the process upon each other cannot be ignored. They cannot coexist without mutual effect. The worlds of public adjudication and private arbitration cannot live in isolation; no iron curtain separates them. The due-process rights evolved by the judicial tribunal are bound to intrude in some form, if by nothing more than argument and analogy, into the presentation of the case to the arbitral tribunal. There will be those who will argue that we cannot have a true arbitral process without due process.

In this task of the application of due process to the arbitral process, you arbitrators will fashion the definitions and formulate the decisions. An old story describes your role.

In ancient times there was a wise and venerable man who knew the answers to all questions. He was the sage of his time and, as happens very often, there were some men who were envious of his great reputation and desired to humiliate him before his followers. So one day when the wise old man was addressing the multitude, there rose from the audience one such envious individual, and he said, "Old wise man, revered leader who knows the answers to all questions, I have a question to ask you. I hold in my hand a bird. Tell me, O Sage, is this bird alive or is this bird dead?"

Now the wise old man knew this was a tricky question because if he said the bird was alive, then the interrogator would crush the bird in his hand and reveal to the audience a dead bird. If, on the other hand, the wise man said the bird was dead, then the questioner would open his fist and the bird would fly away. So the wise man turned to his questioner and said simply, "The answer lies in your hands."

In the hands of you arbitrators rests the application of the principles of due process to the law of arbitration of tomorrow. I would say that the matter lies in capable hands.