CHAPTER 3

MITIGATION AND LABOR ARBITRATION

PART I. DUE PROCESS AND MAJOR OFFENSES

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Arbitrators generally have taken the position that employers must observe certain basic standards of fairness in their disciplinary dealings with employees.[1] Furthermore, arbitrators are required to "provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."[2]

Although all the complexities of due process that exist in judicial proceedings are not necessarily applicable in arbitration,[3] certain basic notions of due process must be followed.[4] This concept of fairness or due process implicates those fundamental principles of liberty and justice that are the foundations of a free society.[5] Arbitrator Carroll Daugherty explained the importance of due process:

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[1]*See* Brand, *Due Process in Arbitration*, in Labor and Employment Arbitration, eds. Bornstein & Gosline (Matthew Bender 1988); Dunsford, *Arbitral Discretion: The Tests of Just Cause*, in Arbitration 1989: The Arbitrator's Discretion During and After the Meeting, Proceedings of the 42d Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 23; Edwards, *Due Process Considerations in Labor Arbitration*, 25 Arb. J. 141 (1970); Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985), 673–75; Fleming, The Labor Arbitration Process (Univ. of Ill. Press 1965), 165–98; Hill & Sinicropi, Evidence in Arbitration, 2d ed. (BNA Books 1987), 229–72, 308–11; Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books (1991), 245–64; Koven, Smith & Farwell, Just Cause: The Seven Tests, 2d ed. (BNA Books 1992), 179–85; Zack, *Just Cause and Progressive Discipline*, in Labor and Employment Arbitration, *id.*, at §19.03(2)(a).

[2]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §5.A.1 (1985).

[3]See Edwards, *supra* note 1, at 142 ("It is clear that the weight of authority in arbitral law still rejects the imposition of public criminal law standards of due process in the private arbitration forum").

[4]*Flintkote Co.*, 59 LA 329, 330 (Kelliher 1972).

[5]*See* Fleming, *supra* note 1, at 165.

> These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. . . . Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action. . . . [C]ompany and government prosecutors must understand that the legal technicalities exist also to protect the innocent from unjust, unwarranted punishment.[6]

This paper examines how some courts have treated arbitrators' rulings on due process issues arising under the contract in discharge cases involving major offenses.[7] First, it briefly summarizes the source and nature of these due process rights. The paper then discusses several recent judicial decisions reviewing arbitrators' due process determinations. Finally, the paper considers appropriate arbitral responses to due process violations.

Contractual Due Process Rights

Due process rights may be derived from three contractual sources.[8] First, the just cause provision has been held to require that certain due process essentials be observed.[9] Second, a contract may require specific due process steps.[10] Third, some arbitrators imply a due process requirement in the contract.[11]

What is frequently referred to as "industrial" due process has been held to include the right to forewarning of prohibited conduct, notice of the charges against the employee, and a fair and objective investigation prior to the employee's discipline or discharge.[12] It may also include protection against unreasonable searches and protection against self-incrimination.

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[6]*Grief Bros. Cooperage Corp.*, 42 LA 555, 557 (Daugherty 1964).

[7]The constitutional and statutory due process rights of public employees are outside the scope of this paper.

[8]Brand, *supra* note 1, at §10.03; Zack, *supra* note 1.

[9]*See, e.g., McCartney's Inc.*, 84 LA 799, 804 (Nelson 1985). *See also Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494, 134 LRRM 2162 (9th Cir. 1990) (arbitrator did not go beyond essence of collective bargaining agreement in determining due process to be component of issue of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 718, 103 LRRM 2380 (8th Cir.), *cert. denied*, 446 U.S. 988, 104 LRRM 2431 (1980) (arbitrator's interpretation of just cause provision as including requirement of procedural fairness was legitimate resolution of contractual ambiguity).

[10]*See, e.g., State Paper & Metal Co.*, 88-1 ARB ¶8112 (Klein 1987) (contract required meeting with union to discuss charges).

[11]*See, e.g., Indiana Convention Center & Hoosier Dome*, 98 LA 713 (Wolff 1992). *But see Auto Workers Local 342 v. T.R.W., Inc.*, 402 F.2d 727, 69 LRRM 2524 (6th Cir. 1968), *cert. denied*, 395 U.S. 910, 71 LRRM 2253 (1969) (court refused to enforce arbitrator's award reinstating seven employees because "discharge was lacking in fundamental fairness" where contract did not contain just cause provision).

