ucts produced, and even in the acceptable length of facial hair and beards. A pertinent example of the pressure on the decision-maker to respond to change arises from discipline meted out for chronic alcoholism. Until recent years, alcoholism was viewed as a human failing attributed to a lack of character and deserving of little patience in meting out stern disciplinary action often including discharge. At present, there is virtual unanimity among medical authorities that alcoholism is an illness that should be treated as such—a view gradually gaining recognition in the industrial community, but by no means universally accepted. Today, when an arbitrator is presented with such medical evidence in a discharge case for alcoholism under the typical "just cause" contract provision, the evidence may compel him to deal with the issue as an illness (and often an absentee problem) rather than a disciplinary problem, as in the past.

In summary, decision-making does not simply involve a mechanical application of the facts to a set of fixed rules. As former Michigan University Law School Dean St. Antoine so aptly phrased it: "The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae."[19]

We have focused our attention to this point upon decision-making in its broadest aspects. Now to a consideration of more specific matters, namely, decisional thinking involving questions of procedure, fair-representation issues, and the interaction of NLRB, judicial, and arbitration proceedings.

IV. Decisional Thinking as Applied to Procedural Matters

Arbitral Discovery

The basic objective of arbitral discovery is to achieve full disclosure while avoiding the legal complexities of discovery as practiced daily by "litigators" in law and motion courtrooms. The authority of labor arbitrators to fashion and administer discovery procedures, it should be noted, is now firmly established.[20]

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[19]St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L.Rev. 1137, 1153 (1977).

[20]For an excellent discussion of arbitral discovery, including a proposal for interaction among the three tribunals of labor dispute resolution—the courts, the NLRB, and

"Discovery" in law is an aggregation of procedures for judicially compelled disclosure of information in pending litigation. These remedies have evolved and been liberally administered by courts to compel early and full disclosure at a pretrial stage of prospective litigation (and during trials) of all of the information that may enable the litigants to understand (and thus settle) and the courts more effectively to narrow and then to resolve the issues in dispute. Courts and the legal profession recognize fully that discovery abuses are common. Most notably is this true of the interminable, repetitively filed written "interrogatories" that constitute its most onerous and readily abused procedure, requiring extensive file searches and often disclosures of sensitive or classified information. Discovery practitioners are specialists and have become known, somewhat pejoratively, as the "litigators," in contrast to "trial lawyers," because they do not expect to, and indeed rarely have to, appear in court to try the case. In large part that is because they have all too often become the means for harassment designed—with considerable success —to coerce sometimes unwarranted settlements.

It is widely accepted, at least in theory, that mutual and early disclosure of all that is available and relevant to a grievance is one of the main purposes of the progressive steps of the typical grievance procedure. The objective, of course, is to facilitate resolution of the dispute. Withholding information that should be disclosed impairs both the prospects of settlement and breeds a corrosive distrust of the good faith of the other party and of the effectiveness of the grievance procedure. In the great majority of bargaining relationships, complete and early disclosure is evidently routine. This is so even though there do occur arguments, sometimes heated ones, over what is subject to discovery and what is properly withheld in the processing of particular grievances.

The Supreme Court in *NLRB* v. *Acme Industrial Co.*[21] emphasized the underlying legally enforceable duty of disclosure which arises from the statutory duty to bargain in good faith and

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arbitration, see the following series of three articles by Edgar A. Jones, Jr., in the University of Pennsylvania Law Review: (1) *Blind Man's Buff and the Now-Problems of Apocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes,* 116 U. Pa. L.Rev. No. 4 (1968); (2) *The Accretion of Federal Power in Labor Arbitration—the Example of Arbitral Discovery,* 116 U. Pa. L.Rev. No. 5 (1968); (3) *The Labor Board, the Courts, and Arbitration—a Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose,* 116 U. Pa. L.Rev. No. 7 (1968).

