hearing, the parties had negotiated that provision out of their contract.

We've run out of time and I hope you've enjoyed this as much as I have.

II. THE UNION-GRIEVANT PRIVILEGE: A WELL-RECOGNIZED METHOD FOR PROTECTING CONFIDENTIAL COMMUNICATIONS AND FOSTERING THE EFFICIENT RESOLUTION OF GRIEVANCES

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A recent California court case[1] appears to have emboldened management counsel seeking to invade what we, as union counsel, have understood to be a longstanding tradition in labor arbitration. Confidential communications between a union representative and a grievant concerning a pending or potential grievance are privileged, and arbitrators will deny employer requests to question the union representative or grievant about the communication. On the few occasions this issue has been joined, unions and their counsel have asserted that failing to exclude these communications from the arbitral record creates a disincentive for grievants to make a complete and frank recitation of the facts to the union representative investigating the member's claim. Employers and their counsel may cite state and federal statutes and cases rejecting a union-member privilege or rejecting privileges in the labor arbitration context, hoping that arbitrators may be reluctant to exclude evidence that appears to have some, albeit marginal, relevance to the issues at hand.

But permitting employers to cross-examine grievants or union representatives about confidential communications concerning the grievance has far more serious consequences than the accepted practice of admitting evidence of questionable materiality, with

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[1]American Airlines v. Superior Court, 114 Cal. App. 4th 881 (Calif. Ct. App. 2003).

the promise to "take it for what it's worth." Failing to recognize a union-grievant privilege undermines the value of arbitration as a means for settling the parties' disputes. This paper therefore argues that the purpose of labor-management arbitration demands that union-grievant confidential communications remain privileged, and that arbitrators honoring that "privilege" do not risk having their decision and award overturned by the courts.

The Principles of Labor-Management Arbitration Support Recognition of a Union-Grievant Privilege for Confidential Communications

Our federal labor law is founded, in part, on Congress's desire to foster procedures whereby union and management resolve disputes arising between them. Section 1 of the National Labor Relations Act (29 U.S.C. 151) includes a finding that commerce is safeguarded from interruption, and commerce is promoted by the encouragement of "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours and working conditions. . . ." Labor-management arbitration has proven instrumental in preserving labor peace and industrial commerce, serving as a substitute for the use of economic weapons.

Preserving these principles has been the mission of the National Labor Relations Board. Our research has not discovered any Board decision addressing the privileged nature of union-grievant communications in the context of a union's investigation or processing of a grievance. Nonetheless, the Board has addressed a similar claim in the context of collective bargaining, recognizing that confidential communications between a union and its members concerning bargaining strategy are privileged. The Board recognized this privilege in *Berbiglia, Inc.*,[2] where the administrative law judge explained the rationale for the privilege:

> The basic reason for revocation of the subpoenas so far as here relevant was my view that requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies

[2]233 NLRB 1476, 97 LRRM 1369, 1495 (1977).

> without fear of exposure. This necessity is so self-evident as apparently never to have been questioned.

This same rationale applies equally well to confidential communications between a union representative and the employee on whose behalf a grievance has been, or will be, filed. The union is still acting in a quasi-fiduciary capacity; it owes a duty to represent the employee fairly in the context of deciding whether to process a grievance, whether to arbitrate that grievance, and the manner in which the grievance is arbitrated.

Moreover, the value of permitting these union-member discussions to take place without fear of disclosure is equally evident. The Board's "collective bargaining privilege" is designed to permit unions to discuss bargaining strategy with their members without the fear that the discussion of possible compromises or contemplated modifications to bargaining proposals would be exposed to the employer during a later arbitration. The privilege for confidential union-grievant communications protects a similar and vitally important interest. Union representatives must feel confident that a grievant will not withhold important, yet possibly compromising, information for fear that the grievant or the union will be forced to disclose that information at arbitration. The frank disclosure by the grievant fosters the accurate evaluation of the merits of a grievance, and benefits the employer to the extent that such a frank disclosure may persuade the union to withdraw the grievance short of arbitration.

