CHAPTER 7

CONTRIBUTED PAPERS

I. AN ARBITRATOR'S AUTHORITY TO SUBPOENA: A POWER IN NEED OF CLARIFICATION

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Introduction

The use of arbitration to resolve labor disputes between parties to a collective bargaining agreement has had a long and successful history. The arbitration mechanism has been extended into other fields, such as consumer complaints, commercial transactions, domestic relations, medical malpractice, and others, in order to settle controversies between parties without resort to the costly alternative of litigation. Even in the field of labor relations the utilization of grievance-arbitration procedures has proved itself remarkably adaptable to meet the changing needs of employers, unions, and employees. Thus methods have been introduced to speed up the processing of certain disputes through the use of expedited arbitration to reduce case overloads or to avoid backlogged, unresolved differences between parties.[1] Special arbitration agreements are presently being used in some industries as a means to determine outstanding bargaining issues and thus minimize the potential of costly strikes.[2] Rules have been developed by the American Arbitration Association to handle complex and difficult issues involved in grievances which allege discriminatory conduct by an employer on the basis of race, sex, color, creed, or national origin.[3] These rules attempt to insure a full and fair hearing for

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[1]*See* American Arbitration Association, Expedited Labor Arbitration Rules (1976).

[2]Abel, Collective Bargaining Labor Relations in Steel: Then and Now (1976).

[3]American Arbitration Association, Employment Dispute Arbitration Rules (1978); Edwards, Arbitration as an Alternative in Equal Employment Disputes, 33 Arb. J. 22 (1978).

all parties—employer, union, and employees—before arbitrators competent in the handling of discrimination grievances and to preserve the goal of finality which courts have generally given to labor arbitration decisions.

Not only have labor arbitrators produced a body of substantive principles which are both well developed and remarkably flexible to meet the continuing demands of the labor relations process but there has also grown up a comprehensive body of procedural rules, which parties uniformly apply to arbitration hearings. The Voluntary Labor Arbitration Rules of the American Arbitration Association, the Procedures for Arbitration Services for the Office of Arbitration Services of the Federal Mediation and Conciliation Service and the Code of Professional Responsibility for Arbitrators of Labor Management Disputes[4] provide guidelines for most of the procedural aspects of an arbitration hearing. These rules provide for the selection of an arbitrator, ethical conduct on the part of the arbitrator, the conducting of the hearing, the filing of post-hearing briefs, the rendering of the award, and the costs and expenses of the hearing. Even where the rules of these tribunals might not technically apply, nevertheless most authorities[5] have agreed upon the proper procedure for such matters as the submission of a case to an arbitrator, the order of presentation, the taking of oaths, the examining of witnesses, and the filing of a decision by the arbitrator.

The Problem: Subpoena Power

There is one procedural matter about which there has been both a general lack of clarity and a marked difference of opinion among courts, arbitrators, and various scholars: the authority of an arbitrator to issue subpoenas for producing documents or giving testimony at an arbitration hearing. These opinions range from those, such as, "[a]rbitrators do not hesitate to request the

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[4]American Arbitration Association, Voluntary Labor Arbitration Rules (1976); 29 C.F.R. §§1404.1 to 16 (1977); *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, ed. Barbara R. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 217–236.

[5]*See, e.g.*, Elkouri & Elkouri, How Arbitration Works, 3d ed. (Washington: BNA Books, 1973), 181–251; Fairweather, Practice and Procedure in Labor Arbitration, 2d ed. (1983), 160–198; Fleming, The Labor Arbitration Process (U. of Ill. Pr., 1965); Scheinman, Evidence and Proof in Arbitration (ILR Pr. 1977).

production of data or information if they have a reasonable basis to believe that it will be germane to the case"[6] to the categorical statement that "subpoenas are not available in private arbitration proceedings."[7] This difference of opinion is not a mere academic dispute. Uncertainty regarding the issuance of subpoenas has caused extensive litigation. For example, in the Supreme Court case of *Detroit Edison Co. v. NLRB*[8] an employer refused to produce data which the union requested concerning promotional examinations given in 1971. The union then asked the arbitrator to compel the company to give this information. When the arbitrator declined on the basis that he lacked the authority to enforce such a demand, litigation continued for over eight years before the National Labor Relations Board, the Court of Appeals for the Sixth Circuit, and finally the United States Supreme Court.

Moreover, the issuance or refusal to issue a subpoena has served as a basis for parties to attack arbitration awards. In *Great Scott Supermarkets v. Teamsters Local 337*,[9] the arbitrator issued a subpoena duces tecum to a union official, at the request of the company, for the union representative to appear and produce certain union records at the hearing. When the employer moved in federal district court to enforce the award of the arbitrator, the union contended that the award was invalid since the scope of the subpoena exceeded the arbitrator's legal authority. The court rejected the claim and held that the arbitrator had the power to compel both the attendance of the union officials and the production of the disputed records. Conversely in *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*[10] a union moved in federal district court to vacate the decision of an arbitrator in a discharge case because the arbitrator had refused to consider evidence of a witness who would not testify at the arbitration hearing and whom the arbitrator had not compelled to attend. Again both the district court and the federal appellate court upheld the award of the arbitrator but this time on the ground that a private arbitrator lacked any power to subpoena witnesses. Although both of these cases upheld the

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[6]Elkouri & Elkouri, *supra* note 5 at 263–264.

[7]*Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1238, 76 LRRM 2274 (D.C. Cir. 1971).

[8]440 U.S. 301, 100 LRRM 2728 (1979).

[9]363 F. Supp. 1351, 84 LRRM 2514 (E.D. Mich. 1973).

[10]*Supra* note 7; *see also Northwest Air Lines v. Air Line Pilots Ass'n*, 530 F.2d 1048, 1050 n.11, 91 LRRM 2304 (D.C. Cir. 1976).

awards of the arbitrators, they did so on diametrically opposed grounds. Thus where the arbitral subpoena authority remains unclear, arbitration awards are open to collateral attack on the basis that the arbitrator did or did not appropriately exercise subpoena authority.