[12]*See* MacPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, 38 Lab. L.J. 387 (1987).

Due process relating to the conduct of the arbitration hearing has been held to include the right to confront and cross-examine witnesses, to present evidence and witnesses on the employee's behalf, and to receive notice of the charges.[13] The last is perhaps the most fundamental of due process rights, since without proper notice the accused cannot prepare an adequate defense.[14] An employee who is not informed of what he or she is charged cannot prepare and present a proper defense.[15]

The Courts and Arbitral Due Process Determinations

Following the principles of the *Steelworkers Trilogy*,[16] the courts have generally accorded deference to an arbitrator's due process determinations.[17] However, the courts have occasionally refused to confirm awards holding that arbitrators are dispensing their "own brand of industrial justice,"[18] or that the awards violate public policy.[19] Cases that seem to invite the closest scrutiny by the courts involve discharge for drug use,[20] for air line safety violations,[21] for violence,[22] and for sexual harassment.[23] Nonetheless, many courts have upheld awards reinstating discharged employees, where the arbitrator found that the employee's due process rights under the contract had been violated.[24]

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[13]*See* Zack, *supra* note 1; Brand, *supra* note 1, at §10.08.

[14]*Cf. In re Ruffalo*, 390 U.S. 544 (1968) (in criminal proceedings, prosecution must give defendant fair notice of charges to permit adequate preparation of defense).

[15]*See Bethlehem Steel Co.*, 29 LA 635, 640 (Seward 1957) (if employee is to have a reasonable opportunity to present evidence on his or her behalf, employee must be given at least some idea of acts, events, or issues to which employee's evidence should relate).

[16]*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). *See also Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

[17]*See* Brand, *supra* note 1, at §10.04[1].

[18]*Id.* (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 16, at 597).

[19]Brand, *supra* note 1, at §10.04[1]. *See, e.g., W.R. Grace & Co. v. Rubber Workers Local 259* 461 U.S. 757, 113 LRRM 2641 (1983).

[20]*Paperworkers v. Misco, supra* note 16 (arbitrator overturned discharge of employee charged with drug possession).

[21]*See, e.g., Delta Air Lines v. Air Line Pilots*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988) (discharge of airline pilot who became drunk during stopover overturned by arbitrator).

[22]*See, e.g., U.S. Postal Serv. v. Letter Carriers*, 839 F.2d 146, 127 LRRM 2593 (3d Cir. 1988) (discharge of employee for firing gunshots into supervisor's unoccupied vehicle overturned by arbitrator).

[23]*Stroehmann Bakeries v. Teamsters Local 776*, 969 F.2d 1436, 140 LRRM 2625 (3d Cir.), *cert. denied*, 113 S.Ct. 660, 141 LRRM 2984 (1992) (discharge of employee for sexual harassment overturned by arbitrator).

[24]*See, e.g., Federated Dep't Stores v. Food & Commercial Workers Local 1442, supra* note 9, at 1495 (employee discharged for insubordination reinstated because employee not given opportunity to respond to charges against him); *Super Tire Eng'g Co. v. Teamsters Local 676*, 721 F.2d 121, 114 LRRM 3320 (3d Cir. 1983), *cert. denied*, 469 U.S. 817, 117 LRRM 2472

Stroehmann Bakeries

The 1992 decision of the United States Court of Appeals for the Third Circuit in *Stroehmann, Inc. v. Teamsters Local 776*,[25] has generated considerable discussion.[26] In *Stroehmann* the employer discharged an employee for sexually harassing a customer's employee. Without determining the merits of the allegations against the employee, the arbitrator reinstated the employee on the ground that his due process rights had been violated because the employer had not conducted a proper investigation.[27]

A three-judge panel for the Third Circuit affirmed the district court's decision[28] vacating the arbitration award, holding in a two-one decision that the arbitrator's award violated well established and dominant public policies concerning sexual harassment in the workplace.[29] Disagreeing with the arbitrator, the majority found that the employer had provided the employee with industrial due process.[30]