Of course the Board has not formally extended the "collective bargaining privilege" to confidential union-grievant communications. Nonetheless, the Board has recognized the union's right to withhold from an employer union notes of conversations with its grievant-members. For example, in *Cook Paint & Varnish Co.*,[3] the Board concluded that the employer had violated the Act by requiring the union to turn over notes of confidential communications with members concerning potential grievances.

> [W]e wish to emphasize that our ruling in this case does not mean that all discussions between employees and stewards are confidential and protected by the [NLRA]. Nor does our decision hold that stewards are, in all instances, insulated from employer interrogation. We simply find herein that, because of [the steward's] representational status, the

[3]258 NLRB 1230, 1231–32 (1981).

> scope of [the employer's] questioning, and the impingement on protected union activities, the employer's interview of the steward violated the NLRB.

The Board has indicated it may limit the scope of the "collective bargaining privilege" to communications that touch on union bargaining strategy, as opposed to documents that contain notes purely of a factual nature. *California Nurses Ass'n (Alta Bates Medical Center).*[4] Nonetheless, the *Berbiglia* rationale should apply to confidential communications in which a grievant is providing a candid description of the facts underlying the grievance.

Arbitrators Have Historically Recognized the Union-Grievant Privilege

Unconstrained by the Federal Rules of Evidence or similar state evidentiary rules, there is a history of arbitrators recognizing a union-grievant privilege in their decisions. Arbitrators have recognized a union-grievant privilege insofar as it protects communications stemming from *Weingarten*[5]-type communications, where a grievant and a steward and/or union representative speak frankly about the circumstances underlying a pending or anticipated arbitration.

The best known treatise on evidentiary rules in arbitration, Hill and Sinicropi's *Evidence in Arbitration* forcefully argues in favor of arbitrators recognizing a union-grievant privilege:

> [T]estimony that is sought from a union steward concerning confidences obtained from a grievant in the course of representing should be privileged in an arbitration proceeding.[6]

Hill and Sinicropi refer to a well-reasoned decision on point by Arbitrator Lionel Richman in *Hughes Aircraft Company and Electronic & Space Technicians, Local 1553*,[7] elucidating the basic logic behind this privilege:

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[4]326 NLRB 1362 (1998).
[5]NLRB v. Weingarten, 420 U.S. 251 (1975).
[6]2d ed. (BNA Books 1987), at 164. *See also* Grenig & Estes, Labor Arbitration Advocacy, §7.51 (Butterworth, 1989), at 89.
[7](86 LA 1112) (1986).

> This [Weingarten] right of union representation inheres in the guarantee of the right of employees to act in concert for mutual aid and protection. These Weingarten rights attach in the context of a proceeding to elicit damaging facts to support disciplinary action. (*Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410, 99 LRRM 2841.) **It would be a worthless right to an employee if the union representation protected by Weingarten could itself be the subject of discovery for the purpose of attacking the credibility of the grievant's *own statements*.**[8]

While this issue has rarely been the subject of reported arbitration decisions, the authority that does exist suggests that the union-grievant privilege for confidential communications is generally recognized by arbitrators.

Federal and State Court Decisions Rejecting the Union-Grievant Privilege are Inapplicable to the Labor-Management Context

State and federal courts have not uniformly recognized the union-grievant privilege outside the context of the grievance/arbitration process. The recent California appeals court decision of *American Airlines, Inc. v. Superior Court*,[9] rejected the privilege in the context of one employee's discrimination lawsuit, where the employer sought to compel the union representative-deponent to disclose communications with other union members. The California Evidence Code prohibited the court recognizing a privilege not established by statute, and the court rejected the argument that the California statute encouraging collective bargaining provided such a statute. On the other hand, the New York appellate court in *Matter of Seelig v. Shepard*[10] affirmed the privilege in the context of a union officer's motion to quash a subpoena requested by the NYC Department of Investigation seeking to discover confidential communications between the union officer and his members, citing the public policy favoring a union's ability to confer with members about problems and complaints free from government intrusion. The court also questioned whether such questioning infringed on associational privileges guaranteed by the First Amendment.

