cedures. It has stood by and permitted outside agencies and organizations to adversely affect the "process and quality" of arbitration in some of the ways that I have pointed out in this paper. Has the Academy become only a "friendly association" among its members? On this score that purpose set forth in its Constitution has been met.

Finally, whether or not you agree with my conclusions, they are derived from 53 years of experience in the labor relations field, both as an advocate and as an arbitrator. I believe that it is the arbitrator's duty and responsibility to maintain the integrity of that process. This is also the duty of agencies and organizations that purport to support arbitration.

I would conclude with an opinion of a world-traveled observer of the labor scene, Ben Rathbun. Ben gave a paper at your 1975 meeting in Puerto Rico entitled, "Will Success Ruin the Arbitrators?" In his own response to that question, he said, "No, but it might be close." And I presume to add that if it does happen, it is because we have dirtied our own nest.

## II. A MANAGEMENT ATTORNEY'S VIEW

J. DAVID ANDREWS*

### Introduction

The notions of "legalism" and "arbitration" are not necessarily at odds, as one might believe. The word "legalism" need not strike fear in the hearts of those who wish to keep labor arbitration as a cheap, expeditious alternative to the courts. There is in all arbitration an intrinsic degree of legalism, in that arbitration is an adjudicatory, determinative process which by its nature requires certain formalities. It is helpful to recognize at the outset, then, that by advocating certain legalisms in arbitration today, I am not proposing any sort of fundamental or drastic change from the basic form of arbitration. Proponents of keeping legalism out of arbitration overlook many of the present day realities in the labor field. The idea of developing set rules and procedures in arbitration is one whose time has come, at least

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with respect to a large amount of the labor arbitration that is currently being conducted today.

Arbitration is not new in this country. The Lex Mercatoria, Chapter 15, published in 1622, contained specific reference to voluntary arbitration of commercial disputes between merchants. How we view the role of formalities in labor arbitration today, however, is largely a result of the fact that the first application of labor arbitration in this country deviated substantially from a pure model of arbitration.

During the 19th century, when unions were struggling to gain recognition and power, they frequently made offers to arbitrate with companies. The arbitration sought by the unions was advocated solely as a means to enable workers to meet with employers to bargain.[1] It has been suggested by commentators that such early misuse of the term "arbitration" has caused labor arbitration to be regarded by many as a process to amplify and effectuate the collective bargaining agreement rather than as a process to determine an issue.[2] Although the Supreme Court in the *Steelworkers* Trilogy[3] protected the labor arbitrator's award from judicial intrusion only where its essence was based on the collective bargaining agreement, such arbitration, especially in such cases as discharge or discipline of an employee, remains essentially an adjudicatory process. It is a process by which the employer and the union engage a third party to find facts and to make a determination based on these findings.

The days of seeking truth or settling disputes by methods such as dunking or dueling are long gone. Over the course of time, Anglo-American jurisprudence has developed through trial, error, and experience a time-tested set of rules and procedures by which to find the truth and settle disputes. It is these rules and procedures which represent the "legalisms" that it is often argued should be kept out of arbitration.

## Reasons for Informality Are Not Supportable

There are a number of reasons traditionally given for encouraging informality of procedure in labor arbitrations. Among the

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[1]*See* Braden, *Arbitration and Arbitration Provisions*, in Proceedings of New York University Second Annual Conference on Labor, ed. E. Stein (1949), 355, 356.

[2]*Id.* at 356.

[3]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

more prominent are such things as the desire for speedy, cheap, and final resolution of the dispute; the relative simplicity of the matters in dispute; the limited scope of the arbitral decision; the therapeutic value of allowing employees to get certain matters off their chest; and the objective of keeping the decision maker free to apply the law of the shop. In today's labor arbitration environment, however, these factors no longer lead to the conclusion that informal, ad hoc, and unstructured procedures best meet the parties' objectives of arbitration. I believe that "legalism," if you will, in labor arbitration is both inevitable and desirable.

**The Legal Requirements Will Assure Certainty and Fairness**

Mr. Kagel focused on the reasons for using a written transcript in arbitrations. I will discuss the use of stricter adherence to the rules of evidence and the establishment of set standards of proof to be used by arbitrators. I believe that the use of these "legalisms" does not detract from the attractiveness of arbitration. Instead, I think it affirmatively enhances the process by providing greater certainty and fairness. The rules of evidence used in courts exist in their present form today because they have been tailored over time to weed out evidence which is inherently unreliable or unrelated to the issue before the tribunal. The standardization of quanta of proof for different types of cases will not cut down on the speed or expeditiousness of arbitration. It will actually allow the parties to know in advance what to expect, so that they can be *more* cost-effective in preparing their cases.