[21] *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 64 LRRM 2069 (1967).

is as applicable to unions as to employers in the bargaining relationship. The Court declared:

> "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."[22]

That duty, when cast in terms of good-faith bargaining, is enforceable by the NLRB and the courts. But cast as a duty of disclosure inherent in the progressive steps of the grievance procedure, it is subject to enforcement in the contractual forum by the parties' arbitrator.

The panel is unanimous in concurring that discovery procedures developed for purposes of litigation should not be imposed upon collective bargaining grievance procedures. Even so, there are circumstances when the cooperative spirit of mutual disclosure requires some arbitral nudges to keep it on track. Some courts have assumed, ill-advisedly we feel, that merely because the parties have opted for the arbitral forum, discovery-type remedies should not be available.

A far more constructive approach, in our view, is the flexible attitude exemplified by Justice John Harlan writing for the Supreme Court in *John Wiley & Sons, Inc.* v. *Livington:*[23] the " 'procedural questions' which grow out of the dispute and bear on its final disposition should be left to the arbitrator." The courts, we believe, when asked to become involved in an arbitral proceeding, should be intent upon encouraging a sequence in which the arbitrator, selected by mutual consent of the parties, is given ample flexibility to fashion such procedural disclosure remedies as seem appropriate in the context of collective bargaining, reserving the judicial superintendence function to assure elemental fairness in the process.[24] Obviously, if the substance of a particular arbitral order is barred by the express terms of the collective agreement or would result in undue intrusion or burden, the court should set it aside or modify it. But the court should exercise the judicial restraint not to set aside arbitral orders that are not expressly precluded by con-

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[22]*Id.*, at 435–436.
[23]*John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557, 55 LRRM 2773 (1964).
[24]Jones, *supra* note 20, at 116 U. Pa. L.Rev. 1236–1243.

tractual terms, but are attributable to an arbitrator's understanding of what is appropriate to the processes of collective bargaining. It is a truism (and a realistic one) that federal and state judges have typically had minimal exposure to labor disputes and collective bargaining prior to their appointments to the courts, as the Supreme Court inferentially recognized in 1960 in *Steelworkers* v. *Warrior & Gulf Navigation Co.*: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."[25]

More specifically, the panel recognized that arbitral discovery normally is limited to the issuance of subpoenas or to the informality of an arbitrator's suggestion of lunchbreak discovery ("May we expect to have that available after the lunchbreak?"). Most arbitrators will issue prehearing subpoenas as a matter of course. As for a prehearing subpoena duces tecum (for the production of documents), however, practices differ. Some arbitrators will not issue a requested subpoena duces tecum without submission by the requesting party of an affidavit (required by law in California) detailing the need and relevancy of the information requested. Other arbitrators will issue a subpoena duces tecum upon request, relying on opposing counsel to raise objections as to relevance or propriety either prior to or at the outset of the arbitral hearing. The characteristic self-restraint of arbitrators, reliant as they are upon continued acceptability to employers and unions alike if they are to hear future cases, may be relied upon to insure their caution in assessing and ruling on the requested issuance of a subpoena duces tecum and other less formal types of disclosure orders.

For example, some arbitrators, asked for a disclosure order during the course of a hearing, will suggest that the parties step into the hall for a discussion in "chambers," inquiring for what purpose the party seeks the requested evidence. Might it be possible to stipulate the substance of what the documents would show or the witnesses would testify to so that they need not be produced? If the need nonetheless requires production, it is likely to be met by an informal request for disclosure by the arbitrator and compliance by the party to whom the request is made. As a union representative observed of a refusal to comply

[25] *Supra* note 18, at 581.

with an arbitrator's request for information, "Who wants to get caught in that crack?"

Thus, the panel concluded that an arbitrator would possess the contractual and legal power to compel disclosure against the resistance of either union or the employer. At the same time it recognizes that the informal approaches to problems of disclosure discussed above could routinely be expected effectively to resolve most discovery problems.

Burden of Proof

In evaluating the evidence, a significant difference of the trial judge approach as contrasted to that of the arbitrator is observable in the application of burden-of-proof concepts. The contrast is of sufficient importance to warrant a separate discussion.

