IV. PROCEDURAL DUE PROCESS, JUST CAUSE, AND THE DUE PROCESS PROTOCOL

MICHAEL H. BECK*

Our panel is asked to consider the following question: "Is procedural due process an element of just cause or a separate issue with distinct remedies?" I have also been asked by our moderator to address due process protections available to unrepresented employees with respect to statutory claims heard pursuant to employer-promulgated arbitration plans where the Due Process Protocol is applicable.[1]

How many in the audience have heard of the sportscaster Bill Stern? To my surprise, I note that about half of the audience has heard of Mr. Stern, indicating either that I am not speaking to a particularly youthful group or that I am speaking to a youthful group that reads sports history. For those of you unfamiliar with him, Bill Stern was a sportscaster who had a radio program in the 1930s, 40s, and 50s. He was a very dramatic storyteller who would tell a story about some unnamed sports figure. He would conclude by asking, "Who was that man?" and then name the individual. Is Bill Stern's radio program relevant to the topic at hand? We shall see.

Part of Just Cause or a Separate Issue?

Let us focus on the question set forth in the program, namely, "Is procedural due process an element of just cause or a separate issue with distinct remedies?" In answer to that question, please bear with me while I read you a relatively brief quote from the published arbitration decision of an arbitrator who had a clear idea of the answer to that question. Arbitrator Daugherty's seven tests regarding just cause, previously described by Jack Clarke, were cited to the arbitrator. Although the arbitrator did not mechanically apply the Daugherty tests in considering the question of whether the discharge was for just cause, he did consider due process principles included in the seven tests. In this regard, he

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*Member, National Academy of Arbitrators, Seattle, Washington.

[1]Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, May 9, 1995, *reprinted in* Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), at 298, available on the Academy's Web site, <http://www.naarb.org/protocol.html>.

found that the employer did not conduct an appropriate investigation regarding whether the grievant violated a rule or disobeyed an order of management. He also found that the employer failed to inquire into any possible justification the grievant may have had for the alleged misconduct. In finding for the union in that case, the arbitrator stated:

> Due process is not a mere technical requirement, it is an integral part of a just cause clause that the parties have agreed upon. For an arbitrator, in construing a just cause clause, particularly where a discharge is involved, to reach a determination without considering whether due process has been afforded a grievant is to invite the very labor unrest the parties hope to avoid in including such a clause in their collective bargaining agreement.[2]

We couldn't have a clearer answer to the question before us than that provided by the arbitrator whom I have just quoted. Getting back to Bill Stern, I ask, Who was that arbitrator? The date of the decision is January 15, 1976, and the arbitrator was Michael H. Beck. It was my eighth arbitration decision, and my first published decision.[3]

Some 26 years later I am not nearly as sure of the source of procedural due process in labor arbitrations. The due process considerations developed by Arbitrator Daugherty came in the context of his attempting to define "just cause" in a situation in which the applicable CBA did not contain a definition of just cause. For example, in *Moore's Seafood Products*,[4] Arbitrator Daugherty states: "The Parties' Agreement contained no definition of 'just cause' for discipline or any guidelines that are to be applied to the facts of a given discipline case in order to determine the existence or non-existence of 'just cause' therein."[5]

Arbitrator Daugherty then stated that he would have to apply what he referred to as "the common law standards developed by arbitrators for such purposes."[6] Arbitrator Daugherty does not indicate how he selected the very specific common law standards that are contained in his seven questions and accompanying notes. In effect, he attempted to codify the just cause standard. Leaving aside the wisdom of such an attempt, the difficulty in doing so is

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[2] See *infra* note 3.
[3] *Quality Food Ctrs.*, 66 LA 239 (Beck 1976).
[4] 50 LA 83 (Daugherty 1968).
[5] *Id.* at 86.
[6] *Id.*

indicated by the fact that he found it necessary to revise these standards twice.[7]

The question suggested by the panel's topic is whether procedural due process is applicable to cases that do not involve a just cause determination. For example, let's consider a CBA that does not contain a just cause clause, but limits the employer's right to discharge by providing that "any discharge that violates state or federal law is prohibited and subject to arbitration under this agreement." Would the traditional due process considerations generally associated with just cause be considered applicable by labor arbitrators? Would Arbitrator Daugherty apply his very specific due process standards in this situation? Arbitrator Daugherty is now deceased, and my research does not reveal that he answered this question during his lifetime. More importantly, however, I am convinced that most, if not all, labor arbitrators would apply the traditional due process considerations generally associated with just cause to this situation.

