

### III. TEAMSTER JOINT GRIEVANCE COMMITTEES: GRIEVANCE DISPOSAL WITHOUT ADJUDICATION

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A new conversation game is matching oxymorons. For the uninitiated, an oxymoron is a term or phrase which, when examined, is seen to be a self-contradiction, such as "military intelligence" or "international order." There may be disagreement as to whether a term is oxymoronic—think of "civil servant," "honest politician," or "Congressional deliberations." Professors might dispute "college education," but labor lawyers would agree on "NLRB law." Even the National Academy has its own traditional one—"permanent arbitrator." Now Dave has entitled our topic with his own oxymoron—"Arbitration Without Neutrals."

At the outset, it is necessary to set the record straight as to the origins of the Teamster joint grievance committees, for Gerry's "authoritative source" has tried to rewrite history. The history is recounted by Ralph and Estelle James, in their authoritative study, *Hoffa and the Teamsters: A Study of Union Power*.<sup>1</sup> The authors had full access to all of the union's files and records, they attended meetings with Hoffa, including those in which he established the Western Conference joint grievance committee system, and observed his command of grievance committee meetings.<sup>2</sup>

The Teamster joint grievance committee structure was fashioned by Farrell Dobbs, an ardent Trotskyite who organized the Central States Drivers Council and negotiated its first contract in 1938. The basic principle, reflecting his deep distrust of bourgeois employers and arbitrators, was to create an open-end procedure in which the ultimate resort was not to arbitration but economic action. It was not Nate Feinsinger's awards but Farrell Dobbs' repudiation of arbitration which led to the creation of joint grievance committees.<sup>3</sup> This grievance structure was embraced by Hoffa, who believed that grievances should not be

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<sup>1</sup>James and James, *Hoffa and the Teamsters: A Study of Union Power* (New York: Van Nostrand, 1965), 168-69.

<sup>2</sup>*Id.* at 3-5.

<sup>3</sup>*Id.* at 168.

adjudicated, but settled in the context of power. He found this method of settling grievances so successful and so useful to his own ends that he imposed it on other areas where arbitration of grievances had long prevailed. In 1961, he risked a strike to overcome the opposition of employers in the Western Conference to the open-ended procedure.<sup>4</sup> It was not Sam Kagel's fees, but Hoffa's desire for control which led to this extension of the joint grievance committee system. In 1963, he negotiated arbitration out of Teamster contracts in Philadelphia.<sup>5</sup> Under his pressure, arbitration clauses were eliminated from most Teamster contracts from Maine to California and supplanted by an open-end joint grievance committee structure.

It is an irony, which must stir Dobbs and Hoffa in their known and unknown graves, that we should discuss this structure which they built under the oxymoronic title of "Arbitration Without Neutrals." The political passion of Dobbs was to denounce arbitration; the persistent purpose of Hoffa was to replace arbitration with economic power. Joint grievance committees are not arbitration; they were designed to deny arbitration. Any doubts as to this should be dispelled by the fact that these committees are not described by the parties as "arbitration" committees but as "grievance" committees. The collective agreements which create them,<sup>6</sup> the procedural rules which govern them,<sup>7</sup> the agenda for their meetings,<sup>8</sup> the minutes of their

<sup>4</sup>*Id.* at 31-32, 135, 169, 202.

<sup>5</sup>*Id.* at 206.

<sup>6</sup>*See e.g.*, the National Master Freight Agreement, effective April 1, 1976, to March 31, 1979. The distinction between joint grievance committees and arbitration is underlined by Art. 8, which in its introductory clause provides that grievance procedures at lower levels shall be created by supplemental agreements and then provides, "If such Supplemental Agreements provide for arbitration of discharges, such procedures shall continue." Sec. 4 then declares:

"Any provision in the grievance procedure of any Supplement hereto which would require deadlocked disputes to be submitted to any arbitration process shall be null and void as to any grievance involving interpretation of the Supplemental Agreement or this National Master Agreement."

The same § 4 appears in the National Master United Parcel Service Agreement, May 1, 1982, to June 1, 1985.

The Automobile Transporters Supplemental Agreement, involved in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976) is exceptional in using the term "Joint Area Arbitration Committee." However, this Agreement provided that if there were a deadlock at the final step, a neutral should be named to sit with the committee, so that it became a true arbitration committee.

<sup>7</sup>For example, Rules of Procedure, Eastern Conference Joint Area Committee, Article IV, Section 2, is entitled "Selection of Grievance Panel."

<sup>8</sup>For example, the agenda for the Ohio State Committee is headed "Ohio Joint State Grievance Committee."

decisions all describe them as "grievance committees."<sup>9</sup> The term "arbitration" is used only by lawyers and courts who would make these committees something they never were and can never be.

Whether the Teamster structure is called "arbitration" or "grievance settlement" might be considered merely a matter of semantics, but words are symbols that shape our thoughts, and by using the word "arbitration" we unconsciously attribute to the process certain qualities and certain values. More important, the law gives to arbitration special deference which it does not give to grievance settlement. Thus, the National Labor Relations Board defers to decisions of arbitrators where statutory rights are involved; it gives no such deference to settlements by grievance committees.<sup>10</sup> In duty of fair representation cases, the courts seem not to give arbitration awards the same scrutiny they give grievance settlements.<sup>11</sup>

I do not intend to enter the debate whether the Board and the courts treat joint grievance committees as the legal equivalent of arbitration. That debate I leave to Dave and Gerry. The important question for my purposes here is not what this season's Board may do, or what some judges in unguarded moments have said. The important question is what the Board and the courts *ought* to do. Should the decisions of Teamster joint grievance committees be given the credibility and legal weight given to decisions by neutral arbitrators?