A few federal courts have also rejected a broad union-member privilege for confidential communications in the context of crimi-

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[8] *Id.* at 1117–18 (emphasis added).
[9] 114 Cal. App. 4th 881, 892, 173 LRRM 3066 (2003).
[10] 152 Misc. 2d 699, 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991).

nal investigations, denying that such a privilege exists under federal common law.[11]

On the other hand, labor arbitrators have long rejected application of federal or state rules of evidence to the arbitral forum. In the absence of contractual language requiring application of such rules, the arbitral community has recognized that evidentiary rules are not binding.[12]

State arbitration statutes do not uniformly require that arbitrators apply state evidentiary rules.[13] For example, the California arbitration statute provides that the rules of evidence need not be observed.[14] Of course, arbitrations subject to section 301 of the LMRA would not be bound by state arbitration procedures.

The Federal Arbitration Act[15] does not require that arbitrators apply the federal rules of evidence. While the applicability of the FAA to labor-management arbitration has not been resolved,[16] those courts applying the Federal Arbitration Act in the context of labor arbitration have rejected the contention that the rules of evidence apply.[17] The Federal Arbitration Act has not been read as requiring that every failure to receive relevant evidence constitutes grounds for vacating an arbitration award; the denial must prejudice the rights of the party to the extent that the party was denied a "fair hearing."[18]

Arbitrators following this general principle usually apply it to *reject* attempts by a party to exclude relevant evidence based upon technical rules of evidence, such as the "hearsay rule." But the principle works as a shield as well as a sword. Where the peculiar nature of labor-management relations justifies excluding evidence otherwise admissible in a federal or state court, because of an important policy promoting the overall interests of resolving disputes through arbitration, arbitrators are free to exclude evidence that courts might otherwise admit.

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[11]*In re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp 332, 335–36 (E.D.N.Y. 1998) (enforcing a subpoena for union officials to testify before the grand jury, and distinguishing cases in which an employer was denied the right to question a union representative about communications with members).

[12]Elkouri & Elkouri, How Arbitration Works 6th ed. Ruben, ed. (BNA Books 2003), at 341.

[13]*Id.* at 342.

[14]California Code of Civil Procedure, Section 1282.2(d).

[15]Title 9, Section 1 et. seq.

[16]See the discussion on this point in Section IV, infra.

[17]*See, e.g., Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985).

[18]*Id.* at 40.

Arbitration Decisions are not Vacated for Excluding Evidence Based upon Privileges not Recognized by State or Federal Courts

The Supreme Court has repeatedly noted the great deference due arbitration decisions by reviewing courts. The standard for judicial review was established by the Supreme Court in *Steelworkers v. Enterprise Wheel & Car Corp.*:[19] as long as the arbitrator's award "draws its essence from the collective bargaining agreement" and eschews the arbitrator's "own brand of industrial justice," then the award must stand, regardless of the court's own feelings of the merits of the case, errors of fact or misinterpretation of the collective bargaining agreement.[20] Awards must be confirmed even when a court may perceive "silly" or "improvident" factfinding, "irrational" or "bizarre" refusals to hear evidence, or when a court believes that the arbitrator's methodology and decision was in "serious error."[21]

The deference to an arbitrator's decision, barring egregious misconduct, stems from a fundamental respect of labor relations and the ability of unions and management to negotiate agreements, and their expectation that those agreements will be respected.[22] Insulating arbitral decisions from governmental intervention reflects the preference for private resolution of labor disputes.[23] Parties bargain for binding arbitration, not for judicial review, and therefore the arbitrator's interpretation of facts and contract language is what the parties have agreed to accept, and what should ultimately prevail.[24] Though this standard does not permit an arbitrator to deviate from "the essence of the contract," the Supreme Court has made it abundantly clear that arbitrator awards must stand unless fraud, dishonesty, bad faith or something similarly malicious presents which would imperil the notion of justice itself.[25] Unless the collective bargaining agreement specifically requires the arbitrator to enforce just those privileges recog-