Many of the labor matters brought before arbitrators today are every bit as complex as most of the disputes that end up in court. One would be hard pressed to maintain that such cases as simple collections matters, which are tried in courts with the full array of procedural requirements, are even on the same order of complexity as many of the issues which now go to arbitration, such as those involving pension funds, compliance with safety standards, and even most discharges. And if an arbitrator's decision defines a critical term of a labor contract, then it not only affects the rights of the grievant; it can have the widespread impact of affecting all the employees covered under that contract, which may reach into the thousands. As a matter of basic fairness, it is incumbent on arbitrators to ensure that the procedure they use provides adequate protection to those who may

not share some of the subjective interests of the immediate parties but who are nonetheless directly affected by the outcome.

Another often-cited advantage of arbitration is that it is a method of providing a final, dispositive resolution of a dispute. But today a number of external pressures are exerted on the arbitral process to adopt a more formalized procedure if the finality of arbitrators' decisions is to be protected. Mr. Kagel earlier mentioned the Supreme Court's decision in *Alexander v. Gardner-Denver.*[4] He noted that the Supreme Court, in Footnote 21, stated that weight could be accorded arbitration decisions if there were conformity with certain enumerated requirements. Mr. Kagel discussed one of those requirements, an adequate record, in justification of his thesis that there should be a written transcript of arbitration hearings. I am basically in agreement with Mr. Kagel's position, however I believe that it can be even more expansive than that which he took. Another of the factors noted by the Supreme Court in Footnote 21 was "the degree of procedural fairness in the arbitral forum."[5] Adherence to the rules of evidence and adoption of standardized quanta of proof greatly increase the degree of procedural fairness and approach more closely the desired procedural protections afforded in a trial. A discrimination lawsuit can drag on for an interminable length of time. It is often during this process that the parties become entrenched in their positions and are unable to mend their differences without one feeling as though he is thereby losing face. If preserving their relationship, so as to increase the likelihood that the claimant may continue to work in his job, is valued, as I believe it should be, then it behooves both employer and employee to have resort to final arbitration of discrimination charges. That may require the adoption of certain "legalisms."

Another external pressure pushing toward greater formality in arbitral procedure arises where the issue to be decided by the labor arbitrator involves a possible breach of the collective bargaining agreement, which is also a possible unfair labor practice under the NLRA. The NLRB in its *Spielberg* and *Collyer* decisions established that it would defer to an arbitral award in such circumstances if the award met certain standards.[6] One of these

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[4]415 U.S. 36, 7 FEP Cases 81 (1974).

[5]*Id.* at 60 n.21.

[6]*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955); *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

standards was that the proceedings before the arbitrator have been fair and regular. The *Spielberg/Collyer* doctrine necessarily requires greater formality and regularity of procedure in the arbitration process, which would come from the legalisms I am advocating.

Also, because of the increase in cases charging unions with breach of the duty of fair representation, it has become very much in the interest of unions to ensure that the handling of their grievances and the processing of arbitration claims is not subject to attack. An increasingly safe way to ensure that is to comply with procedural formalities. A transcript which shows that certain procedural rules and requirements have been met in the Union's efforts to represent a grievant's interests could well provide and document that extra measure of effort required to defeat an unfair representation challenge.

The Supreme Court noted another of the important functions of labor arbitration in *Steelworkers v. American Mfg. Co.*[7] The Court stated that "[t]he processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[8] This passage, and the idea it represents, often tend to be misconstrued by advocates of informal arbitration procedures. It is not an open invitation for parties simply to get something off their chests by introducing it into evidence regardless of its evidentiary value. It is addressed more to the need for an available procedure by which a dispute may be brought than it is to the nature or formality of the procedure itself. As Dean Shulman has so acutely noted, "[t]he more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."[9]

It would be wrong to assume that the parties themselves are necessarily well served by, or even desire, having an arbitrator play fast and loose with the rules of evidence. It is frustrating for both sides to have an arbitrator "take the evidence for what it's worth." I quote F.A. O'Connell, who noted, "The arbitrator who says that [he will 'take the evidence for what it's worth'] either knows what it's worth but is afraid to say so and rule accordingly, or he doesn't know. In either case, he doesn't belong where he

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[7]*Supra* note 3.
[8]*Id.* at 568.
[9]Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1017 (1955).

is."[10] It is probably true that in the long run the employer and the grievant are hurt equally by the introduction of hearsay or irrelevant evidence. But what does that show? It hardly seems to be a very compelling argument for abandoning a system of rules widely accepted to be based on fundamental notions of fairness and reliability.