This question cannot be answered by abstractions or general principles, nor by resort to analogies. It can be answered only by examining how these committees in fact function. Such an examination faces a major obstacle. Their doors are closed to outsiders; no one is allowed in the hearing room except those involved in the proceedings. Transcripts or tape recordings of hearings are often made, but copies are not available, even to the grievant, except by subpoena. Even minutes showing the name

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<sup>9</sup>For example, the transcript of a discharge hearing was headed "Missouri-Kansas Joint State Grievance Committee Hearings." The minutes of the Ohio State Committee meeting reporting the decisions reached is headed "Ohio Joint State Grievance Committee."

<sup>10</sup>For the Board's latest statement of its deferral policy, see *Olin Corp.*, 268 NLRB No. 146, 115 LRRM 1056 (1984); *United Technologies Corp.*, 268 NLRB No. 83, 115 LRRM 1049 (1984). See also *Memorandum, Office of General Counsel* (NLRB), March 6, 1984.

<sup>11</sup>Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 812 (1973); Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. Pa. L. Rev. 1310 (1977).

and type of grievance and the decision are not generally available. Only a relatively few union officials and employer representatives have a full picture of how the process works, and it is not easy to find one who will talk or provide documents. As a result, there has been no penetrating study of the process; the most revealing is that in the Jameses book, for Hoffa, to his regret, gave them full access to union documents and proceedings, allowed them to attend joint grievance committee meetings, and freely discussed with them how he manipulated the open-end grievance procedure to achieve his ends.<sup>12</sup>

I start, therefore, with a handicap. I have been forced to construct a picture from many bits and pieces gathered from interviews, friendly and unfriendly, stray documents which have wandered my way, evidence developed in litigated cases, findings of administrative law judges, court decisions, the writing of the Jameses, and the little bit written by others. From all of this a picture has emerged, which, though not as complete or detailed as I would wish, illustrates some of the major features of these committees.

### **The Joint Grievance Committee and Its Meetings**

If the image in our mind of a joint grievance committee is an established tribunal of three union and three employer members hearing cases as they arise and deciding them on the facts presented at the hearing, we will be badly misled. The joint grievance committee typically consists of twenty-five members appointed by each side.<sup>13</sup> On the union's side, the members are normally paid union officials—business agents and local union officers—appointed by the state or international officers of the union. On the employer's side, the members are officers of various trucking companies appointed by the employer's association.

The meetings of the joint grievance committees are the canvas and the background against which we must see the grievance settlement process. At the state or intermediate level, meetings are customarily held monthly with 50 to 200 grievances on the

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<sup>12</sup>*Supra* note 1 at 31–32, 219–20.

<sup>13</sup>The size of the joint grievance committees varies, with some at the local level having as few as five on each side. The size of the hearing panels also varies, with panels at the local level having as few as two from each side and panels at the area conference level customarily having five from each side.

agenda for each meeting. All of those interested or involved in the grievances—as many as 200 or 300 persons—gather in a hotel or motel for one or two days. This includes state officers of the union, officers and business agents from many of the local and district councils in the state, and particularly from locals who have grievances on the agenda, and grievants and witnesses in the scheduled cases. On the employer's side there will be officers of the employers' associations, representatives of employers who have cases scheduled, and their witnesses. All of these intermingle, socialize, politick, and discuss cases in restaurants, bars, corridors, and their rooms.

In simplest terms, a joint grievance committee meeting is an assemblage of a large number of union officials, union members, and employer representatives gathered for the purpose of mass disposal of outstanding grievances. The hearing of cases by hearing panels may be the principal activity, or at least the most formal and visible activity, of the meeting, but the hearings are only a part of the total process.

Grievance hearings are held in separate rooms with only the panel members, a secretary and stenographer, and those directly involved in the grievance present. The panel consists of three union and three employer representatives, who are designated *ad hoc* by the union and employer co-chairman of the joint grievance committee. Although they are supposed to be drawn from the committee members, alternates may be used so that any union officer or employer may be designated. The panels, therefore, are not stable or permanent and may change from meeting to meeting or even case to case as the chairman sees fit.

Not all of the cases on the agenda are heard. A substantial number may be withdrawn, that is, settled before hearing; others may be held over for a later meeting. Only a third to a half of the cases on the agenda come to hearing. More than one panel may be created, depending on the number of cases to be heard, but a single panel will commonly hear 15 to 30 cases in a day. On the average, the panel spends about fifteen minutes in hearing a case and five minutes in discussing and deciding it.

In deciding cases, the general principle is that each case is decided on its own facts and does not establish a precedent for other cases. No opinions or explanations for decisions are given; the decision is unilluminatingly worded, "Based on the facts presented, the claim is denied," or "Based on the facts, the grievant shall be reinstated with no back pay." Certain general

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rules do, of course, evolve, and the employers' associations in the Central States have a so-called "Black Book" of precedents based on prior decisions, as they interpret them. The "Black Book" is not officially recognized by the union but is used by many business agents.

Meetings of the joint area committees follow the same general pattern, except that they are larger and involve more cases. The Central States Joint Area Grievance Committee normally meets for three days every three months, and has 500 to 800 grievances on the agenda. Hearings are held before four or more separate panels and again each panel hears 15 to 30 cases each day.

The larger number of cases, with the larger number of local unions and employers involved, means that the number of people assembled and intermingling is two or three times as large. The grievance meeting becomes a veritable convention of union officials—area, state, district, and local—along with employer representatives, in which the principal and official business is to dispose of several hundred grievances in the three-day period. The varieties of unofficial business and activities pursued need not be described here; they can be easily imagined.<sup>14</sup>

It is important to note that if the hearing panel has a tie vote—"deadlocks"—the case moves up to the next level. If an employer panel member votes to sustain the grievance, or a union panel member votes to deny it, there is no appeal. In short, if a union panel member votes with the employers to deny the grievance, the effect is to accept the employer's answer and refuse to appeal the grievance. The decision is "final and binding" in the same way that a union's agreement to settle, or its decision not to appeal the employer's last answer, is final and binding.