Potential Tort Liability

In addition to undermining the finality of arbitration awards, doubts as to an arbitrator's authority to issue subpoenas can lead to legal actions against arbitrators. The fact that arbitrators today find themselves personally involved in litigation is no longer a unique occurrence.[11] In the past few years arbitrators have increasingly been named or joined as defendants in a variety of lawsuits, although most challenges against individual arbitrators have been dismissed by courts on the basis of arbitral immunity.[12] The issuance of a subpoena by an arbitrator to an objecting witness may involve an arbitrator in a lawsuit on the theory such action results in false imprisonment. Thus there are cases which hold that where a person causes a restraint on the freedom of movement of an individual against his will through the improper assertion of legal authority, there exists a cause of action for false imprisonment. This is true even if the confinement of the individual was only for a brief duration and the

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[11] *Cahn v. Garment Workers*, 311 F.2d 113, 51 LRRM 2186 (3d Cir. 1962) (antitrust suit asserted by employer against arbitrator and union, alleging that the union through the offices of the arbitrator was compelling the employer to maintain practices which violated the Sherman Anti-Trust Act); *General Contractors Ass'n of N.Y., Inc. v. Teamsters Local 282*, 98 LRRM 2135 (S.D.N.Y. 1977) (employer names arbitrator as a defendant in an action to declare the arbitrator's appointment by the company and the union invalid); *Hill v. Aro Corp.*, 263 F. Supp. 324, 64 LRRM 2315 (N.D. Ohio 1967) (grievant, whose discharge an arbitrator had upheld, sued the arbitrator for various acts alleged to be inconsistent with the arbitrator's duties and in excess of his jurisdiction); *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (1956), *aff'd memo*, 165 N.Y.2d 717 (1957) (an unsuccessful party in a labor arbitration alleged collusion in the making of an award and sought money damages from the arbitrator, the union, its representative, and its attorney.)

Some suits have challenged the selection of an arbitrator, others have attacked the neutrality of arbitrators; and some have been filed under §301 of the Labor Management Relations Act by disgruntled grievants or losing parties in an arbitration matter. It is nevertheless costly to arbitrators, as to any litigants, to retain legal counsel to file even a successful motion to dismiss a complaint or a motion for summary judgment and to defend against any appeals.

[12] *See* cases *supra* note 11; *but see Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 230 S.E.2d 380 (N.C. 1976) (if arbitrators engage in misconduct during arbitral proceeding, the assertion of arbitral immunity does not protect the arbitrators from being deposed about their award).

person asserting the authority acted without malice and in the good faith belief that he has the legal right to issue process.[13]

One caveat: most cases concerning false imprisonment have involved improper arrest by private citizens or police officials.[14] Yet plaintiffs have successfully asserted the cause of action against judicial officers. If a judicial officer acts in good faith but in the clear absence of any jurisdiction or authority and causes an individual to be detained, such official can incur liability for false imprisonment despite claims of judicial immunity.[15] By analogy a strong argument can be made that an arbitrator, even under a claim of arbitral immunity, would likewise be subject to an action for false imprisonment if the arbitrator issued process which resulted in the restraint of a witness against that person's will and a court later found that the arbitrator had no legal authority to grant such process. The false imprisonment claims may be significant and include compensatory damages for pain, suffering, and humiliation in addition to actual damages since the interest injured is clearly a personal one.[16]

If it is true that "[a]rbitrators do not hesitate to request the production of data or information" through the subpoena process, they may be running a risk in doing so where the power to issue subpoenas is unclear. In view of such difficulties, it is useful to analyze both the objections to the use of subpoenas by labor arbitrators on the one hand and the legal bases utilized by courts and arbitrators which have recognized the need for arbitrators to issue compulsory process on the other.

Rationale for Arbitral Subpoena Power

As noted in the *Detroit Edison* and *Washington Post* cases, some courts and arbitrators have concluded that labor arbitrators do not possess subpoena power. This view was expressed by

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[13]*See* Restatement (Second) of Torts §§35, 41, 45A (1965); Prosser, Law of Torts (4th ed. 1971), 42–49. If an arbitrator causes a subpoena to issue for improper purposes, he may also be liable for the tort of abuse of process. Restatement (Second) of Torts §682 (1977).

[14]*See, e.g., Sullivan v. Murphy,* 478 F.2d 938 (D.C. Cir.), *cert. denied,* 414 U.S. 880 (1973); *Dubreuil v. Pinnick,* 383 N.E.2d 420 (Ind. App. 1978); *Nadeau v. State of Maine,* 395 A.2d 107 (R.I. 1977); *Allison v. Ventura County,* 68 Cal. App.3d 689, 137 Cal. Rptr. 542 (1977).

[15]*See, e.g., Pierson v. Roy,* 352 F.2d 213 (5th Cir. 1965); *Holland v. Lutz,* 194 Kan. 712, 401 P.2d 1015 (1965); *Waters v. Ray,* 167 So.2d 326 (Fla. App. 1964); *Minor v. Seliga,* 168 Ohio St. 1, 150 N.E.2d 852 (1958).

[16]Prosser, *supra* note 13 at 47–48.

arbitrator Saul Wallen in *American Telephone & Telegraph Co.*[17] The union had demanded that the company terminate an employee under a maintenance of membership clause when the union had expelled the individual from membership for failure to observe the union's bylaw requiring the observance of an affiliated union's picket line. The company sought documents from the union in order to determine the validity of the expulsion and the status of the employee as a member of the union and the unit. The union refused to comply with the company's request. The arbitrator upheld the union's expulsion of the employee from the membership and the union's right to request that the employer dismiss the employee under the union security clause. Arbitrator Wallen dismissed the company's demand for written records on the basis that "[a]n arbitrator has no right to compel the production of documents by either side."[18] According to Arbitrator Wallen the most he could do was to draw an adverse inference from the union's failure to present the requested material to the company.

Lack of arbitral subpoena authority is based on a number of theories. One theory is the common law notion that private arbitrators were not thought to have the power to issue compulsory process since an arbitrator's authority was in no way akin to or derived from the judicial power granted to the courts. At common law, all authority of an arbitrator was narrowly construed as being limited solely to rights derived from the contract authorizing arbitration.[19] Another theory is that subpoenas interfere with important individual rights of freedom of movement and privacy of documents, which only courts should have the power to restrict, since only judges have sufficient expertise to balance the important legal rights involved.[20] Another theory rests on the fear that allowing arbitrators the use of compulsory process would inject too strong an aura of formality into a process the basic strength of which has been its relative informality. It is said that subpoena power carries the potential of

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[17]6 LA 31 (1947); *see also Tectum Corp.*, 37 LA 807 (Autrey, 1961); Fleming, *supra* note 5 at 175.