Admittedly, because prehearing briefs generally are not submitted in labor arbitration, it is inevitable that there will be a slightly looser application of relevance rules. And that seems to be a desirable compromise in terms of balancing, on the one hand, the desire for keeping costs and delay to a minimum and, on the other, the desire for using a proven procedure. The arbitrator will not necessarily know at an early point in the proceedings what might be relevant to an issue later raised. This one consideration, however, does not provide the justification for flinging open the door to whatever pieces of evidence the parties may want to submit.

Hearsay becomes no more reliable in an arbitration proceeding than it is when presented in court. What is the purpose in admitting unreliable evidence if it does nothing to advance the reasons for choosing arbitration in the first place? Also, there is no justification, for example, for an attorney being able to testify in an arbitration proceeding by virtually unlimited use of leading questions in situations where he would not be able to do so in a court proceeding. What harm is there in limiting lay opinion testimony in arbitration only to those opinions which are rationally based on the witness' perceptions and are helpful to a clear understanding of his testimony? Does protecting privileged information undercut the speediness, finality, or therapeutic value of arbitration? Is it really advantageous to allow into evidence, for example, prior offers to compromise, when the rule of evidence keeping out such evidence is itself based on the policy of aiding compromise and settlement of disputes?

Whereas the lack of availability of any sort of prearbitration discovery may once have justified an expansive approach to evidentiary requirements, both sides today have much more information available to them. Employers now keep vast amounts of information about most of the matters which tend to

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[10]O'Connell, *Arbitration Procedure and Practice: Management Viewpoint*, in Proceedings of New York University 15th Annual Conference on Labor, ed. E. Stein (1962), 331, 338.

go to arbitration. Arbitration is generally the final step in a series of increasingly formal grievance proceedings. At each grievance step the parties exchange information on their respective positions. Where a union has asked for, and been denied, certain documents, the union may seek their production at the hearing by asking the arbitrator to issue a subpoena duces tecum.[11] If entirely new evidence surfaces at the arbitration, an arbitrator will often remand the case to the grievance procedure. Furthermore, an employer must now supply the union with the information needed to process and settle disputes. The obligation to provide information, first recognized as a part of the duty to bargain,[12] has been extended by the Supreme Court to the grievance/arbitration context.[13]

So it seems to me that the time has come for stricter adherence to evidentiary rules in labor arbitration. And rules of evidence necessarily go hand in hand with the standard or quantum of proof against which the evidence is to be measured.

Let's look at the issue of standards of proof in terms of what standards have been used in discharge cases.[14] There is no consistency whatsoever among the various standards of proof used by arbitrators to sustain employee discharges. The standards used range from "the preponderance of the evidence,"[15] to "only the clearest and most convincing cases."[16] Between these two extremes, arbitrators apply such standards as "reasonable doubt," "clear and convincing evidence," and "evidence to convince a reasonable mind."[17]

Some arbitrators justify their use of a certain standard in a particular case on whether the cause of discharge involves charges of a criminal or immoral nature or whether it is a less serious infraction of company rules.[18] Other arbitrators look at the fact that the severe impact of any discharge, whatever the cause, justifies use of the reasonable doubt standard.[19] Still

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[11]*See I. Hirst Enterprises Inc.*, 24 LA 44 (Justin, 1954). *But see University of California*, 63 LA 314 (Jacobs, 1974) (university hearing procedure provided hearing officer no inherent power to issue subpoena).

[12]*NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 38 LRRM 2042 (1956).

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

[14]*See generally* Benewitz, *Discharge, Arbitration, and the Quantum of Proof*, 28 Arb. J. 95, 97 (1973).

[15]*Howell Refining Co.*, 27 LA 486, 491 (Hale, 1956).

[16]*Kroger Co.*, 25 LA 906, 908 (Smith, 1955).

[17]*See* Farley and Allota, *Standards of Proof and Discharge Arbitration: A Practitioner's View*, 35 Lab. L.J. 424, 425 (July 1984); Benewitz, *supra* note 14 at 97.