In both criminal and civil litigation, the burden of proof (beyond a reasonable doubt in criminal cases; by a preponderance of the evidence in civil matters) is the principal criterion relied upon by a trial court when ruling on contested matters. To prevail, the moving party must sustain the burden of proof.

In the arbitration of discharge and discipline cases, burden-of-proof concepts are also used, but arbitrators apply them in a much more flexible manner. For example, in discharge cases involving charges of moral turpitude, most arbitrators will require the employer to prove the charge beyond a reasonable doubt because of the severe social and economic stigma which attaches to an employee whose discharge is sustained upon such grounds. Moral turpitude discharge cases offer the closest analogy in the application of burden-of-proof standards by courts and arbitrators.

On the other hand, in virtually all other discharge and discipline cases, arbitrators will impose the burden of proof upon the employer without attempting to define the standard in precise terms. Also, in most of these discharge and discipline cases, arbitrators will generally not base their decisions solely upon burden-of-proof concepts to the exclusion of other factors that deserve consideration. Burden-of-proof criteria applied in a courtroom cannot be baldly transplanted to an arbitration proceeding without glossing over important differences between courtroom litigation and discharge arbitration—differences summarized by UCLA Law Professor Benjamin Aaron, a noted authority on the arbitration process and labor law, in the follow-

ing analysis explaining why the criminal-law standard of proof should have only limited applicability in discharge cases:

> "Those who are prone indiscriminately to apply the criminal-law analogy in the arbitration of all discharge cases overlook the fact that employer and employee do *not* stand in the relationship of prosecutor and defendant. It cannot be emphasized too often that the basic dispute is between the two principals to the collective bargaining agreement, that is, the company and the union. At stake is not only the matter of justice to an individual employee, important as that principle is, but also the preservation and development of the collective bargaining relationship. . . . The case of an employee sleeping on the job, or of the worker accused of punching another man's time card—these and many others are often incapable of proof beyond a reasonable doubt, and the most the arbitrator can say is that more likely than not, the penalty was justified. *How much weight he gives to the doubts that inevitably arise may frequently depend on a variety of considerations having absolutely nothing to do with the amount of proof adduced in the particular case:* the employee's past record, his length of service, or the possibility of severe economic forfeiture resulting from the discharge, on the one hand, or the effect of his reinstatement on the morale of supervisors and fellow employees, or the restraining influence it would have on a joint company-union program for stamping out certain undesirable conditions, on the other. *The one thing we may be sure of is that, if the arbitrator is familiar with the facts of industrial life and understands that his function is creative as well as purely adjudicative, he will not evaluate the evidence solely on the basis of rigid standards of absolute proof or presumptions of innocence.*
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> "There are some disciplinary cases, however, in which the arbitrator is justified, indeed required, to observe the same exacting standards of proof that prevail in a criminal proceeding. These are the instances in which an employee is disciplined for having allegedly committed some act of moral turpitude, such as stealing, engaging in aberrant sexual practices, or participating in subversive activities. Since upholding the disciplinary penalty for these or similar acts permanently brands an employee just as surely as a criminal conviction would, the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt." [Emphasis added.][26]

In sharp contrast to the continuing nature of a union-management relationship, the plaintiff and defendant in most litigation go their separate ways once judgment has been rendered. The trial judge, therefore, need not be concerned with the consequences of his decision upon their future relationship. However, an arbitrator who fails to consider this unique relationship is

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[26]Aaron, *Some Procedural Problems in Arbitration,* 10 Vanderbilt L.Rev. 733, 741–742 (1957).

unlikely to survive the high mortality rates characteristic of the arbitral selection process. Application of burden-of-proof concepts is simply one example of the impact the continuing relationship of an employer and union has upon the decision-making process.