### **The Grievance Hearing Process**

Hearings before grievance panels take the outward form of truncated adjudicatory proceedings.<sup>15</sup> We must inquire, how-

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<sup>14</sup>The rules of the Central States Joint Area Committee insure time for other activities by providing in Art. V, § 4, "No case presentation shall begin after 5:00 p.m., except by mutual agreement of the parties and the Co-Chairmen."

<sup>15</sup>The rules of the Central States Joint Area Committee limits cross-examination and oral argument. Art. V, § 6, provides: "Agreements of participants and cross-examination shall be terminated after all factual evidence is presented. Only panel members shall have the right to cross-examine participants and witnesses."

ever, to what extent this is form and to what extent it is substance, for the question before us is whether a decision, when it is reached, should be treated as an adjudication equivalent to an award in grievance arbitration. This is certainly the question before the NLRB and the courts when deciding what credence to give decisions of such joint grievance committees. It is necessary, therefore, to examine more closely the grievance hearing process from this perspective. Does it measure up to the standards which we expect of an adjudicatory process? I want to focus on five elements where it seems to me to fall short.

### *I. Inadequacy of Evidence*

In many cases, the hearing does not provide adequate opportunity to present relevant evidence and give it careful consideration. As already stated, a panel hears between 15 and 30 cases a day, with an average of fifteen minutes spent in hearing evidence and five minutes spent in discussing it. About one-fourth of the cases are discharge cases and many others involve complicated and disputed fact questions. The time available is simply not adequate to obtain the facts, resolve conflicts in the evidence, and explore the implications.

The dimensions of this problem, and others, are difficult to measure, for the only transcripts of hearings available are those obtained by subpoena in litigated cases. However, in one discharge case the transcript so obtained had only two pages of testimony. When the employer objected to the timeliness of the grievance, the panel refused to hear any of the grievant's evidence or argument as to why the failure to file should be excused. The panel abruptly went into executive session and denied the grievance.<sup>16</sup> In an NLRB case, the trial examiner noted that the joint committee heard 39 cases in two days, including 13 discharges. The NLRB proceedings involved three of those discharges and the hearing took five days.<sup>17</sup> In another case, the trial examiner noted that the panel transcript in a discharge case was 17 pages, while the NLRB transcript was 110 pages of the same size.<sup>18</sup>

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<sup>16</sup>Transcript of Grievance Hearing between Truck Drivers Union Local 407 and Navajo Truck Lines, Inc. (Grievant Ronald Krosky), July 28, 1976, put in evidence in *Krosky v. Navajo Freight Lines, Inc.*, U.S. Dist. Ct., N.D. Ohio, Civ. Action No. C-78-1239.

<sup>17</sup>*Denver-Chicago Trucking Co., Inc.*, 132 NLRB 1416, 48 LRRM 1524 (1961).

<sup>18</sup>*Modern Express, Inc.*, 149 NLRB 1507 (1964).

One of the factors which seriously impairs the ability to present relevant evidence is the cost of attending grievance meetings. At the state level, even if the meeting is centrally located, the parties and witnesses may have to travel 100 to 150 miles and stay overnight. At the area level, they may have to travel 300 to 400 miles and stay two or three nights.<sup>19</sup> Small locals and small employers may be unable or reluctant to pay to have all useful witnesses present, and it will be beyond the resources of individual grievants to make full presentation of the evidence. In the absence of witnesses to testify directly, reliance must be placed on a local officer or business agent to tell the story. The second-hand presentation is often unpersuasive and may be half-hearted or incomplete. In one case, a driver who was discharged for refusing to cross a picket line lost his case, in part because he was unable to bring witnesses to show the employer's past practice of not requiring employees to cross picket lines, and in part because the business agent failed to point out that he had never been given a warning letter, as required by the contract.<sup>20</sup> In another case, the discharge was upheld when the employer stated that the grievant had been previously disciplined for a prior offense. This was not true; the offense had been committed by another driver, but the business agent failed to show this. His excuse was that he was not familiar with the grievant's work record.<sup>21</sup>

Illustrative of the potentialities of this problem is a case involving Gateway Transportation Company.<sup>22</sup> An employee, misnamed Drudge, encouraged and aided other employees in filing grievances, agitated for reform of the union, and petitioned for the removal of a union representative. In the words of the trial examiner, "the activities of Drudge were not calculated to endear him to either the Union or the Respondent."<sup>23</sup> He was issued warning letters for not recording his log accurately, but this, the trial examiner found, was a pretext for his discharge for his other activities. At the joint committee hearing, the union representative simply read the grievance, said he knew nothing about it and left the total defense to Drudge. When Drudge tried

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<sup>19</sup>Cases are not necessarily heard in the order in which they are listed on the agenda. The parties must, therefore, be prepared to come for the full three days of the meeting.

<sup>20</sup>*Roberson v. Allied Delivery Sys.*, U.S. Dist. Ct., N.D. Ohio, Civ. Action No. C81-1982.

<sup>21</sup>*Herman Bros. Inc.*, 252 NLRB 848, 105 LRRM 1374 (1980).

<sup>22</sup>*Gateway Transp. Co.*, 190 NLRB 199, 77 LRRM 1136 (1971).

<sup>23</sup>*Id.* at 200.



to present evidence of discrimination, the panel cut him off with, "We don't need that." The hearing took fifteen minutes, and the executive session took five to ten minutes to issue the decision—"Letter stands." The trial examiner candidly observed, "I question whether in that time any serious consideration could be given to the charge of discrimination," and went on to declare, "In the instant case I find that Drudge was inadequately represented."<sup>24</sup>

The point here is not simply that the system is vulnerable to abuse and may occasionally go astray. The point here is that the number of cases, the pressures of time, the unavailability of evidence, and the speed with which cases are disposed makes it impossible for the panel in many cases to hear all the relevant facts, or even to make a considered judgment on the basis of limited facts and arguments presented at the hearing. This, in turn, creates a climate and practice of inadequate preparation, summary presentation, incomplete inquiry, and decisions based on a partial skeleton or imaginary shadow of the facts.