[18]Benewitz, *supra* note 14 at 97.

[19]*Id.* at 101.

others have been so confused by the panoply of available standards of proof that they hold that, and I quote, "each discharge incident should be resolved upon the equities as disclosed by the particular record in an impartial manner without being influenced one way or the other by complicated, theoretical, or technical rules [concerning burden of proof] admittedly helpful in jury cases in court."[20] Perhaps the most novel approach was taken by Arbitrator Laughlin in the *Daystrom Furniture Co.* case.[21] Instead of looking to the nature of the offense in determining the appropriate standard of proof to apply, he concentrated on the type of penalty imposed. He suggested that the standard of proof should vary with the severity of the penalty.

Out of all this apparent confusion and inconsistency, what is important is to see that requiring consistent standards of proof makes the arbitration process no more "legalistic" (i.e., no less fair or expeditious) than it is now. Arbitrators, by the very nature of their task, have to apply the evidence that they receive against some standard. Although many arbitrators are accomplished and experienced attorneys, the principal standards of proof to choose from, i.e., preponderance of the evidence, clear and convincing evidence, and beyond reasonable doubt, are all based on simple, common sense, lay notions. It does not require any specialized legal knowledge to apply these standards. Nor does it take any more time or money of the parties to have one consistent standard applied. Finally, it does not create any more formality in the procedure to have a set standard than to have one chosen at the whim of the arbitrator.

The lack of consistently applied rules of evidence and standards of proof in labor arbitration does little affirmatively to advance the objectives of labor arbitration. If anything, it tends to thwart the very purposes of arbitration. Although individual arbitrators may be consistent through time in their personal use of such rules, you will find gross inconsistencies among arbitrators if you are to look laterally across them as a group. Often parties will have no control over the ultimate decision regarding which arbitrator will decide their dispute—for example when that choice is voluntarily submitted to an arbitration or mediation service. Even if the parties do find out who the arbitrator will be, but he has not ruled on a similar case in the

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[20]*National Mine Serv., Ashland Div.*, 68-1 ARB, ¶8007, p. 3025 (Hunter, 1967).
[21]65 LA 1157 (Laughlin, 1975).

past, they will not know in advance what to expect in the arbitration proceeding. This makes it very hard for them to anticipate how much evidence will be needed to prove or rebut their positions. In a sense, they are submitting important matters to a crap shoot. This may cause each of the parties to prepare a more extensive case, at greater expense, than he might have prepared otherwise. This problem goes well beyond the uncertainties faced when a judge is appointed to your case in the courts. There is no way to control for either the vagaries of individuals' applications of rules or the impact of their ideologies upon such judgments. Therefore, at least one constant in the formula, i.e., a standard set of rules to be applied, should be brought under control.

What alternatively happens as a result of lateral inconsistency among arbitrators is that the parties engage in arbitrator-shopping in an effort to find an arbitrator who will apply the standard of proof which most benefits their position. Based on fundamental notions of fairness, a whole set of court rules and attendant doctrine have been developed to prevent tribunal-shopping among courts. Given what may be an unequal access to resources between employers and employees, it hardly seems fair to give an advantage to one party simply because he can find out more than the other about the procedural idiosyncrasies of a particular arbitrator.

## Conclusion

There may well remain certain situations where excessive simplicity of subject matter or a special need for speediness outweighs the justifications for the procedural protections I have been advocating. In those situations there may be required only procedural devices which are absolutely necessary to bring the disputed matter to resolution, and devices such as written briefs or written opinions can be abandoned. There has been a growth recently in the use of expedited procedures by both employers and unions which can meet the needs of these special circumstances. In most other labor arbitration situations, however, the fairness of the outcome, and thus the ultimate viability of the process itself, may well depend upon those procedures which have been time-tested for providing the fairest outcome.

Despite a number of cries during the past few decades of "creeping legalism,"[22] arbitration remains as popular as ever with employers and unions.[23] But there are growing pressures for labor arbitration to become more legalistic if it is to maintain its currect turf and expand into new areas of deferral by the courts. The time has come to recognize that "legalism" need not be a four-letter word. Arbitrators, employers, and employees alike can be well served by accepting it into labor arbitration.

[22]*See Creeping Legalism in Labor Arbitration: An Editorial,* 13 Arb. J. 129 (1958).
[23]*See* Bartlett, *Labor Arbitration: The Problem of Legalism,* 62 Or. L. Rev. 195, 226 (1983).