[18]6 LA at 43.

[19]5 Am. Jur. 2d *Arbitration and Award* §91 (1962).

[20]The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In addition the Supreme Court has recognized a right of individuals to be free from unreasonable restraints upon their freedom of movement both in interstate and intrastate activities. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

indiscriminate use which could lead to a form of civil discovery. Both courts and arbitrators have uniformly rejected any formal application of discovery, such as that found in the Federal Rules of Civil Procedure, to arbitration proceedings.[21] A fourth argument contends that parties to a collective bargaining agreement already possess a mechanism to require an objecting party to produce relevant evidence. Under the National Labor Relations Act, both employers and unions are under a legal duty to bargain in good faith over wages, hours, and terms and conditions of employment. In *NLRB v. Acme Industrial Co.*,[22] the National Labor Relations Board held that the duty to bargain in good faith entails an obligation on an employer to furnish information needed by a union to evaluate grievances and to determine whether such grievances should be pressed to arbitration. The Supreme Court upheld the Board and noted that the arbitration process can function properly only if the parties have sufficient information concerning pending grievances. It is thus argued that if the employers or unions can require information during the arbitral process through the National Labor Relations Board, any power on the part of an arbitrator to subpoena materials is unnecessary.

However persuasive, these arguments are outweighed by compelling policy considerations to the contrary. For example, securing information concerning a grievance from the other party by filing unfair labor practice charges with the NLRB under Sections 8(a)(5) or 8(b)(3)[23] can be both time-consuming and costly. It can take approximately one and one-half years between the time a charge is filed and the time a decision is rendered by the Board.[24] A case might even drag through the appellate courts for years as did *Detroit Edison*. Such delays build the tensions and pressures that the arbitration system was designed to eliminate.

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[21]*See, e.g., Great Scott Supermarkets, Inc. v. Teamsters Local 337*, 363 F. Supp. 135, 1, 84 LRRM 2514 (E.D. Mich. 1973); *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *see also* Fairweather, *supra* note 5, at 133–134; Fleming, *supra* note 5, at 62–63.

[22]385 U.S. 432, 64 LRRM 2069 (1967).

[23]29 U.S.C. §§158(a)(5), (b)(3); *cf. Chesapeake & Potomac Tel. Co.*, 259 NLRB 225, 109 LRRM 1019 (1981), where the Board required an employer under §8(a)(5) to produce information which a union had sought initially during an arbitration procedure by subpoena but a federal district court had denied enforcement to the arbitral subpoena.

[24]*See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1796 Table III (1983).

One of the purposes of arbitration is to resolve disputes in a quick and efficient manner as an alternative to formal litigation. Thus an arbitrator can dispose of the request for a subpoena prior to the arbitration hearing within a relatively short time.[25] Arbitral subpoena power would provide a timely and efficient means to ascertain both the relevancy of disputed material and a party's obligation to produce certain evidence.

The charge that arbitral subpoena power introduces formalistic discovery rules, and thus bogs down the arbitration process, is overstated. Most arbitrators have taken a balancing approach to the problem. Arbitrators typically resist attempts by either unions or companies to engage in full scale discovery; nevertheless they have recognized the rights and needs of parties to obtain pertinent information in certain cases.

Thus, arbitrators have resisted fishing expeditions. In *I. Hirst Enterprises, Inc.*,[26] the union, which represented performers employed by the company, claimed that the company had violated its collective bargaining agreement by failing to comply with various obligations, such as the securing of proper union contracts from individual performers. The union presented no evidence at the hearing but argued that all of the relevant data was in the hands of the company, and thus the company had the burden of disproving the union's allegations. Arbitrator Jules Justin found that the burden in this case was on the moving party, i.e., the union, to substantiate its claim with sufficient evidence.

Justin concluded that under the labor agreement the union could have requested the arbitrator to issue a subpoena duces tecum. Thus, Arbitrator Justin would not allow the union to use the arbitral process to engage in a broad-based general inquiry into the company's employment practices with the hope of finding some contractual violations. He noted:

> [A] party who refuses to use the means provided by arbitration, cannot use the arbitration process as a 'fishing expedition'—to find out for the first time if the other party had violated the contract. Nor can one party use the arbitration process as a means to 'police' the contract—unrelated to or in the absence of a specific claim supported by material facts of evidentiary value.[27]

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[25]*See* 35th FMCS Ann. Rep. 17, Table 5 (1982).
[26]24 LA 44 (1954).
[27]*Id.* at 47.

Not only has there been a marked disinclination to allow one party the use of subpoena authority as a "fishing expedition" to discover contract violations, but there is also simply not the time to allow it. The parties usually choose an arbitrator in the final steps of the grievance procedure, when most information has been exchanged. The time between the appointment of the arbitrator and the hearing is relatively short and does not lend itself to far-reaching depositions, interrogatories, or other pretrial discovery devices.[28] Accordingly, power to subpoena relevant evidence and witnesses will not result in full-scale prearbitration discovery given the reality of arbitral restraint; rather, arbitral subpoena power will increase the facts available to the decision maker and increase the chances for an informed decision.

Perhaps the use of subpoenas by labor arbitrators will have a beneficial aspect in one area where courts have refused to accept arbitrators' decisions as final—that concerning grievances of employment discrimination. In *Alexander v. Gardner-Denver Co.*,[29] the Supreme Court refused to require that a federal district court defer to the decision of an arbitrator in a case that involved claims of contractual violations and unfair employment practices under Title VII of the Civil Rights Act of 1964. One of the bases of the Court's decision was that "the fact-finding process in arbitration usually is not equivalent to judicial fact-finding."[30] The Court noted that "compulsory process . . . [is] often severely limited or unavailable in arbitration proceedings."[31] Since the discrimination claim might not be fully presented in an arbitration proceeding, the Court held that a federal district court need only give the weight which it deemed appropriate to the decision of an arbitrator in such instances. However, the Court did note that the arbitrator's award should properly be accorded "great weight"[32] if, inter alia, the arbitration provided the proper degree of procedural fairness and resulted in an adequate record with respect to the issue of employment discrimination. Proper use of subpoenas by labor arbitrators in discrimination grievances could provide the necessary record

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[28]*See* note 25 *supra*.
[29]415 U.S. 36, 7 FEP Cases 81 (1974).
[30]*Id.* at 57.
[31]*Id.* at 57–58.
[32]*Id.* at 60 n.21.

for hearing of the discrimination allegations. Entirely consistent with the nature of the arbitration process, the subpoena power provides a flexible tool to produce pertinent data to the parties and to the arbitrator, thereby increasing judicial deference to the arbitrator's award.