## *2. Use of Ex Parte Evidence*

One of the reasons that the process works as well as it does is, perhaps, because the decisions are not based on the evidence presented at the hearing, but on information and direction obtained outside the hearing. Indeed, discussion of pending cases between panel members and parties involved in the cases is an integral part of the process.

The employer chairman of the Central States Joint Area Grievance Committee stated that he had several calls or visits a week from employers about pending cases which would ultimately come before the panel on which he sat. He discussed the cases with them, gave them his evaluation of the merits, and made suggestions as to how to present their cases. In addition, on the afternoon before the Joint Area Committee meeting, "the employers have a prescreening with the employer members of the joint area committee for any company that desires to screen its case with the grievance panel members, and any of them are free to make recommendations or suggestions." He stated that

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<sup>24</sup>*Id.* at 206.

the union also had prescreening sessions the night before the grievance committee meetings.<sup>25</sup>

As a result of this prescreening, one or more of the panel members may have detailed information concerning the case before the hearing begins. That information may go far beyond what is presented in the hearing, or what would be relevant at the hearing. It may include personal information concerning the grievant, political problems in the union, the importance of winning the grievance, or the acceptability of losing it. This information is not transmitted to the other party or to the grievant, but it can be communicated to other panel members in the executive session. Cases may in fact be decided during the prescreening process by union officials directing panel members how they should vote on particular cases. The Jameses state that "On Monday union officials huddle late into the night in Hoffa's suite thrashing out knotty problems and defining their positions."<sup>26</sup>

*Ex parte* communications do not end with the prescreening. The employer chairman, in his deposition, acknowledged that business agents go to employer panel members to discuss and lobby for votes in advance. They might sit in the coffee shop or hotel room, he said, and try to persuade the employer to their view before the hearing.<sup>27</sup> Employers undoubtedly attempt in similar ways to discuss cases with union panel members and influence them. One person described the breakfast hour in the coffee shop as a "game of musical tables" as union and employer representatives constantly moved about talking with first one and then the other about various cases.

Before the hearing begins, some or all of the panel members may have made up their minds or have had their minds made up for them.<sup>28</sup> The employer chairman acknowledged that, in the particular case for which the deposition was taken, the employer had flown from Cincinnati to St. Louis to discuss the case with him, and that before the hearing began he had concluded that the grievant was guilty and the discharge should be sustained.<sup>29</sup>

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<sup>25</sup>Deposition of John W. Shepard, in *Davis v. Ryder Truck Lines, Inc.*, U.S. Dist. Ct., S.D. Ohio, Civ. Action No. C-1-82-215.

<sup>26</sup>*Supra* note 1 at 31.

<sup>27</sup>*Supra* note 25.

<sup>28</sup>See Tobias, *Individual Suits for Breach of Labor Agreement and the Union's Duty of Fair Representation* 5 U. Tol. L. Rev. 514, 541-42 (1974).

<sup>29</sup>*Supra* note 25.

In some cases, the individual panel members have not only made up their own minds, but the decision has been agreed upon. The hearing becomes a mere formality, not even a good charade, and the grievant will never know the evidence which decided his fate.

### 3. *The Trading of Grievances*

The hearing process is well adapted and used for the purpose of trading grievances under the guise of adjudicating each case on its merits. Elliot Azoff, in his article on joint committees, pointed out that "the joint committee is structured so as to insure maximization and exploitation of opportunities for wheeling and dealing."<sup>30</sup> The large number of cases withdrawn from the agenda demonstrate the usefulness of the meeting for settling grievances, and on that I venture no comments. The focus here is the use of the adjudicatory form to disguise consensual settlement or trading of grievances.

Prehearing discussion of grievances invites disguised settlements and trades. If one or more panel members agree to vote for the other side, there is, in effect, a settlement, but it will take the form of a decision by the panel. The *quid pro quo* for such an agreement may be a reciprocal vote on another grievance so that two decisions, one for the employer and one for the union, may be the implementation of a single trade.

Even though there are no advance agreements, prescreening enables the panel members to know the cases which will come before them, and to establish priorities as to those which must be won and those which can, or ought to, be lost. As individual cases are heard and decided there can be implicit or explicit understandings among the panel members that agreement by one side on one case will be reciprocated with agreement by the other side on a later case. Azoff has observed, "in the constant *quid pro quo* of the committee system, there is always a suspicion that an employee is being sacrificed to appease the employer to buy his good will for future negotiations or in return for past favors rendered."<sup>31</sup>

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<sup>30</sup>Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325, 328-29 (1973).

<sup>31</sup>*Id.* at 338. "Hoffa finds it helpful to buy good will on both sides of the table, and he does so by granting or withholding favors through the grievance procedure." James and James, *supra* note 1 at 172.

Trading of grievances is also invited by the changing roles of the players. Grievance committee rules generally prohibit a panel member from sitting on a case which involves his or her local union or employer. Individual panel members may thereby be required to step down in particular cases, and when they do they often become the representative of their local union or employer in presenting the case. They thus act as advocate in a case decided by the panel on which they sit for other cases. The inducement for implicit or explicit trading becomes obvious.

In some joint grievance committees, decisions are not handed down in each case as it is heard, but all decisions are held until the end of the day or until after the end of the meeting and then all handed down at once. This procedure makes the trading of grievances almost inevitable, and as one union official said, it is a trading of friends for enemies.