Even if one considers a nondisciplinary situation, due process considerations are applicable. For example, take the case where a senior employee grieves the selection of a junior employee for a particular vacancy or promotion pursuant to a modified seniority clause. In these situations, arbitrators generally require that the employer establish that the senior employee received due process in connection with the comparison of his or her qualifications to that of the junior employee and that the process or procedure by which the work qualification comparison was made was fair and reasonable.

I conclude that our duty as labor arbitrators is to make sure that an arbitration hearing is fundamentally fair—that is, that fundamental due process is afforded a grievant. The specific due process requirements may vary depending on the nature of the case.

Public sector employees have specific due process rights derived from the U.S. or state constitutions. In fact, the U.S. Supreme Court has recognized that public employees have a property or liberty interest in their continued employment.[8] These constitutional requirements do not apply to private sector employees. Labor arbitrators have nevertheless applied many of these proce-

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[7] *Whirlpool Corp.*, 58 LA 421, 422 (Daugherty 1972).
[8] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

dural due process protections to private sector arbitrations. While arbitrators generally consider these procedural due process protections as an element of just cause where such a clause is an issue, the starting point for due process protections is not the concept of just cause. Rather, concepts of procedural due process are necessary to ensure a fair hearing for both parties in an adversary proceeding, such as a labor arbitration.

The Supreme Court has stated in the famous *Steelworkers Trilogy*[9] that an arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."[10]

The foregoing leads me to conclude that the source for procedural due process considerations in labor arbitration is not merely the just cause clause of a CBA, but the very fact that the CBA provides for an adversarial proceeding in order to resolve disputes between management and employees represented by their union.

Many CBAs contain due process protections that would not be considered by most labor arbitrators as encompassed by just cause clauses. For example, a clause frequently found in CBAs is one that requires an employer, before discharging an employee, to notify and, in some cases, to meet with the union. In these situations, procedural due process would be a separate issue and not an element of just cause. Thus, while due process may be found to be an element of just cause, it is much broader than that. In this sense, one can say that procedural due process is a separate issue with distinct remedies.

The key question to consider in an arbitration case where there has been a lack of procedural due process that prejudices the grievant is: What is the appropriate remedy? Furthermore, even if no prejudice is found, there may well be certain types of due process violations that still require a remedy. The specific remedies to be applied where there have been procedural due process violations is beyond the scope of this brief presentation, but hopefully we can discuss this question during the time reserved for questions.

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

[10] *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

Employment Arbitration and Due Process

I turn now to the Due Process Protocol and will compare the due process protections available therein to those available in labor-management arbitrations. The Due Process Protocol was designed as a means of providing due process in the resolution of employment disputes involving statutory rights.

Any discussion of employment arbitration in general, and the Due Process Protocol in particular, must begin with the U.S. Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[11] where the Supreme Court made clear that, as a general rule, statutory claims are fully subject to binding arbitration agreements. In that case, the employee, Gilmer, raised several challenges to arbitration under the New York Stock Exchange Rules, claiming that arbitration impermissibly diminished his ability to vindicate his statutory rights effectively. However, the Supreme Court held as follows: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute: it only submits to their resolution in an arbitral, rather than a judicial, forum."[12] The Court further stated that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[13]

If one is to "vindicate [his or her] statutory cause of action in the arbitral forum," there must be procedural due process protections available. This is the purpose of the Due Process Protocol. The court's decision in *Gilmer* deferred to a unilaterally promulgated arbitration plan in which the employee, Gilmer, had no choice but to waive his statutory rights in order to hold his job as a registered security broker.

The Due Process Protocol came about as a result of the work of a task force on alternate dispute resolution in employment, which set as its purpose the establishment of a protocol providing for due process in the resolution by mediation or by binding arbitration of employment disputes involving statutory rights. The task force included individuals designated by their respective organizations, including the NAA. The NAA designated Arnold Zack, who worked

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[11]500 U.S. 20 (1991).
[12]*Id.* at 28.
[13]*Id.*

diligently in putting together and then promoting the Due Process Protocol. Other designated representatives were from the American Bar Association, the American Arbitration Association (AAA), the Society of Professionals in Dispute Resolution, and the American Civil Liberties Union. Their signatures are attached to the Due Process Protocol.

A significant due process protection included in the Due Process Protocol is the right of the employee to choose his or her representative. Furthermore, the Protocol requires that the arbitration procedure specify this right and also include a reference to institutions that might offer assistance, such as bar associations, legal services, civil rights associations, trade unions, and so forth. The Protocol also provides that the arbitration procedure should give the arbitrator the authority to provide for fee reimbursement as part of the remedy, in accordance with applicable law or in the interest of justice.

With respect to access to information, the Protocol provides that adequate but limited pretrial discovery be encouraged so that employees will have access to all information reasonably relevant to their claim.