The arguments that only courts should possess subpoena power fall under closer scrutiny. In most cases courts do not directly issue subpoenas. For example, the Federal Rules of Civil Procedure provide that the clerk of a federal district court is to issue a signed and sealed subpoena "in blank to a party requesting it who shall fill it in before service."[33] Under federal practice, any person can receive a subpoena, not from a judge, but from the clerk of courts and can serve it upon another party. Similarly, most administrative agencies allow commissioners or directors, who may or may not be attorneys, to issue subpoenas and make initial determinations of relevancy concerning documents or testimony sought by a subpoena in proceedings before the agency.[34] The basis for granting subpoena power to administrative officials is that such persons have the expertise in regard to their agency affairs to know what facts should be developed in any proceedings before the agency.

Similarly, the courts have long recognized the special expertise of arbitrators in handling collective bargaining contract disputes. Certainly arbitrators, who have been chosen by the parties because of their knowledge and experience in labor relations, have the same ability as administrative officials in agency matters to determine what evidence is relevant and necessary for the resolution of a grievance. Moreover, just like subpoenas issued by agencies in administrative matters, subpoenas issued by arbitrators are neither self-executing nor self-enforcing. An arbitrator has no contempt power to compel a party to obey an arbitral subpoena. If a party refuses to comply with a subpoena issued by an arbitrator, that party can file a motion in a court of competent jurisdiction to quash the subpoena or the other party may file a motion to enforce the subpoena issued by the arbitrator. At that time, a judge will weigh any of the legal interests involved and determine the scope and propriety of the subpoena. It is only after a court has

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[33]Fed. R. Civ. P. 45(a) (1977).

[34]*See, e.g.*, 29 U.S.C. §161(1) (1976) allowing the NLRB or "its duly authorized agents or agencies" to issue subpoenas; similar right given to EEOC at 42 U.S.C. §2000e–9 (1977).

issued a directive to comply with an arbitral subpoena that the contempt power becomes relevant. In such cases, the court, and not an arbitrator, determines whether to issue a citation for contempt if a party continues to refuse to produce the evidence or testimony sought.

The common law notion that an arbitrator lacks any authority to compel either the attendance of witnesses or the production of written material at the hearing fails to recognize that such evidence can be essential if the party is to receive the full and fair hearing for which it bargained in the labor agreement.

In most arbitration cases subpoenas will be unnecessary. Many issues will be relatively straightforward and simple and can be resolved on the basis of the evidence presented by both sides. Also one party will usually give the other side all information that party possesses during the grievance process either in hopes of resolving the dispute prior to arbitration or because parties realize the necessity of preserving the mutual faith and trust required for an ongoing collective bargaining relationship.

However, subpoena authority may be essential in some cases: the issues or the facts before the arbitrator may be exceedingly complex and technical; the evidence necessary to resolve the dispute may be in the control of only one party; a party may refuse to give the relevant data to the other side where the relationship between the parties has broken down; one party may be attempting to avoid obligations under the collective bargaining agreement; a complete revealing of the facts may result in heavy liability against one party; or a party may feel that some type of privilege exists in not making information available. For example, in *Teamsters Local 757 v. Borden, Inc.*,[35] the company closed its local ice cream processing facility and laid off all of the employees represented by the union. The union claimed that the company had violated clauses in the collective bargaining agreement whereby the company had promised not to close the local facility and import ice cream for sale within the locale and had similarly promised not to contract out the work of bargaining unit employees. In order to determine whether the company had in fact violated these clauses, it was necessary for the union to inspect the books and records of the company concerning its sales and purchases of ice cream and its use of outside manufacturers. On the other hand, there was certainly

[35]78 LRRM 2398 (S.D.N.Y. 1971).

no incentive for the company to produce the necessary documents. The collective bargaining relationship between the company and the union had terminated insofar as the company was concerned. Moreover, the records requested could contain sensitive market data or trade secrets. Finally, if the company had violated the contract, it might be responsible for substantial monetary damages in terms of lost wages to all of the employees who had been laid off. Not surprisingly the company first refused to arbitrate the issue and then refused to produce any of the records which the union subpoenaed until the company was ordered to do so by a federal district court.

If there had been no means to compel an employer in a situation such as the *Borden* case to supply the necessary evidence, the union would receive significantly less than it bargained for in the arbitration clause of the collective bargaining agreement. When parties agree that disputes or grievances will be resolved at a hearing before a neutral third party, they implicitly consent that the hearing will be a full and fair one so that the arbitrator can arrive at a just conclusion. The arbitrator, who is generally an outsider to the dispute, must rely on the parties to produce the evidence necessary for him to make an informed decision. If one party refuses to provide such information and the other party cannot require the production of this relevant and significant material, the arbitrator's decision will not be based upon all pertinent data and may prevent an equitable decision. The inability to have all facts presented to the arbitrator would undermine faith in the arbitral system's ability to properly resolve grievances. It would be underscored by case law which generally limits judicial review of arbitration awards.

Grounds for the Subpoena Power

Even where there is agreement that arbitration authority exists to issue subpoenas, there can be considerable conflict as to what is the proper legal basis for such authority. Generally, four grounds have been proffered: (1) the United States Arbitration Act, (2) state arbitration laws, (3) the procedures of the American Arbitration Association or of the Federal Mediation and Conciliation Service, or (4) the collective bargaining agreement itself. Yet each of these presents problems for the practitioner as the following discussion discloses.

1. United States Arbitration Act.

Some courts have utilized Section 7 of the United States Arbitration Act, which allows an arbitrator "to summon in writing any person to appear as a witness and, in a proper case, to bring any records which may be deemed material as evidence in the case,"[36] as legal support for arbitral subpoenas. In *Machinists Local Lodge 1746 v. Pratt & Whitney Division, United Aircraft Corp.*,[37] a union requested from the arbitrator a subpoena for the production of a witness and records in the control of the company citing as authority a state arbitration statute. The arbitrator issued the subpoena but the company refused to comply. The federal district court, upon motion of the union to enforce the subpoena, held that it did have the authority to compel the company to comply but that the subpoena should have been properly issued under the United States Arbitration Act rather than a state arbitration statute.