Whatever virtues or vices there may be in trading grievances through a process of negotiation, the trading of cases is antithetical to any adjudicatory process where each case is to be decided on its own merits.<sup>32</sup> The susceptibility and use of the hearing process for grievance trading undermines any claim that it is an adjudicating rather than a negotiating process, and any claim that its decisions should be given any more or different credence than grievance settlements reached by negotiation.<sup>33</sup>

#### 4. *Political Control and Use of the Process*

Hearing panels on the union side, particularly above the local level, are subservient to the political hierarchy of the union. The union co-chairman of the state or area joint committee is appointed by an international or state officer and can be removed by that same officer. Members of the committee are

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<sup>32</sup>NLRB Member Jenkins characterized the process in the following terms:

"Whatever result such a Committee of protagonists might reach, it is in part the product of economic power, adjustment with an eye to other disputes or differences between them or on future bargaining positions, and other considerations unrelated to the merits of the particular claim before the Committee." *Terminal Transport Co.*, 185 NLRB 672, 675 (1973). (dissenting opinion)

<sup>33</sup>See generally James and James, *supra* note 1 at 178-81. Miller quotes from the Jameses as praising Hoffa's grievance decisions. He leaves out what goes before and after. The Jameses, in the preceding paragraph state that "the number and quality of those carried forward are influenced by political considerations. The point to be stressed is that Hoffa is certain to win all of the cases with serious political or interpretive consideration." The paragraph following the quote states, "periodically, however, he finds it useful to bend slightly, to make deals, and then the flexible open-end grievance procedure is extremely helpful in assuring that the cards turn up right." (p. 182)

appointed by the committee chairman or by the officer who appointed him, and the committee chairman designates the members of the panels. Any panel member who votes contrary to instructions of the chairman will not be designated for future cases, particularly those which have a political component. There is thus the ability to exercise direct political control by the international president and other international officers over the votes of union members on the panels.

Union officials can always cause a grievance to be denied by the simple device of instructing one of the union panel members to vote with the employers. They can often cause a grievance to be won by agreeing that another grievance will be denied. Thus a local union or individual union member who causes political difficulties can be punished, and a politically loyal local union or member can be rewarded. In many cases, both political ends can be served by the single trade.

Political control can be exercised in a less direct fashion. If the committee deadlocks, the ultimate recourse is to economic action, and the right to strike is controlled by the international president. A strike called against a single employer in the highly competitive trucking industry creates nearly irresistible pressure. The president, by refusing to approve a strike, can let the grievance die, and by approving the strike, can compel the employer to concede. By indicating to the grievance panel members his intention in case of a deadlock, he can influence their votes, particularly those of the employer panel members who find discretion a better part of valor and a trade better than a total loss.

Political control of the joint grievance committee structure enables the union hierarchy to extend its political influence down to the local level. Not only do dissident members have their grievances denied, or deadlocked and allowed to die, rebellious locals find it nearly impossible to win grievances. The political influence may be even more pointed to build up or to discredit particular local officers or business agents. An officer or business agent who is markedly successful in winning grievances gains political support among local members, while one who is unable to win before the joint grievance committee will soon be replaced by someone with greater promise of success. Local officials are thus made politically dependent or obligated to the union hierarchy which controls the joint grievance committees. More important for our purposes here, this political use of the process,

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which has been described by the Jameses and confirmed by various union officers and business agents, results in grievances being decided not on their merits but on the political ends to be served.

The politically controlled open-ended grievance procedure may also be manipulated to reward cooperative employers and discipline resistant ones. The Jameses characterized Hoffa's use of the procedure as the carrot and the stick. Employer support in negotiation or organization efforts was obtained by granting favors through the grievance procedure. If an employer did not cooperate, local unions were told to press all possible grievances against the employer. These were deadlocked and used to threaten strikes. Some grievances could always be held in deadlock so as to keep the threat of a strike constantly available. Actual strikes were used sparingly, keeping the employers indebted to Hoffa and willing to cooperate in deciding grievances.<sup>34</sup> Hoffa also used the joint grievance procedure for his political purposes inside the union; it was one of the principal devices for his achieving centralization and solidification of political control of the union. Some union members often benefited by these manipulations, even beyond that to which they may have been entitled under the collective agreement. The important point here, however, is that grievances were not decided on their merits; grievances were pawns used to serve other purposes, particularly in pursuit of political power in the union.

##### *5. The Potentiality for Bias*

Grievance hearing panels are inherently lacking in neutrality; the panel members on each side are responsible for representing that side's interest. This does not, of course, require employer panel members to defend every act of every employer, nor require union panel members to support every claim of a local union or to vote against every discipline of an employee. But when ambiguities exist, the facts are uncertain, or the problems are unforeseen, it is expected that their views will differ. In the absence of compromise or trading, they will deadlock.

The lack of neutrality, however, may take a much more immediate and direct form of bias. If the issue in a case is whether the

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<sup>34</sup>See James and James, *supra* note 1 at 172-74, 206-7, 219-20, 309-10.

employer must pay drivers for the time spent making safety inspections, the response of an employer panel member may depend on whether his company has to make such safety inspections, and the response of a union panel member may depend on whether drivers in his local union make such inspections. Because each panel member has his own immediate constituency, he sees in every case its impact or lack of impact on his employer or his local union. This can cause him to be highly concerned or largely indifferent and to bend his vote accordingly in the case. Although this alone might not be sufficient to shift his vote in the case, it influences his willingness to trade grievances, and the ability to make a trade.

A much more insidious kind of bias grows out of the political character of the joint grievance committees, particularly on the union side. As already stated, union members on the panel are designated by the union chairman of the joint grievance committee. Any local union officer or business agent may be designated and the panel may be changed at any time. Thus, the union chairman can determine the makeup of the union side of the panel for any specific case. The union chairman is himself politically appointed—the state chairman by the state president, and the area chairman by an international vice-president or the executive board. The political control is direct and dominant.

Political bias may take a variety of forms; the following cases are sample illustrations drawn from litigated cases:

A. In *Brown Co. Livingston–Graham Division*,<sup>35</sup> the Company formed a subsidiary, which then negotiated “for hire” agreements with other local unions at lower rates. This resulted in the lay-off of some of the Company’s drivers, with the work going to members of the other local union. The drivers filed a grievance protesting the Company’s movement of work to the subsidiary. When their grievance came before the joint grievance committee, two of the union representatives on the panel were from the locals who benefited from the work. When one of the grievants interrupted the hearing to say that the union was not fairly representing them, he was told to present his own case. Union members of the panel joined with the employer members to deny the grievance.