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[19]363 U.S. 593 (1960).
[20]*Id.* at 597.
[21]*United Paperworkers International Union v. Misco*, 484 U.S. 29, 39 (1987); *see also Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 510 (2001).
[22]*Misco* at 36 (quoting *Steelworkers* 363 U.S. at 596).
[23]*Id.* at 37.
[24]*Id.* at 37–38.
[25]*Id.* at 38.

nized by state or federal courts, arbitrators may adopt reasonable policies concerning the admissibility of evidence and privileges to be recognized.

An arbitrator's evidentiary decisions, because procedural in nature, will rarely form the basis for vacating an arbitration award. The Supreme Court characterizes an arbitrator's procedural decisions as being entitled to even greater deference than the arbitrator's contract interpretation.[26] In *Misco*, an arbitrator upheld a grievance challenging the employer's termination of a worker for possession and use of drugs on company premises. The arbitrator overturned the discharge, concluding that the grievant's presence in the car with the cigarette and smoke was not proof that he either had possessed or used the drugs. More to the point of this analysis, the arbitrator refused to allow into evidence the fact that marijuana gleanings were found in the car, reasoning that because the company was unaware of this when it terminated the worker, the gleanings could not have been used as a basis for discharge.

The Supreme Court upheld the arbitrator's award, stating "when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator."[27] Addressing the issue of the disputed evidence, the Supreme Court concluded that the arbitrator's decision to exclude evidence of the drug gleanings constituted neither bad faith nor affirmative misconduct.[28]

Since *Misco*, the circumstances in which an award has been vacated for what amounts to evidentiary error have been limited to cases in which a party has been deprived of a full and fair hearing as in *International Union, United Mine Workers of America v. Marrowbone Development Company*,[29] or the procedural error was in "bad faith" or so "gross" as to constitute "affirmative misconduct" by the arbitrator.[30]

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[26] *United Paperworkers International Union v. Misco*, 484 U.S. 29, 39–40 (1987).
[27] *Id.* at 40.
[28] *Id.* at 40–41.
[29] 232 F.3d 383 (4th Cir. 2000) (holding that the arbitrator exceeded his authority under the CBA and deprived the union of a full and fair hearing).
[30] *Misco*, 484 U.S. at 40.

Recognition of the Union-Grievant Privilege Does not Deny an Employer a Full and Fair Hearing

Courts owe no deference to arbitration awards where arbitrators have denied the parties a full and fair hearing. But an arbitrator's decision to exclude confidential statements made by the grievant to the union will not meet this standard. The Fourth Circuit concluded in *International Union, United Mine Workers of America v. Marrowbone Development Co.*,[31] that an arbitrator's refusal to hear all of the union's evidence amounted to a denial of a full and fair hearing and therefore affirmed a lower court's decision to vacate and remand for an evidentiary arbitration hearing. The Fourth Circuit reasoned that although an arbitrator "retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present," by excluding essentially the entirety of the union's case and then reaching a decision in favor of the employer, the arbitrator had exceeded his authority and in doing so denied the union a full and fair hearing.[32] A "court will not set aside an arbitration award because the arbitrator refused to hear evidence that was immaterial [or] cumulative," nor does an arbitrator need to hear all evidence the parties wish to put forward.[33] Only in cases where exclusion of relevant evidence "so affects the rights of a party that it may be said that he was deprived of a fair hearing" might vacatur be appropriate.[34]

Mere exclusion of a confidential statement made by the grievant to the union does not rise to the level of the denial of a full and fair hearing. The grievant's earlier statement to the union is not itself direct evidence of either the grievant's misconduct or the employer's defense. The asserted relevance of the grievant's statement is almost always to call into question the version of events the grievant offers at the arbitration or at an earlier union-employer grievance meeting. More often than not, the grievant's statement is character evidence used to call into question the credibility of the grievant as a witness. In a disciplinary arbitration, where the privilege will most often be asserted, the employer bears the burden of proof. If the employer can not establish "just cause" without having to rely upon

[31]232 F.3d 383 (2000).
[32]*Id.* at 389.
[33]*Id.* at 389.
[34]*Id.*

the grievant's prior confidential statement to the union, the discipline should be overturned.