One problem, however, in relying upon the United States Arbitration Act, is that there is some doubt whether the Act applies to disputes involving collective bargaining agreements. Section 1 of the Act, which defines its scope, specifically provides "[n]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[38] The courts have been split as to whether this exclusion concerns only individual contracts of employment or is also applicable to collective bargaining agreements.[39] Another difficulty is that the United States Arbitration Act, which was initially enacted in 1925, was

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[36]9 U.S.C. §7 (1976).

[37]329 F. Supp. 283, 77 LRRM 2596 (D. Conn. 1971); *see also Berger v. Leonard Workman Co.*, 73 CCH Lab. Cases ¶ 14, 217 at 28,733 n.11 (S.D.N.Y. 1973); *Great Scott Supermarkets, Inc. v. Teamsters Local 337*, 363 F. Supp. 1351, 84 LRRM 2514 (E.D. Mich. 1973).

[38]U.S.C. §1 (1976).

[39]Some cases have held that the federal arbitration statute is applicable to labor disputes on the theory that the exclusion for "contracts of employment" in §1 refers only to "an individual transaction, rather than . . . union-negotiated collective agreements." *Electrical Workers (UE) Local 205 v. General Elec. Co.*, 233 F.2d 85, 98, 38 LRRM 2019 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547, 40 LRRM 2119 (1957); *see also Machinists Local 967 v. General Elec. Co.*, 406 F.2d 1046, 70 LRRM 2477 (2d Cir. 1969); *Retail, Wholesale & Dep't Store Local 19 v. Buckeye Cotton Oil Co.*, 236 F.2d 776, 38 LRRM 2590 (6th Cir. 1956); *Signal-Stat Corp. v. Electrical Workers (UE) Local 475*, 235 F.2d 298, 38 LRRM 2378 (2d Cir. 1956), *cert. denied*, 354 U.S. 911, 40 LRRM 2200 (1957). On the other hand, some courts have excluded collective bargaining agreements from the coverage of §1. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466–67, 40 LRRM 2113 (1957) (Frankfurter J., dissenting); *Electrical Workers (UE) v. Miller Metal Prods., Inc.*, 215 F.2d 221, 34 LRRM 2731 (4th Cir. 1954); *Pennsylvania Greyhound Lines, Inc. v. Street, Elec. Ry. & Motor Coach Employees*, 193 F.2d 327, 30 LRRM 2310 (3d Cir. 1951); *Textile Workers v. Cone Mills Corp.*, 166 F. Supp. 654, 43 LRRM 2012 (M.D.N.C. 1958).

aimed primarily at commercial, rather than labor, disputes.[40] These doubts as to the applicablility of the Act to collective bargaining agreements make it a somewhat precarious base for exercising arbitral subpoena power.

2. State Arbitration Statutes.

Instead of federal laws, some courts and arbitrators have looked to state arbitration statutes as a source of subpoena power. Some twenty states have enacted the Uniform Arbitration Act, which empowers arbitrators to "issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence."[41] In *Allied Maintenance Company of Illinois*[42] the issue arose whether a union could require a company to cause a customer, whose complaint had led to the dismissal of the grievant, to attend a prearbitration conference. While Arbitrator John Sembower found that the company had no such authority over the customer, he noted that the arbitrator could have compelled such attendance at the arbitral hearing since "the Arbitrator may issue a subpoena under the Uniform Arbitration Act in Illinois."[43]

However, again, there is some question as to the efficacy of state arbitral statutes as the foundation for subpoena power. First, a number of states have either not adopted the Uniform Arbitration Act or have made no provisions in their laws authorizing an arbitrator to issue subpoenas.[44] Since the case of *Textile Workers v. Lincoln Mills*[45] (in which the Supreme Court first announced the express policy of the national labor laws to favor arbitration as a dispute resolution mechanism), courts have emphasized that federal and not state law governs the inter-

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[40]43 Stat. 883 (1925), *see, e.g., Petition of Dover S.S. Co.*, 143 F. Supp. 738 (S.D.N.Y. 1956).

[41]Uniform Arbitration Act §7(a); *see also* 7 Uniform Laws Ann. §7(a) (Master ed. 1978).

[42]55 LA 731 (1970); *see also In re Steinberg*, 40 LRRM 2619, 29 LA 194 (N.Y. Sup. Ct. 1957); *Automatic Elec. Co.*, 42 LA 1056 (Sembower, 1964).

[43]55 LA at 737.

[44]*See, e.g.*, Kan. Stat. Ann. §5–401 (1982); Mich. Stat. Ann. §§27 A.5001 to 5035 (1980); N.H. Rev. Stat. Ann. §542:1 (1974); Va. Code §§8.01–577 to –581 (1984). For an excellent article concerning the lack of subpoena power under the Michigan Arbitration Act, see Page, *The Subpoena in the Michigan Arbitration Act*, 1975 Det. Law. 8–11.

[45]353 U.S. 448, 40 LRRM 2113 (1957); *see also 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); 29 U.S.C. §173(d) (1976) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement").

pretation of collective bargaining agreements and arbitration clauses. The rationale is founded upon the desirability and need for uniform federal policy favoring arbitration and interpretation of arbitration clauses in collective bargaining agreements. Thus, even when state law principles are applied to arbitration clauses, the Supreme Court has mandated that such state law is to be completely absorbed into federal law and can no longer serve as an independent source of rights.[46]

Undue reliance upon state arbitral statutes could provide a means to circumvent established national policy. Under the state law approach, an arbitrator hearing a dispute in Michigan, which has not granted subpoena power to labor arbitrators in its state arbitration statute, could not require the attendance of witnesses or the production of documents at an arbitration hearing; whereas, the same arbitrator hearing the same type of dispute in Indiana could issue a subpoena. This is precisely the result that *Lincoln Mills* and the *Trilogy* sought to avoid. Thus, unless federal courts absorb state arbitration statutes into federal labor contract law, state law cannot achieve the necessary uniformity required.