To this point, we have attempted to explain why courtroom burden-of-proof concepts are applied differently in most arbitrated discharge and discipline cases. Burden-of-proof concepts are, however, sparingly imposed and seldom mentioned by arbitrators in most other grievance cases. When presented with contract interpretation issues, the arbitrator's function is to ascertain and give effect to the mutual intent of the parties based upon relevant contract language and other evidence in the record. In these cases, as Professor Aaron noted: "Neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrator as much guidance as possible."[27]

When contract terms are ambiguous, so that their meaning cannot be derived solely from an analysis of the disputed language, it becomes necessary for the parties to present other evidence of intent—evidence of past practice or negotiating history, most typically. Not surprisingly, the recollection of partisan witnesses is often sharply conflicting as to discussions that occurred in prior negotiations or as to the establishment of a binding practice. Nevertheless, when an arbitrator finds it necessary to base his findings upon custom or prior discussions, he is extremely cautious about expressing his decision in terms of the burden of proof. Most arbitrators attempt to avoid the use of so-called lawyer's language because their opinions are written primarily for practitioners.

One final point concerning burden of proof deserves our attention. An analysis of judicial decisions suggests that the burden of proof can be a much more flexible rule of evidence than is generally realized. For example, in a leading Title VII case, *Franks* v. *Bowman Transportation Co.*,[28] involving retroactive seniority, the U.S. Supreme Court appears to have shifted the burden of proof based upon equitable considerations. In that case, the federal district court held that the company had discriminated against certain black applicants by denying them

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[27] *Id.*, at 742.

[28] *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 12 FEP Cases 549 (1975).

truck-driving jobs because of their race, but the district court rejected petitioners' claim for retroactive seniority to the date of their initial applications for employment. The Court of Appeals for the Fifth Circuit affirmed on the retroactive seniority issue. In reversing the court of appeals and remanding the issue to the district court, a majority of the U.S. Supreme Court ruled in relevant part:

> ". . . petitioners here have carried their burden demonstrating the existence of a discriminatory hiring pattern and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. [Citations omitted.] Only if this burden is met will retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members."[29]

In short, once petitioners proved a discriminatory hiring pattern, the High Court shifted the burden of proof to the employer by requiring that, at the time members of the class again sought the jobs previously denied them, the burden would be placed upon the employer to prove that one or more of the applicants were not in fact unlawfully discriminated against, either because there were no job vacancies at the time of their applications, or because they lacked the required skills, or because of some other nondiscriminatory reason. Only by satisfying this burden of proof could the employer deny retroactive seniority to individual class members. This is simply one example of the resourcefulness displayed by courts across the nation in implementing civil rights legislation.

Precedent

How should an arbitrator respond when asked to dismiss a grievance upon the grounds of res judicata? The applicable principles in courtroom and arbitration proceedings differ, although the underlying rationale is often invoked by arbitrators.

Although judicial doctrines of res judicata and stare decisis are not binding upon arbitrators, nevertheless, arbitrators frequently apply the same principles in their consideration of precedent. To avoid blurring the exact differences in the meaning of these terms, Witkin's definitions are quoted below:

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[29] *Id.*, at 772–773.

1. *Res judicata.* "The doctrine of *res judicata* gives certain conclusive effect to a *former judgment* in subsequent litigation involving the same controversy [and parties]. It seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.* It is well established in common law and civil law jurisdictions, and is frequently declared by statute." [Emphasis in original.][30]

2. *Stare decisis.* "The doctrine of stare decisis expresses a fundamental policy of common law jurisdictions, that a rule once declared in an appellate decision constitutes a precedent which would normally be followed by certain other courts in cases involving the same problem. It is based on the assumption *that certainty, predictability and stability in the law are the major objectives of the legal system;* i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. Another justification for the doctrine is convenience; lawyers and the courts are relieved of the necessity of continually reexamining matters settled by prior decisions." [Emphasis added.][31]

Even though an arbitrator is not bound by a prior decision based upon an interpretation of the identical contract provision between the same parties, he will generally follow the prior decision to assure stability and finality to the collective bargaining relationship. A fundamental objective of grievance arbitration is to provide a definite terminal point, a resolution of rights issues that is *final and binding* on both parties. *Finality* is vital to *stability* in the administration of the collective agreement. When an arbitrator, therefore, is asked to reverse a ruling established in a prior case between the same parties, he must carefully balance the importance of stability and finality against whatever doubts he may have as to the wisdom of the prior decision. In the panel's opinion, an arbitrator should rule contrary to a decision or a principle established in a prior arbitration between the same parties only upon a showing of substantially altered circumstances or an error so egregious as to outweigh in importance the consideration of stability and finality. Of course, when either party deems an arbitral decision repugnant to the contract or unsatisfactory for whatever reason, it can seek to modify (or nullify) that ruling during subsequent negotiations for a renewed agreement. In the absence of such modification, the parties may be held to have adopted the award as part of the contract.