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<sup>35</sup>234 NLRB 769 (1979).

B. A similarly loaded panel was used in *Kirkland v. Arkansas-Best Freight Systems*.<sup>36</sup> Arkansas drivers protested the Company's moving work from terminals in Arkansas in the Southern Conference to a terminal in Dayton, Ohio in the Central States Conference. The joint grievance committee had two members from the Central States and one from the Southern Conference, and the court remarked that the Southern Conference representative was "a complete cipher and made no effort to play an active or intelligent role." The court also remarked that the employer representative had lobbied the labor members of the panel in advance of the meeting. The union members of the panel voted to approve the change made by the Company, thus giving the work to Central States drivers.

C. In *Mason-Dixon Lines, Inc.*,<sup>37</sup> a driver in Local 407, Harold Baer, led the employees' opposition to changes which the terminal manager sought to make without the consent of the union, and he filed a number of grievances concerning this and other matters. He was also active in the Teamsters for Democratic Unionism (TDU), a national organization critical of the Teamster's leadership, and published articles in TDU publications critical of Local 407's business agent, Horta. Baer was discharged on the charge of excessive garnishments, which the administrative law judge found pretextual. Baer's discharge grievance was heard by a joint grievance committee on which the union panel members were officials of Local 407, and he was represented by the business agent, Horta, whom he had criticized and who was a bitter vocal opponent of TDU. The business agent never discussed the case with Baer prior to the hearing, never mentioned the grievances Baer had filed, and never argued that Baer was discharged for his union activities. Indeed, he spoke only 15 lines at the hearing. The ALJ described the bias in the following terms:

"Baer had become a problem for both the Respondent and Local 407 because of his grievances . . . and his TDU activities . . . I find and conclude that the vast majority (if not all) of the officers and officials of not only Local 407 but the Teamsters as a whole in Ohio were opposed to the TDU and its members, supporters and activities. I further conclude that Horta was far from objective in his dealings and activities with and on behalf of Baer in and about his entire discharge process."<sup>38</sup>

<sup>36</sup>629 F.2d 538, 105 LRRM 2875 (8th Cir. 1980).

<sup>37</sup>237 NLRB 6, 98 LRRM 1540 (1978).

<sup>38</sup>*Id.* at 13.



The ALJ cautiously concluded that there was "a strong suspicion" of collusion to get rid of a mutually unwanted employee.

D. A similar case of potential political bias is described in *Early v. Teamsters Local 82*.<sup>39</sup> Two active and vocal members of the TDU were discharged on the claim that they had walked off the job without express permission and before completing their assignments, although they had told their immediate supervisor and he had not objected. It was Saturday; they had already worked 9½ hours; it was then 8:30 p.m. and they were to report at 6:00 a.m. the following day. The two grievants, as members of the TDU, had advocated reforms in the local and international union, had spoken out in opposition to the incumbent officers' policies, had run an opposition slate against the president and business agent, and had refused to testify on behalf of the officers in a lawsuit growing out of that election. At the joint grievance committee, the president of the local sat as one of the two union members of the panel, and the case was presented by the business agent. Not surprisingly, the union members of the panel voted with the employer members to uphold the discharge.

E. Bias may take the form of union officers deliberately undercutting the grievant's case during the hearing. In *Finn v. Yellow Freight System, Inc.*,<sup>40</sup> Finn was discharged when he refused to make a second run on the grounds that he was dangerously fatigued after already making a 9-hour run and having slept only 6 hours in the preceding 42 hours. He was charged also with leaving the terminal without having his trip ticket signed by the dispatcher. Finn was an active member of TDU, which had opposed a contract provision negotiated in part by the secretary-treasurer, the chief executive officer of the Local. The TDU had also filed internal union charges against the secretary-treasurer and other officials, and had launched a campaign to amend the Local's by-laws to shift some control from the officers to the rank and file. This was, of course, opposed by the secretary-treasurer and the other officers. Finn was the first TDU member of the Local to have a discharge grievance after this by-laws campaign.

When the grievance was carried to the joint area committee, the hearing panel included an official from a neighboring local

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<sup>39</sup>699 F.2d 552 (1st Cir. 1982).

<sup>40</sup>U.S. Dist. Ct., E.D. Pa. Civ. Action No. 82-2547.

who had negotiated the same controversial clause that Finn and the TDU had opposed, and who had been the target of internal charges filed by TDU members and negative publicity in TDU newspapers. At the hearing Finn was represented by the president of the Local, who did not press the argument that Finn's failure to have the trip ticket signed was a mere pretext for the real reason—Finn's rightful refusal to drive while dangerously fatigued. The president also incorrectly told the panel that Finn had a prior written warning for refusing work. During the hearing, the secretary-treasurer, who was in the hearing room as a spectator, broke into Finn's testimony, to contradict him, thereby undermining his credibility and making clear that the local officers wanted Finn discharged. The panel, on the basis of the evidence before it, denied the grievance.

F. A more gross case of hearing misconduct occurred in *Roberson v. Allied Delivery System*.<sup>41</sup> A driver who was shop steward and a political opponent of the local president and state officers, was discharged because he refused to make a pick-up across a picket line without police protection. At the local joint committee, a number of other employees testified that the practice was not to require drivers to cross the picket lines in such circumstances and the case was deadlocked. The hearing before the Ohio Joint State Committee was scheduled with only a holiday weekend intervening and the grievant was unable to get his witnesses to that hearing. At the close of the State Committee hearing, William Presser, an International Vice-President and President of the Ohio Conference, rose and berated the grievant and his business agent, said the grievance was "the worst piece of shit I've ever heard," called the grievant a "trouble-maker" and told him, "You're out." Mr. Presser was a political ally of the Local president, and had appointed the union co-chairman of the Joint State Grievance Committee. The most significant fact is not that Presser influenced the panel's decision; he could have easily done that by giving the word to union members of the panel prior to the hearing, or even by a nod of the head at the hearing. The significant fact is that Presser's being present and speaking was in violation of the committee's own rules, but his highly prejudicial statement was accepted without any objection by any panel members, and without even a motion to strike the remarks

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<sup>41</sup>U.S. Dist. Ct., N.D. Ohio, Civ. Action No. C81-1982.

from the record. Political influence is an accepted part of the process.