Circuit Judge Hutchinson, the author of the majority opinion, commented that he believed it was important to distinguish the concept of industrial due process from due process as required by the Constitution. Judge Hutchinson interpreted *Misco's*[31] public policy exception to the general rule against court review of the merits of a labor arbitration decision as implying that an arbitrator's concept of industrial due process does not override a definitive public policy. He concluded that lack of full industrial due process would not prevent the court's vacating the arbitration award.[32]

Dissenting, Circuit Judge Becker agreed with the majority's vigorous condemnation of sexual harassment but declared that the majority had given short shrift to the industrial due process rights of the employee. In Judge Becker's view, the employer's "egregious failure to provide [the employee] with the procedural

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(1984) (employee discharged for drinking at work reinstated because employee not forewarned of consequences of conduct); *Anaconda Co. v. Machinists Dist. Lodge 27*, 693 F.2d 35, 111 LRRM 2919 (6th Cir. 1982) (employee discharged for absenteeism reinstated because employee denied union representation); *Teamsters Local 878 v. Coca-Cola Bottling Co., supra* note 9 (discharge of employee for dishonesty overturned because employer failed to give employee adequate opportunity to present his side of case before discharge).

[25] *Supra* note 23, at 1438.

[26] *See, e.g.*, Study Time 3:1 (1992).

[27] 969 F.2d at 1438.

[28] *Stroehmann Bakeries v. Teamsters Local 776*, 762 F. Supp. 1187, 136 LRRM 2874 (M.D. Pa. 1991).

[29] 969 F.2d at 1438.

[30] *Id.* at 1445.

[31] *Paperworkers v. Misco, Inc., supra* note 16.

[32] 969 F.2d at 1445 n.7.

protections guaranteed by the collective bargaining agreement justifie[d] his reinstatement," and found that the "arbitration award was . . . perfectly appropriate and well within the arbitrator's discretion. . . . "[33]

At least one court has disagreed with *Stroehmann's* holding that an arbitrator's award, reinstating an employee accused of a major offense without a determination regarding the merits of the allegation, violates public policy. In *Pan American World Airways v. Air Line Pilots,*[34] the bankruptcy court ruled that a board of adjustment had not exceeded its jurisdiction in ordering a pilot's reinstatement based solely on due process grounds, without making any findings as to whether the pilot was guilty of the charged misconduct.

The discharged pilot had allegedly permitted a flight attendant to manipulate the flight controls of a 747 during a regularly scheduled flight from New York to Los Angeles. After a hearing the five-member board sustained the pilot's grievance, based on its finding that the pilot had been deprived of a full and fair investigation of the charges. The board did not make a finding as to whether the pilot had actually committed the alleged conduct.[35]

Relying on *Stroehmann,* the employer took the position that a finding regarding just cause necessarily includes a determination of the underlying issue of whether the pilot had in fact permitted a flight attendant to manipulate the plane's controls and, if so, whether that misconduct warranted the employer's discharge of the pilot. The court declined to follow *Stroehmann,* noting that *Stroehmann* appeared to reflect the court's concern as to the arbitrator's failure to explain how the employer's investigation was deficient and as to evidence that the arbitrator was "biased and insensitive."[36] Furthermore, the court determined that the *Stroehmann* decision conflicted with a 1981 Second Circuit ruling[37] that it may be necessary to make a finding on the underlying facts if a just cause determination can be made on other grounds, such as that the employer's discharge decision was procedurally defective.[38]

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[33]*Id.* at 1447.

[34]140 B.R. 336 (Bankr. S.D.N.Y. 1992).

[35]*Id.* at 337–38. The National Transportation Safety Board subsequently determined that the flight attendant had not manipulated the controls and that the pilot had not violated FAA regulations. *Id.* at 341.

[36]*Id.* at 339. *See also Industrial Workers (UIWS) Local 16 v. Virgin Islands,* 987 F.2d 162, 171, 142 LRRM 2526 (3d Cir. 1993) (citing *Stroehmann* for the principle that an "arbitration award may be vacated when the arbitrator is biased against a party").

[37]*Perma-Line Corp. v. Painters Local 230,* 639 F.2d 890, 894, 106 LRRM 2483 (2d Cir. 1981).

[38]*Pan Am. World Airways v. Air Line Pilots, supra* note 34, at 339.