3. American Arbitration Association and Federal Mediation and Conciliation Service Procedures.

Instead of federal or state arbitration statutes, some arbitrators have relied upon the procedures established by the American Arbitration Association (AAA) or of the Federal Mediation and Conciliation Service (FMCS) as grounds for labor arbitrators to issue subpoenas. In *Chesapeake & Potomac Telephone Company of West Virginia,*[47] the union requested certain medical and work records, which were in the files of the company, concerning the grievant who had been discharged for alcoholism. Arbitrator Harry Dworkin rejected the company's argument that he had no power to compel the production of these documents. Arbitrator Dworkin noted that, although the collective bargaining agreement did not explicitly provide subpoena power, he could refer to the Voluntary Labor Arbitration Rules of the AAA since he was appointed to hear the dispute by the

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[46]*Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

[47]21 LA 367 (1957); *See also Nathan v. Ferrar*, 29 American Arb. J. 286 (1974); *University of California*, 63 LA 314 (Jacobs, 1974).

AAA. He then found that under Rule 28 of the AAA procedures a labor arbitrator had the power to order the company to produce some of the relevant documents that the union had demanded.

Rule 28 of the AAA states that "[w]hen the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party."[48] Similarly, Section 1404.14(c) of the FMCS Office of Arbitration Services provides that "[t]he conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control."[49] Clearly, neither of these rules literally grants subpoena power. AAA Rule 28 merely refers to existing law and thus brings into play all of the problems previously discussed. The FMCS Rule does not even mention the subpoena power but merely restates the generally accepted proposition that the arbitrator determines questions of procedure. Moreover, it is self-evident that not all collective bargaining agreements refer to or use the procedures of either the AAA or the FMCS. Neither of these rules would provide a uniform procedure for determining whether the subpoena power exists and, thus, neither provides a firm legal support for arbitral subpoena power.

4. Collective Bargaining Agreement.

Some arbitrators have determined that there exists an implied right to issue subpoenas from the labor agreement itself.[50] The theory is that when parties to a collective bargaining agreement expressly assent to an arbitration clause, they also implicitly agree to the means necessary to obtain a full and fair arbitration hearing. Such means would include the authority to insure that all relevant evidence is produced by both parties. Although this argument has merit, it cannot apply in the case of third parties who are not represented by the signatories to the labor contract; yet these outside parties may be material and necessary witnesses to insure a fair resolution of a dispute between a company and a union. The strict contract approach may not provide a sufficiently broad basis for the arbitral subpoena power.

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[48]American Arbitration Association, Voluntary Labor Arbitration Rules (1976), R. 28.

[49]29 C.F.R. §1404.14(c) (1977). There is a stronger argument for subpoena authority under §1404.14(c) if the collective bargaining agreement incorporates it by reference.

[50]*See, e.g., Vickers, Inc.*, 43 LA 1256 (Bothwell, 1964); *B.F. Goodrich Co.*, 31 LA 763 (Ryder, 1958).

A Suggested Approach

In order to insure the uniformity necessary in the arbitration process and to avoid the limits of the contract theory as a basis of arbitral subpoena power, it is suggested that the proper legal foundation for an arbitrator's subpoena power is Section 301 of the Labor Management Relations Act.[51] Under Section 301, courts have historically looked both to the collective bargaining agreement between the parties and to the national labor policy to fashion rules favoring the arbitration process. For example, the Supreme Court has held under Section 301 that a successor company, which did not specifically agree to an arbitration clause with a union, was nevertheless bound to arbitrate a dispute with the predecessor's labor union under the predecessor company's labor agreement.[52] In another case, the Court found that a company was bound to arbitrate a dispute which arose under the contract, even though the grievance was filed after the collective bargaining contract had terminated and after the company had ceased to do business.[53] Thus the courts have broadly construed the scope of arbitration clauses and the powers of arbitrators. Similarly, in regard to arbitral subpoenas, given the demonstrated need for such power in order to properly and fairly resolve some labor disputes, courts could easily infer that such a power exists under Section 301.

The duty to enter into the labor contract is a voluntary one and thus one must remember that the obligation to arbitrate is likewise voluntary. The arbitrator derives his authority and jurisdiction from the contract. Thus, under Section 301, the parties would be allowed to contractually exclude or limit the power of the arbitrator to issue subpoenas,[54] just as the parties can exclude any subject matter from the scope of their arbitration clause. However, as the Supreme Court determined in regard to matters excluded from the arbitration clause, a court should find

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[51]Section 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. §185(a) (1976).

[52]*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).

[53]*Nolde Bros., Inc. v. Local 358*, Bakery Workers Local 358, 430 U.S. 243, 94 LRRM 2753 (1977).

[54]*See, e.g., Garment Workers Local 99 v. Clarise Sportswear Co.*, 44 Misc.2d 913, 255 N.Y.S.2d 282 (1964) (court upholds a specific contractual limitation upon the arbitrator's authority to subpoena documents).

that the power to subpoena exists "unless it may be said with positive assurance" that the parties intended not to grant such a power in the arbitration clause and that "[d]oubts should be resolved in favor of coverage" [i.e., power to subpoena].[55] In the absence of any specific exclusion, given the national policy favoring the arbitration process, given the number of states which have provided arbitrators the authority to subpoena, and given the presumed intent that the parties in agreeing to an arbitration clause intended a full and fair hearing of all grievances, courts should determine as a matter of policy that labor arbitrators do have the power to issue subpoenas to parties to a collective bargaining agreement.

Applied to third parties, such as outside witnesses, the argument is more difficult since it cannot be argued that these persons have implicitly agreed to the subpoena power and because the issuance of a subpoena certainly curtails their individual liberty. Before extending the authority of an arbitrator to issue subpoenas to third parties, one must carefully evaluate the interests involved. Here, however, an analogy can be drawn to the issuance of subpoenas by administrative agencies. Such agencies have been routinely allowed to subpoena witnesses who are not parties to the dispute before the agency.[56] For example, courts have allowed the Equal Opportunity Employment Commission to compel testimony or the production of documents from third parties by administrative subpoenas.[57] The rationale for this grant of power is that such subpoenas will aid in the administrative process of eradicating the vestiges of employment discrimination, which is the basic purpose of Title VII of the Civil Rights Act of 1964. Thus courts have determined that the purposes of Title VII override the infringement upon the rights of privacy and freedom of movement of third parties who are subpoenaed by the agency.

Similarly, the arbitration process has as its goal the no less important task of the peaceful settlement of labor disputes so as

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[55]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 46 LRRM 2416 (1960).

[56]*See supra* note 34.