G. Finally, in *Roadway Express, Inc.*,<sup>42</sup> the grievant, William Burns, had opposed the reelection of Hoffa and formed the Rebel Teamsters Union, which criticized both the Teamster leadership and the trucking industry. He had filed numerous grievances, including claims that his seniority rights to runs had been denied. He was discharged because of allegedly not being available for duty. Burns claimed that when his case reached the Central States Joint Area Committee, one of the Local's officers told others before the hearing, "Burns lost his case." When his case was called for hearing, Hoffa came in and presided over the hearing, cross-examining Burns at length and commenting on the evidence. The NLRB, in a crafted understatement, said that the facts "strongly support the conclusion that the arbitration tribunal was constituted with members whose common interests were adverse to the grievant, Burns."<sup>43</sup> The significant fact is not that Hoffa could use the joint grievance to remove a thorn in the flesh. He could, and seemingly did, do so by instructions to the union panel members before the hearing. The significant fact is that Hoffa wanted to make clear to all involved that he controlled the procedure, and such control was an accepted practice in the procedure. The Jameses characterize the case as "documenting the power which the open-end grievance procedure gives Hoffa in disciplining recalcitrant members and dissident rank-and-file leaders."<sup>44</sup>

I will not bore you or entertain you with further examples; most people tire quickly of "X rated" performances. These are but a few examples gathered from a spotty survey of Board and court cases. Of necessity, these are cases in which bias is visible on the surface of the facts, but they signal the hidden masses which lie below the tips of the icebergs. The potentials for bias are ever-present, particularly when the case touches political considerations, because the process is politically controlled. As Azoff states:

"One inherent danger of the committee system is the ease with which it may be used as a tool for disciplining union members. . . . A union member who is a thorn in the side of leadership must conform his

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<sup>42</sup>145 NLRB 513, 54 LRRM 1419 (1963).

<sup>43</sup>*Id.* at 515.

<sup>44</sup>James and James, *supra* note 1 at 181.

behavior strictly to the letter of the contract, as the slightest infraction of a rule may well result in the maximum contractual penalty. In these cases, it is almost impossible to prove that the union has informed management that it desires to discharge or discipline a dissident member. The line between affirmatively seeking management's assistance and merely removing the protective union buffer that normally prevents the employer from disciplining union members with a heavy hand is hazy at best."<sup>45</sup>

### Devices Facilitating Arbitrariness

The pliability of the joint grievance process to trading of grievances, political manipulation, and distortion by bias is enhanced by three elements. *First*, the avowed principle that each case is based on its own facts and does not establish a precedent provides unlimited flexibility in disposing of any particular case without regard to past or future cases. Similar grievances need not be similarly decided; a grievance can be granted or denied for reasons wholly irrelevant to its merits with no costs beyond that of the particular grievance. *Second*, the lack of any statement of the facts of the case or reasons for the results makes impossible any inquiry as to whether the decision is consistent with other decisions or what rules or principles are relied upon. The panel need not commit itself to any rationale; indeed, it need have no rationale, but can fabricate an explanation, should one be required. *Third*, there is no readily available record of the hearing. Although transcripts may be made, they are not available short of a subpoena, and the hearing is closed except to the immediate parties. In many cases, the record does not show who voted to grant and who voted to deny the grievances. In some instances, the record does not even show who sits on the case. There is thus a degree of anonymity that reduces the panel members' personal responsibility.

To reinforce the binding effect of the joint grievance committee's decisions, the grievant's hands are tied both at the beginning and close of the hearing against raising any challenge to the fairness of the committee or the hearing. It is a common procedure that before the joint grievance committee will hear a case, the grievant, business agent, and employer are required to sign the following statement:

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<sup>45</sup>*Supra* note 30 at 336.

"Said parties do hereby waive any objection they may have to the manner in which the said Joint Grievance Committee was constituted; and

"Said parties do hereby agree that they will be bound by the decision of said Joint Grievance Committee, pursuant to the applicable labor agreement."<sup>46</sup>

The second method of tying the grievant's hands is for the committee to ask the grievant at the close of the hearing if he has been given a fair hearing. Thus, in *Early v. Teamsters Local 82*, where the grievants were critics and political opponents of the Local president who sat on the panel and the business agent who presented their case, the chairman of the committee asked the grievants whether they had been properly represented. They felt compelled to say "yes" for fear of alienating union members of the panel.<sup>47</sup> In *Roadway Express*, Hoffa, who had injected himself onto the panel to hear the discharge case of a vocal dissident leader, asked at the end of the hearing,

"Have we as a union represented you properly, presented your case with all evidence you submitted to us, and have you been permitted to submit all the evidence you have in your possession at this time before this duly constituted committee?"

The grievant, who recognized that his fate was irretrievably sealed, replied, "I still say no."<sup>48</sup> The two strings may be tied at the same time by requiring the parties to sign the waiver form at the end of the hearing, thus waiving both the makeup of the committee and the conduct of the hearing. If the waiver is not signed, the committee refuses to issue a decision. The effect is to leave the grievant remediless. The effect of these devices is to discourage losing grievants from politically or legally challenging the result, and if the grievants dare raise a later challenge the waivers and admissions are used against them.

Finally, the grievance committee structure denies political accountability, even though its decisions are politically motivated, for the union members on the panel are officers and business agents of other local unions who are not politically answerable, and are often strangers to the grievants.<sup>49</sup> Although the decision not to support the grievance is in fact made by the

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<sup>46</sup>Affidavit of Konstantine Petros, Jr., May 31, 1983, concerning procedure in cases involving Local 20 and Roadway Express. See also transcript of Grievance Hearing between Truck Drivers Union, Local 407 and Navajo Freight Lines, Inc., *supra* note 16.