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[30]Witkin, California Procedure, Vol. 4, §147, 3292, 2d ed. (San Francisco: Bancroft-Whitney Co., 1971).

[31]*Id.*, Vol. 6, Part I, §653, at 4570–4571.

The precedential value of arbitral decisions under other contracts depends upon a number of factors, such as the similarity of contract terms, pertinent facts, and, in particular, the arbitrator's competence. The reasoning of an experienced and respected arbitrator that is directly in point can be highly persuasive. In the final analysis, the weight given to a decision involving different parties, if any, is a matter of degree. Some arbitrators state flatly that they give no weight to decisions rendered under other parties' contracts, except for unusual situations.

Finally, a word or two is in order concerning the effect of grievance settlements as precedents for the future. The settlement of a grievance by the parties deserves considerable, often decisive, weight as to the meaning of ambiguous language. Frequently, such settlements may offer the most reliable basis for ascertaining the parties' intent. Therefore, should the same issue arise again, the prior settlement often will be considered a binding precedent. An important qualification should be noted: a large majority of grievances are settled annually at the level of the workplace with no reference to the contract, based upon individual perceptions of equities. Such settlements may involve either relatively minor matters that do not warrant arbitration, or even major matters when the parties choose to avoid a confrontation on the merits in the hope that the issue will not arise again. When the parties intend a settlement to apply solely to the grievance being processed, the final disposition should include a statement to the effect that the settlement is "nonprecedential." That should bar its consideration in any future proceeding. In the absence of such statement, the settlement will very likely be considered a binding precedent.

Time Limits

The right to a hearing and impartial determination of a controverted matter is so taken for granted in our concepts of justice that we sometimes forget this right is virtually nonexistent for a majority of the world populace. As the Second Circuit observed: "Under our Constitution there is no procedural right more fundamental than the right of a citizen . . . to tell his side of the story to an impartial tribunal."[32] In recognition of this

[32] *Winders* v. *Miller*, 446 F.2d 65, 71 (1971).

basic right, decision-makers normally can be expected to give a broad construction not only to statutory time limits, but also to those in a grievance procedure. In arbitration, the reasons for a broad construction of the time limits for processing a grievance are especially compelling because of the parties' continuing relationship. A grievance technically barred from being determined on the merits often leaves a festering sore to erupt again, in one form or another, at some future date. Therefore, for reasons of self-interest, it is quite common for both parties to extend time limits by mutual agreement. In a courtroom proceeding, by contrast, the parties usually meet and part as strangers; they are not compelled to "live together" and thus endure the practical consequences of an adverse ruling.

Time limits for each prescribed step in a grievance procedure must be observed in order to preserve the right to a hearing on the merits. When the language of such provisions are ambiguous in respect to a given situation, arbitrators will usually lean heavily toward a finding of arbitrability because of their belief that the long-term interests of the parties are better served by resolving such disputes on the merits, rather than upon technical grounds. An arbitrator, however, does not possess an unfettered discretion in such matters. His primary duty of interpreting the bargaining agreement requires him to reject an untimely grievance unless some valid basis for waiving the prescribed time limits is present.

The panel's consensus was that, in the interpretation of contractual time limits, doubts should be resolved against forfeiture of the right to process a grievance. The principle of avoiding forfeitures will usually be invoked, even when time-limit provisions are clearly spelled out, *if* the parties have been lax in their enforcement. On the other hand, if either party has not complied with an unambiguous time-limit requirement, further processing of the grievance might very well be barred when such time limits have been consistently observed.