[39]*Id.* at 340.

The court concluded that the board had not exceeded its jurisdiction by failing to reach the underlying issue, because the board had found a sufficient basis for sustaining the grievance in the lack of due process provided during the investigation. Rejecting the argument that the board had erroneously injected due process considerations into the grievance process and that the award did not draw its essence from the contract, the court pointed out that the collective bargaining agreement required an adjustment board to include such procedural considerations in its just cause determination.[39]

The Tenth Circuit declined to follow *Stroehmann's* public policy analysis in *Seymour v. Blue Cross/Blue Shield.*[40] *Seymour* involved the arbitration of a claim seeking health insurance benefits for a liver transplant. The arbitration panel denied benefits and the insureds appealed. Declining to follow what it described as the Third Circuit's "broad view" of the public policy exception as expressed in *Stroehmann,* the Tenth Circuit stated that, in determining whether an arbitration award violates public policy, a court must assess whether the specific terms in the contract violate public policy by creating an explicit conflict with other laws and legal precedents, keeping in mind the admonition that an arbitration award is not to be lightly overturned.[41]

Recommendations

The principles of due process as embodied in the concept of just cause protect all employees from arbitrary and capricious action and protect the innocent from unjust, unwarranted punishment.[42] Whether charged with a major or a minor offense, employees covered by just cause provisions are entitled to due process and fundamental fairness. Charges of outrageous misconduct or major offenses do not excuse an employer's compliance with the agreed-upon due process requirements in the collective bargaining agreement.[43] Guaranteeing procedural fairness to employees accused of major offenses does not violate any public policy.[44]

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[40]988 F.2d 1020 (10th Cir. 1993).

[41]*Id.* at 1024.

[42]*See Grief Bros. Cooperage Corp., supra* note 6, at 557.

[43]*Cf. Miranda v. Arizona,* 384 U.S. 436 (1966) (conviction for kidnapping and rape overturned by Supreme Court, where conviction was result of improperly obtained confession).

[44]*See Stroehmann Bakeries v. Teamsters Local 776, supra* note 23, at 1448 (Becker, J., dissenting).

No one should be surprised that arbitrators generally interpret just cause provisions as including due process protections. In *Teamsters Local 878 v. Coca-Cola Bottling Co.*,[45] the court stated:

> The Company indicates surprise at being presented with an arbitrator's award in which "just cause" was interpreted as having a fair hearing dimension. We think that this surprise is unfounded; arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. As Professor Summers noted, "[o]n the bare words 'just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law."[46]

However, because the full dimensions of the concept of just cause may not be readily apparent to persons not experienced in labor-management relations, an arbitration award based in whole or in part on due process should describe the contractual source of the due process requirement. In addition, the award should detail how the employer violated due process rights and how the employee was prejudiced by that violation.[47]

In most cases, the finding of a due process violation should not prevent the arbitrator from addressing the merits of the charges. If the arbitrator orders reinstatement, the award should discuss whether or not the reinstated employee poses a threat to the health or safety of other persons.[48]

Where there is a due process violation, the remedy should reflect its significance. Although the remedy may result in a reduction of the penalty assessed by the employer, the violation should not be considered merely as a mitigating factor in determining the proper remedy for the offense. As in the case of any violation of a collective bargaining agreement, the remedy for a due process violation should endeavor to make the employee whole for that injury. The remedy should take into consideration the significance of the due process requirement and the prejudice suffered by the employee as a result of the

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[45] *Supra* note 9.

[46] *Id.* at 719–20 (quoting Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 500 (1976)).

[47] *Compare Stroehmann Bakeries v. Teamsters Local 776, supra* note 23, at 1438 *with Pan Am. World Airways v. Air Line Pilots, supra* note 34, at 339.