<sup>47</sup>*Supra* note 39 at n.8.

<sup>48</sup>*Supra* note 42 at 522.

<sup>49</sup>James and James, *supra* note 1 at 171.

grievant's own local officers, or by upper levels of the union hierarchy, the only visible decision makers are the panel members who are beyond political reach of the grievants. All others can disown responsibility for the surrender of the grievance,<sup>50</sup> and this disclaimer of responsibility is reinforced by the adjudicatory form of the procedure. The process is a political shell game in which political accountability is made to disappear. With no political responsibility, arbitrariness, unequal treatment, and reprisals by union officers are not restrained by any effective internal political check.

### Conclusion

The important issue, as stated at the outset, is whether decisions of Teamster joint grievance committees should be given the credibility, deference, and legal weight given to decisions by neutral arbitrators. If the only interests at stake were those of the principal parties to the collective agreement, the international union, and the employers' associations, the Board and the courts would have little concern with how those parties mutually agreed to resolve their contractual disputes. The interests at stake, however, include the rights of individual employees—their statutory rights under the National Labor Relations Act, and their contractual rights under the collective agreement.

When the NLRB defers to arbitration in an unfair labor practice case, the Board accepts the arbitrator's decision as a determination of statutory rights.<sup>51</sup> Thus, if an employee files a charge claiming that the reason for her discharge was her processing numerous grievances or criticizing union officers, the rights at stake are her statutory rights under Section 7 of the National Labor Relations Act to engage in protected concerted activity. Deference by the Board means that the arbitrator's decision substitutes for the Board's decision as to whether her

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<sup>50</sup>Some business agents make a practice, when they lose a case, of sending a letter to the losing grievant listing the panel members and emphasizing that they were responsible for the decision. Responsibility is thereby focused on individuals who are not politically accountable to the union.

<sup>51</sup>Board deference takes two forms. First, the Board may "defer" in the sense of postponing proceeding with the unfair labor practice case until the contractual issue has been decided. If the arbitrator reinstates the employee with back pay, there is little purpose served in the Board's proceeding to a decision and order. Second, the Board may "defer" in the sense of accepting the arbitrator's decision as an adjudication of the merits of the unfair labor practice charge. The deference discussed in the text is not the first, but the second form.

Section 7 rights have been violated. The question is whether the process and the tribunal which produces that decision can be responsibly entrusted with determining that statutory right.

It should need no argument at this point that Teamster joint grievance committees cannot be entrusted with determining such statutory rights. Indeed, the joint grievance committees violate almost every procedural and structural principle built into the statute by Congress for the protection of those rights. Congress provided for full investigation of charges, open hearings to produce all of the relevant facts, findings based on evidence in the record, decisions based on the facts of the particular case made by disinterested officials who have special competence to determine statutory rights and who write opinions explaining their decisions. Each unfair labor practice case is to be decided on its own merits, not traded off for other cases or used for political purposes. Whatever deference the Board might give to decisions made by neutral arbitrators after full hearing and adjudication of the case on its merits, the decisions of Teamster joint grievance committees are entitled to no such deference.

When an employee whose grievance has been denied in arbitration sues the union for violation of its duty of fair representation and the employer for breach of contract, the primary focus is on the earnestness and adequacy of the union's presentation. There is a presumption that the arbitrator has objectively and fairly weighed the evidence presented to him and based his decision on the relevant contract provisions. The court defers to the arbitrator's adjudication of the employee's contract rights. Again, it should need no argument that where the contract rights of individual employees are involved, the decisions of the Teamster joint grievance committees are not entitled to the deference given to the decisions of a neutral arbitrator made after a full and fair hearing. The joint grievance committee process gives no assurance that the individual contract rights will be fully and fairly adjudicated on their merits. Although most cases may be properly decided, just as most grievance settlements are properly decided, the process is structured to conceal *ex parte* evidence, reliance on irrelevant considerations, grievance trading, political motivations and personal bias.<sup>52</sup>

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<sup>52</sup>The lack of an opinion makes it "an almost impossible evidentiary problem to clearly show animus or bad faith," Azoff, *supra* note 30 at 350. As the trial Examiner observed in *Modern Motor Express, Inc.*, 149 NLRB 1507, 1512, 58 LRRM 1005 (1964), "Collusion could be very easily accomplished and almost impossible to prove."

Here, as elsewhere, the credence and weight to be given a decision depends on the quality of the process, the character of the tribunal, and the reasons given for the decisions. Teamster joint grievance committee decisions fall short of arbitration on all counts. They were created as a repudiation of arbitration; they are treated by the parties as distinct from arbitration; lawyers, the Board, and the courts should cease misusing the good name of arbitration.

#### IV. BIPARTITE AIRLINE SYSTEM BOARDS

STUART BERNSTEIN\*

My assignment is to say a few kind words about a bipartite system board of adjustment—the type of board involved in the *Del Casal* case described by Dave Feller in the closing portion of his remarks.

For 18 years I served as a company appointee on the United Air Lines Pilots System Board of Adjustment, so obviously my views are shaped almost exclusively by that experience.

For the first nine years of my tenure all hearings were conducted by a bipartite Board—two members selected by the carrier and two by ALPA—the Air Line Pilots Association. During these years the Board could not sit with a neutral unless it deadlocked after hearing, and then the Board and neutral would consider and decide the case on the record made before the bipartite Board.

The underlying collective bargaining agreement was subsequently changed to provide that the company or union could opt to have a neutral sit with the Board from the inception of its proceedings. From then on, no case of any significance was heard by the bipartite Board. In fact, if a neutral was not requested it was a rather unsubtle signal that neither party had much interest in the case.

System boards are mandated by the Railway Labor Act<sup>1</sup>—unlike joint committees which are solely contractual. The Act contemplates there be no work stoppage over minor—grievance—disputes.

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<sup>1</sup>45 U.S.C. § 151, *et seq.*