As to arbitrator selection, the protocol contemplates selection through the use of a designated agency such as the AAA. There are also provisions regarding conflicts of interest and disclosure. The Protocol also requires that the arbitrator have the authority to order whatever relief would be available in a court of law. It also requires that the arbitrator issue an opinion and award that summarizes the issues, states the disposition of any statutory claims, the relief requested, and sets forth the award of the arbitrator.

A major issue that the members of the Due Process Protocol Task Force could not resolve was the question of the timing of the agreement to arbitrate a statutory dispute. Should pre-dispute mandatory arbitration required as a condition of employment be permitted? Can such an agreement by an employee be considered informed and voluntary?

The NAA has taken a position in opposition to mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights. The NAA also recognizes that, under current case law, NAA members may serve as arbitrators in such cases, but provides that its members should consider and evaluate the fairness of any employment arbitration proce-

dures in light of the Academy's Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems.[14]

The content of these Guidelines is beyond the topic presented to this panel, but it should be noted that the Guidelines refer to the Code of Professional Responsibility for Arbitrators of Labor Management Disputes. In 1996, the Code was amended to include arbitration procedures unilaterally established by employers to resolve employment disputes under personnel policies and handbooks or such procedures unilaterally established by unions to resolve disputes with represented employees in agency shop or fair share cases.

Clearly there are due process protections generally provided to employees covered by a CBA that an employer, although agreeing to be subject to the Due Process Protocol, is still free not to include in its arbitration plan. For example, under the Protocol, employees have no due process rights with respect to events that took place prior to their termination. Thus, the failure of the employer to conduct an investigation regarding the offense it alleges the employee committed and its failure to allow the employee to present his or her side of the story prior to termination are not available. The same is true regarding the *Weingarten*[15] right to have a representative present at a meeting that may lead to discipline.

Affirmative defenses such as double jeopardy are not referenced in the Due Process Protocol. Let me give you an example: A black truck driver is fired in the aftermath of an accident he had with his truck while delivering products. The employee believes he was terminated because of his race. The employer has in place an arbitration plan providing for the arbitration of statutory disputes. The employee's representative argues that the termination was race–based, but the arbitrator does not agree. However, it turns out that the employee had been given "final discipline," namely a written warning, for the same offense two weeks earlier. Under a CBA, the union could argue for the application of the double jeopardy doctrine, and the arbitrator could rely on that in reinstating the employee. Under the employer-promulgated plan subject

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[14]Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems, May 21, 1997, available on the Academy's Web site, <http://www.naarb.org/guidelines.html>.

[15]*NLRB v. Weingarten*, 420 U.S. 251, 88 LRRM 268 (1975).

to the Due Process Protocol, there would be no basis for an arbitrator to rely on the double jeopardy doctrine and, furthermore, the plan could easily preclude such a defense.

Other areas of due process not specially mentioned in the Protocol are the timely implementation of discipline as well as principles of corrective discipline.

To some extent one's view of the utility of the Due Process Protocol will be based on one's view of whether or not *Gilmer* was appropriately decided. However, faced with *Gilmer,* the response by the various organizations I have described in putting together the Due Process Protocol was significant. A wise man and a former president of this Academy told me, in discussing this very subject of employer-promulgated arbitration in the context of collective bargaining arbitration procedures, that "we cannot let the best be the enemy of the good." The good here is the Due Process Protocol. Returning to Bill Stern, Who was that man? That man was Ted St. Antoine.

Here it should be noted that I have not compared an employer-promulgated arbitration to a trial in a state or federal court, but to a labor arbitration. Is it appropriate to do so? What did the *Gilmer* court say? As noted above, it stated: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute: it only submits to their resolution in an arbitral, rather than a judicial, forum."[16]

What kind of arbitral forum was the *Gilmer* Court talking about? The courts have begun to define that forum. For example, in *Cole v. Burns International Security Services,*[17] Judge Harry Edwards, writing for the court, recognized that an employer-promulgated arbitration procedure had to allow certain basic rights in order to be enforceable. At a minimum, the arbitration agreement had to (1) provide for neutral arbitrators, (2) provide for more than minimal discovery, (3) require a written award, (4) provide for all of the types of relief that otherwise would be available in court, and (5) not require employees to pay unreasonable costs or any arbitrators' fees and expenses as a condition of access to the arbitration forum. Judge Edwards cited the Due Process Protocol in the *Cole* decision.

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[16] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991).
[17] 105 F.3d 1465 (D.C. Cir. 1997).

A major obligation we undertake as arbitrators is to make sure that the arbitration process is fundamentally fair. We can and should look to the due process protections established in labor arbitration and implement them as appropriate in employment arbitrations regarding statutory disputes. The courts will follow.