[48] *See U.S. Postal Serv. v. Letter Carriers, supra* note 22, at 149 (arbitrator found that employee was amenable to discipline and showed no proclivity to more violence after he shot at supervisor's unoccupied car); *Exxon Shipping Co. v. Exxon Seaman's Union*, 801 F. Supp. 1379, 141 LRRM 2185 (D.N.J. 1992) (explaining that *Stroehmann* was concerned with failure of arbitrator to determine whether sexual harassment had occurred, because that undermined employer's ability to fulfill its obligation to prevent and sanction sexual harassment in workplace).

violation.[49] Reinstatement, with or without back pay, should not be the automatic response for a due process violation. Arbitrator Robben Fleming has explained:

> The procedural irregularity may not have been prejudicial in any sense of the word, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process, and the end result could on many occasions be quite ludicrous. If, for instance, an employee gets drunk on the job and starts smashing valuable machinery with a sledge hammer, it would hardly seem appropriate to nullify his discharge on the sole ground that the union be given advance notice.[50]

Appropriate remedies for due process violations may include upholding the grievance without regard to the underlying facts, reducing the disciplinary penalty, disregarding the due process violation and denying the grievance, and providing a remedy for the due process violation that has no effect on the underlying discipline.[51] Some arbitrators have reinstated discharged employees without back pay;[52] others have awarded back pay in varying amounts without reinstatement.[53]

An arbitrator may decline to hear evidence of new or additional grounds for discipline or discharge brought up for the first time at the arbitration hearing.[54] Evidence concealed or not revealed to the opposing party before the hearing may be excluded or the arbitrator may continue the hearing in order to give the party surprised by the evidence time to prepare a response.[55]

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[49]*See, e.g., Cameron Iron Works*, 73 LA 878 (Marlatt 1979) (in order to overturn employer actions on procedural grounds, arbitrator must find there was at least a possibility that procedural error may have deprived grievant of fair consideration of case).

[50]Fleming, *supra* note 1, at 139–40. *See Dunsford, supra* note 1, at 31 (substantial number of reputable arbitrators measure significance of procedural deficiency against harm done to interests of employee by the omission).

[51]Brand, *supra* note 1, at §10.09. *See generally* Hill & Sinicropi, *supra* note 1.

[52]*See, e.g., Meyer Prods.*, 91 LA 690 (Dworkin 1988).

[53]*See, e.g., Chromalloy Am. Corp.*, 93 LA 828 (Wolff 1989) (back pay from date of discharge to close of arbitration hearing awarded, since grievant not informed of specific charges against him prior to hearing); *State Paper & Metal Co.*, 88-1 ARB §8112 (Klein 1987) (back pay awarded from date of discharge to date of hearing where contract provided that no employee would be discharged without hearing). *See also Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 539 P.2d 774 (1975) (remedy for violation of employee's due process rights is back pay for period discipline was improperly imposed, that is, from effective date of imposition of discipline until date of decision after a fair hearing).

[54]*See* Koven, Smith, & Farwell, *supra* note 1, at 248–50; *Price Bros. Co.*, 61 LA 587, 589 (Howlett 1973) (generally arbitrators hold that an employer may not present evidence of alleged offenses not specified as reasons for the discharge when notice was given).

[55]Grenig & Estes, Labor Arbitration Advocacy: Effective Tactics & Techniques (Butterworth Legal Publishers 1989), 163.

Conclusion

By addressing the concerns of reviewing courts, arbitration awards should withstand judicial scrutiny, protect the health and safety of third persons, and safeguard the contractual due process rights of employees. Where there is a due process violation, the remedy for the violation should reflect the significance of the violation. If a discharged employee is reinstated as a result of a due process violation, the award should show why the employee does not pose a threat to the health or safety of other persons.

PART II. AN ACADEMY SURVEY: DO YOU MITIGATE?

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This paper reports the results of a survey of members of the National Academy of Arbitrators regarding the extent to which arbitrators mitigate terminations for major offenses such as theft, fighting, or on-premise alcohol or drug use. This research has been stimulated by arbitration decisions overturned in recent years by courts where employer procedural errors were found sufficient to reduce a discharge penalty even though the employer had satisfied the burden of proof on the merits of the dispute. Despite the fact that the court system is willing to let individuals who may be guilty go free on procedural grounds in criminal cases that can be equated with major offenses on the job (e.g., theft and drug abuse), the courts have disagreed with arbitrators in the mitigation of discipline on procedural grounds, most frequently when public policy issues (e.g., sexual harassment or drug use) are concerned.

While arbitrators may decry this external intrusion into the arbitral process, it is important to look internally to assess whether this pattern of decisions *may* raise questions about the efficacy of decisional frameworks used by some arbitrators to mitigate disci-

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