[57]*See, e.g.*, Motorola, Inc. v. McClain, 484 F.2d 1339 (7th Cir. 1973), *cert. denied* 416 U.S. 1339 (1974); *Graniteville Co. v. EEOC*, 438 F.2d 32 (4th Cir. 1971); *Sheet Metal Workers Local 104 v. EEOC*, 439 F.2d 237, 241 (9th Cir. 1971). The same power to subpoena third parties has also been recognized in regard to the NLRB. *Link v. NLRB*, 330 F.2d 437, 439, 55 LRRM 2977 (4th Cir. 1964); *NLRB v. Lewis*, 310 F.2d 364, 366, 51 LRRM 2630 (7th Cir. 1962); *Bland Lumber Co. v. NLRB*, 177 F.2d 555, 25 LRRM 2056 (5th Cir. 1949); *Remington Rand, Inc. v. Lind*, 16 F. Supp. 666, 670 (W.D.N.Y. 1936).

not to interrupt the flow of interstate commerce. Where the testimony or information of third parties is necessary to the just resolution of an industrial dispute, an arbitrator should be allowed to require the production of such evidence so as to limit the possibility of industrial strife. Moreover, the invasion of the rights of the third party will be minimal since most arbitration hearings, should the third party be required to attend, are of relatively short duration.[58] Moreover, if the subpoena issued by the arbitrator to the third party is for some reason unwarranted, such person can have a court balance the interests involved since an arbitral subpoena, similar to an administrative subpoena, is not self-enforcing.

This suggested approach was followed in the *Borden* case, noted previously. There the federal court found that an arbitrator had the authority to subpoena records of an employer concerning the closing of a plant. The court applied Section 301 to determine the authority of the arbitrator.[59] This was a proper analysis since under Section 301 the subpoena power would remain basically contractual in nature, and would provide a uniform basis for an interpretation favoring an arbitral subpoena power. This method is consistent with the national policy developed under Section 301 of supporting the arbitration process by insuring a full and fair hearing.

The Issuance of an Arbitral Subpoena

1. The Request.

The initial request for a subpoena should be made to the arbitrator and not to the courts. Under the collective bargaining agreement, the parties have chosen the arbitrator's decision to be the resolution of both substantive and procedural matters. This was recognized by the Supreme Court in *John Wiley & Sons, Inc. v. Livingston,*[60] which held that procedural objections to an arbitration hearing first should be determined by the arbitrator before court review. In the *Borden* case the union sought the issuance of the subpoena for company records first from the

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[58]The average time for the hearing of an arbitration case has been approximately one day for the past 10 years. 34th FMCS Ann. Rep. 37, Table 16 (1981).

[59]78 LRRM at 2399.

[60]376 U.S. 543, 55 LRRM 2769 (1964).

court rather than the arbitrator. The court correctly found this to be improper:

> The arbitrator in this action has already devoted time and energy to the resolution of this dispute. In doing so, he has become familiar with the substantive issues in the case and, under the Labor Relations Management Act and the decisions which have construed it, it is properly his function to determine the relevancy and materiality of the documents requested and whether production should be ordered. The review of this court sought by the applicant here *in medias res* can only serve to impair the integrity of the arbitration process.[61]

The best procedure for a party seeking to compel production of witnesses or records would be to notify the arbitrator of the necessity for a subpoena shortly after the arbitrator's selection and prior to the hearing. This will give the other party time to file any objections with the arbitrator concerning the evidence sought. If a party objects, the arbitrator can then weigh the relevancy of the material sought and the propriety of the objection. Moreover, if the objecting party protests that the documents sought contain confidential or other sensitive information, the arbitrator will have the time to make an *in camera* inspection to insure that only relevant and proper information will be considered.[62]

2. Form of the Subpoena.

Unlike subpoenas issued by federal clerks in district court cases, there is no one, generally accepted form for arbitral subpoenas. Certainly the subpoena should contain the caption of the case, to whom the subpoena is addressed, a specific description of any document sought, and the date, time, and location of the hearing. The subpoena should also expressly state that it is not self-enforcing nor should it give the appearance of any threat of imminent legal custody. The reason for this is twofold. First, it is improper that the person to whom a subpoena is directed (particularly if this is a third party to the dispute) be

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[61]78 LRRM at 2399–2400. *See also, Wilkes Barre Publishing Co. v. Newspaper Guild Local 120,* 113 LRRM 3409 (M.D. Pa. 1982); *Kreindler v. Judy Bond, Inc.,* 36 Misc.2d 948, 234 N.Y.S.2d 382 (Sup. Ct. 1962); *In re Royal Trimming, Inc.,* 36 LA 225 (N.Y. Sup. Ct. 1961). For an excellent article concerning the procedure for the issuance of an arbitral subpoena, *see* Page, *Subpoena Practice in Arbitration,* N.Y.L.J. 1 (12/6/72).

[62]*See Machinists Local Lodge 1746 v. Pratt & Whitney Div., United Aircraft Corp.,* 329 F. Supp. 283, 77 LRRM 2596 (D. Conn. 1971) (court requires company to produce records under an arbitral subpoena but first orders an in camera screening of documents by arbitrator). *See also* Fleming, *supra* note 5, at 170–75.

made to believe that the arbitrator has the power to issue a citation for contempt if that party fails to appear at the hearing. Secondly, noting that the subpoena is not self-enforcing is a safeguard to the arbitrator's personal legal protection against suits for false imprisonment or abuse of process. Most courts have held that a cause of action for false imprisonment cannot be based upon threats of potential, future confinement through a subsequent legal action.[63] Thus, the only sanction that should be noted in the subpoena is that failure to obey it *may* subject the subpoenaed party to subsequent court proceedings. A sample subpoena is set out in Addendum A at the end of this paper. An alternative approach used by one arbitrator is presented in Addendum B.

3. Enforcement.

If the arbitrator refuses to issue the subpoena, the party who has requested such can challenge this decision if that party later seeks court review of the arbitrator's decision.[64] On the other hand, if the arbitrator issues a subpoena and the party to whom the subpoena was issued refuses to comply, there are two possibilities. Either the subpoenaed party may file a motion to quash[65] or the party requesting the subpoena may file a motion to enforce the process under Section 301.[66]It is at this point that a court will be required to determine the standard of review of the arbitrator's decision to issue compulsory process. If the objection of the party refusing to comply with the subpoena is primarily one of relevancy, the court should review the finding of the arbitrator that the evidence is material to the proceeding the same as it would a decision of an arbitrator on the merits of the case. In other words, the arbitrator's decision, which is what the parties have bargained for in regard to the issuance of the subpoena, should be given the deference which federal courts have traditionally shown the determinations of labor

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[63]Prosser, *supra* note 13.