Erroneous Evidentiary Rulings Do Not Constitute Affirmative Misconduct

If an arbitrator's award can be deemed the product of procedural aberration so egregious that it is tantamount to affirmative misconduct, then a court may have grounds to vacate as well. This is an extraordinarily rare occurrence, and one that has not been found at the Supreme Court level. An arbitrator's recognition of the union-grievant privilege, based upon sound labor relations policy and longstanding tradition, cannot be considered "affirmative misconduct." Even a "serious error" involving an evidentiary ruling is not affirmative misconduct justifying vacating an arbitrator's award.[35]

The Federal Arbitration Act's Grounds for Vacation Are Inapplicable

Employers seeking to invade this grievant-union privilege may seek to rely upon section 10 of the Federal Arbitration Act, which states that an award may be vacated where the arbitrator has been guilty of "misconduct in refusing to hear evidence pertinent and material to the controversy. . . . "[36]

The Supreme Court has not yet ruled that the FAA is applicable to collective bargaining arbitration. In *Misco*, the Supreme Court referred to the practice of looking to the FAA for guidance in labor arbitration cases, noting the then-current analysis that the FAA did not apply to contracts of employment.[37] While the Supreme Court has since interpreted the FAA as applying to contracts of employment with the narrow exception of employees involved in transportation industries,[38] the Supreme Court has not visited the issue of

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[35] *Teamsters Local Union No. 688 v. Supervalu, Inc.*, 171 LRRM 3270, 3274 (E.D. Mo. 2003) (the court declined to vacate an award though the arbitrator had excluded hearsay without objection having been made, and allegedly misled a party to believe that its exhibits had been admitted).

[36] 9 U.S.C. §10(a)(3).

[37] *United Paperworkers International Union v. Misco*, 484 U.S. 29, 40 & n.9 (1987).

[38] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

whether a collective bargaining agreement is such a contract of employment.[39]

Many courts have concluded that the FAA does not apply to labor arbitrations subject to section 301; rather, the FAA serves only to guide federal courts in fashioning a federal common law of labor arbitration.[40] Should the Supreme Court conclude that the FAA applies to labor arbitration, the substantive law developed under section 301(a)[41] will still prevail when a conflict exists with any provision of the FAA.[42] As noted above, federal courts have rejected employers' attempts to vacate arbitrator's awards based upon procedural irregularities, reasoning that an arbitrator's evidentiary error is a procedural matter left to the sound discretion of the arbitrator.

Conclusion

Arbitrators have long acknowledged the necessity for recognizing a union-grievant privilege in the context of labor arbitrations. Based upon the foregoing analysis, arbitrators should continue to recognize the privilege, disregarding state or federal evidentiary rules not applicable to the arbitral forum. Moreover, should an employer seek to vacate an arbitrator's award based upon the arbitrator's recognition of the union-grievant privilege, federal common law created pursuant to section 301 will dictate that the employer's challenge be rejected. Arbitrators recognizing the privilege can be confident that not only are they making the correct choice, excluding evidence with only marginal relevance, but they are supporting the effectiveness of labor arbitration as a means for promptly resolving industrial disputes.

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[39]A recent Ninth Circuit decision suggests that the Supreme Court has not yet decided whether the FAA applies to §301(a) arbitrations. *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1197, n.1 (9th Cir. 2004).

[40]*International Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 494–95 (5th Cir. 2003); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 1997).

[41]29 U.S.C. §185(a).

[42]*Smart v. International Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 724 (7th Cir. 2002); *IBEW Local 545 v. Hope Electrical*, 175 LRRM 2641(8th Cir. 2004).