The Trier's Role—Active or Passive

There are two polar positions of the trier's role in the hearing, regardless of whether he sits as judge or arbitrator. One is activist, involved, concerned about shaping the course of the proceedings to obtain all relevant evidence. The other is passive, detached, deferring to the representatives of the parties the

burden of presentation. The first speaks; the other listens.

The distinction is significant. The arbitration process provides a ready source of illustration. The activist arbitrator will take a hand in fashioning a submission agreement when the parties are unable to agree among themselves. He will push for stipulations of fact when there is little or no likelihood of a conflict of testimony. He will question witnesses vigorously. When neither side has called an important witness, the activist will do so on his own motion. If one side, either through inexperience or incompetence, puts on a dismal case, such an arbitrator will intervene to obtain information deemed essential. The purpose, of course, is not to make a bad representative look better. Rather, it is to elicit facts necessary to the rendering of a fair decision.

The passive trier will refrain from such activism, particularly when attorneys are present. The burden rests with them. If they fail to shoulder it, so be it. Such is the adversary system in all its implications. The decision-maker's role fundamentally is to make decisions. His task at the trial or hearing is to preserve order and to permit both sides to present what counsel and not the trier wants presented.

Conceived in such polar terms, the partisan of either view not only disagrees with the opposite position, but also tends to condemn it morally. Debate becomes obscured by self-righteous pronouncements. The activist holds that the decision-maker has a moral obligation to mete out justice. How can this be done if the conspicuous gaps in the record are left unexplained? The passive trier insists that his role is to make a decision on the record the parties choose to make. It is not his responsibility to shore up either party's presentation.

In the real world, of course, such extreme situations seldom, if ever, occur. The pressures of an actual case create their own modes of conduct, and no trier, regardless of how dedicated he is to one of the polar positions, can be impervious to them. Thus, we are all compromisers—some more, some less. In the context of most fact situations covered during our discussions, both arbitrators and judges conceded they would elicit information essential to the decision from a witness once it became apparent that counsel for the parties overlooked the point.

It is difficult to conceive of any arbitrator, an articulate breed, enduring a long, boring, and irrelevant proceeding without opening his mouth beyond announcing the arrival of the lunch

hour. Similarly, even maverick arbitrators in certain cases manage to suppress strong activist propensities. They view their role basically as judicial. When they intervene actively, they do so with the calculation of a high-wire tight-rope walker, well aware of the prospects of success and the perils of failure.

The active-passive dichotomy is even more accentuated in the propensity of decision-makers to encourage settlement of a case. Of course, judges often perform this role in pretrial proceedings, and the activist judge or arbitrator may choose to do so during the trial or hearing. Ordinarily, even an activist arbitrator will not attempt to mediate a dispute unless he perceives (usually based upon prior experience with the same parties) that the parties will be receptive to his efforts.

In the *typical* case, it may be difficult to tell an active from a passive trier by his conduct. Even in some unusual cases, one cannot tell them apart. But there are occasional instances in which the philosophical differences actually determine the manner in which the trier conducts the case.

V. Interaction of NLRB, Judicial, and Arbitration Proceedings

Trial judges rarely consider NLRA issues and almost never have occasion to resolve on the merits NLRA issues of fact or law. Thus, both federal district judges and state trial court judges are reasonably well insulated from consideration of the kinds of NLRB-related issues concerning which arbitrators and NLRB personnel find a *Collyer-* and *Spielberg-*created common ground.

NLRB decisions are reviewed by federal courts of appeals, and only in respect to extraordinary matters like injunction requests and procedural questions on the enforcement of subpoenas and similar types of matters do trial judges become involved in NLRA proceedings.

Federal district judges and state trial court judges could become involved in *Collyer-Spielberg* and other arbitrator-NLRB-related issues in their capacity as decision-makers in actions to compel arbitration or to enforce arbitration awards. But ordinarily those proceedings are not trials de novo in the sense that witnesses are heard and credibility and other issues of fact are resolved. An arbitration-enforcement proceeding is more akin to the judicial appellate process.