[64]*Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co.*, 442 F.2d 1234, 76 LRRM 2274 (D.C. Cir. 1971); *Great Scott Supermarkets, Inc. v. Teamsters Local 337*, 363 F. Supp. 1351, 84 LRRM 2514 (E.D. Mich. 1973); *Garment Workers, Joint Bd. of Cloak, Skirt & Dressmakers v. Senco, Inc.*, 289 F. Supp. 513, 69 LRRM 2142 (D. Mass. 1968).

[65]*In re Royal Trimming, Inc.*, 36 LA 225 (N.Y. Sup. Ct. 1961); *Sun-Ray Cloak Co. v. Rosenblatt*, 256 App. Div. 620, 11 N.Y.S.2d 202, 205 (1935).

[66]*Teamsters Local 757 v. Borden, Inc.*, 78 LRRM 2398 (S.D.N.Y. 1971); *Machinists Local Lodge 1746 v. Pratt & Whitney Div., United Aircraft Corp.*, 329 F.Supp. 283, 77 LRRM 2596 (D. Conn. 1971).

arbitrators.[67] However, if the objection raised is essentially legal in nature, e.g., a doctor-patient privilege in regard to medical records or an attorney's work-product privilege,[68] then the court would be the proper body to weigh such arguments due to judicial expertise in determining such legal issues. Once the court has decided to enforce an arbitrator's subpoena, the objecting party must comply. However, if that party still refuses to appear or to produce the evidence as ordered, then it will be incumbent upon the other party to file a motion seeking a contempt citation from the court. The power to issue a citation for contempt rests with the courts alone.[69]

Conclusion

A review of the status of the law today concerning the power of arbitrators to issue subpoenas reveals that there is much conflict not only among those who question whether the power exists, but even among those who believe in such authority. There is also considerable disagreement as to the proper legal bases of the subpoena power. In such a situation an arbitrator issuing a subpoena on any legal ground today risks not only a reversal of his award but also potential tort liability. Such disharmony and uncertainty in the law can only weaken the arbitral process. Although Section 301 provides perhaps the best foundation for granting the subpoena power to labor arbitrators, it is more important that the courts clarify whether arbitrators possess the authority and, if so, on what legal grounds they might issue subpoenas. Only in this way can the parties and arbitrators involved in the arbitration process insure that they are acting within proper legal limits.

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[67]*See Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960) (so long as an arbitrator's decision draws its essence from the collective bargaining agreement, a court should not review the merits of the decision).

[68]*See, e.g., Great Scott Supermarkets, Inc. v. Teamsters Local 337*, 363 F. Supp. 1351, 84 LRRM 2514 (E.D. Mich. 1973).

[69]*Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *Steinberg v. Mendel Rosenzweig Fine Furs*, 9 Misc.2d 611, 167 N.Y.S.2d 685, 29 LA 194 (Sup. Ct. 1957).

Addendum A
Sample Subpoena

In the Matter of	)	
Arbitration between:	)	
	)	
The Acme Company	)	
and	)	Case No. 85-315
Local 1524, United Labor	)	Grievance of Eva Jones
Workers of America,	)	
AFL-CIO-CLC	)	

SUBPOENA

TO: William Adams
The Acme Company
1234 Main Street
Columbia, Missouri 65201

You are hereby requested to appear at the Main Street Hotel, 5678 Main Boulevard, Columbia, Missouri, on the 12th day of July, 1985, at 9:00 o'clock A.M. to testify in the above proceeding at the behest of Local 1524, United Labor Workers of America, AFL-CIO-CLC. Failure to appear may result in a proceeding in a court of competent jurisdiction, which has the authority to issue an order enforcing this subpoena.

DATE: _____ _____
John L. Smith, Arbitrator

Addendum B

Gentlemen:

I have received a request from the (union) (company), attached, that you provide the following (documents) (witnesses) at the hearing on July 4, 1985, at 10:00 a.m.

If you find it appropriate, please comply.

If you feel it inappropriate, I will hear your argument as to its inappropriateness at the hearing. If I agree with your position, that will be an end to it.

If I disagree, and you do not comply with the request thereafter, negative conclusions may be drawn from your refusal, or I may reject the submission of any evidence by you relating to the matter involved in the request as appropriate.

II. RIGHTS ARBITRATION AND TECHNOLOGICAL CHANGE

OSCAR A. ORNATI*

This essay represents an inquiry into the impact of contractual restraints, precedents, and arbitrators' values as moderators of the impact of technological change.

I am reporting on a survey of arbitration decisions, published mainly between 1980 and 1984, that deal with contractual disputes consequent to the introduction of technological changes.

The context within which I started my inquiries included the following:

1. The broad national concern with the decline in our comparative advantage—in the "smokestack" sector—frequently negatively associated with unionism.
2. The recent technical literature's preliminary consensus that productivity is higher in the presence of unionism than in its absence.[1]
3. The recent flowering of studies aimed at the development of a general theory of arbitrators' behavior. These studies are mostly the work of economic theorists,[2] whose theorizing about arbitrators' behavior is, so far, limited to interest arbitration.

One of my concerns in choosing this topic was to attempt to extend the model of arbitrator behavior to disputes over "rights."[3] Such econometric studies of interest disputes are consistent with the notion that arbitrators' decisions tend to approach an "appropriate award" with the "appropriate award"

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[1]Freeman and Medoff, What Do Unions Do? (New York: Basic Books, 1984), 163.

[2]Ashenfelter and Bloom, *Models of Arbitrator Behavior: Theory and Evidence*, 74 Am. Econ. Rev. 111–124 (1984); Farber, *Splitting-the-Difference in Interest Arbitration*, 35 Indus. & Lab. Rel. Rev. 70–77 (1981); Farber and Katz, *Interest Arbitration, Outcomes, and the Incentive to Bargain*, 33 Indus. & Lab. Rel. Rev. 55–63 (1979); Kochan and Baderschneider, *Determinants of Reliance on Impasse Procedures: Police and Firefighters in New York State*, 31 Indus. & Lab. Rel. Rev. 431–440 (1978).

[3]Disputes over "interests" in which arbitrators become involved are those in which the parties are at an impasse over what should be in a collective bargaining agreement, disputes over "rights" are concerned with the interpretation of existing contracts.