Chapter 4

THE PROCESS OF PROCESS: THE HISTORICAL DEVELOPMENT OF PROCEDURE IN LABOR ARBITRATION

Laura J. Cooper*

As soon as employment arbitration began to burgeon in the early 1990s, it became commonplace to bemoan the inadequacies of its procedural protections. Court decisions and academic articles highlighted some shockingly inequitable procedures in employment arbitration systems promulgated unilaterally by employers.[1] Commentators compared the unfairness of employment arbitration procedures with the fairness of labor arbitration procedures and suggested that the difference was the inevitable consequence of the "fact" that procedures in labor arbitration, unlike those in employment arbitration, were the result of negotiations between parties of relatively equal bargaining power.[2]

The problem with this explanation, though, is that labor arbitration procedures are not in fact usually the result of negotiations between unions and employers. It will take an experienced labor arbitrator, or labor or management advocate, just a moment's reflection to realize that collective bargaining agreements rarely, if ever, articulate any arbitration procedures. Although both contemporary collective bargaining agreements and their earlier manifestations typically describe the pre-arbitration grievance process, they do not define the arbitration procedure itself.[3]

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*Member, National Academy of Arbitrators, Minneapolis, Minnesota; J. Stewart and Mario Thomas McClendon Professor in Law and Alternative Dispute Resolution, University of Minnesota Law School. I am grateful for the comments of Benjamin Aaron and Dennis R. Nolan on earlier drafts of this article.

[1] *See, e.g.*, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. Kan. L. Rev. 583, 606–08 (2004) (hereinafter cited as Bales).

[2] *See, e.g.*, Bales, *supra* note 1, at 603–04; Zack, *The Evolution of the Employment Protocol*, 48 Disp. Resol. J. 36 (Oct.–Dec. 1995).

[3] Wirtz, *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA, Inc. 1958), 12 (hereinafter cited as Wirtz) ("the subject of rules for the conduct of arbitration hearings is not touched upon at all in most collective bargaining agreements"); Kagel, *Practice*

In fact, the early practice of arbitration was sometimes wholly divorced from written contracts. When George W. Taylor started arbitrating in the men's clothing industry in Philadelphia in the early 20th century, the parties didn't even have a contract until they were shamed into writing one by persistent inquiries from others interested in the source of their arbitration practice; and even then their contract was only skeletal.[4] Indeed, in the early days under the Wagner Act, an agency attorney reported, it was not uncommon for collective bargaining agreements to be oral rather than written and when written they rarely contained specific grievance procedures.[5] Arbitrator William E. Simkin reported arbitrating in the men's clothing industry for 2 years in the early 1940s before he was ever shown a copy of the parties' contract.[6] Surveys of collective bargaining agreements from the middle of the 20th century, when arbitration became widespread and its procedures more uniform, reveal a consistent absence of provisions about arbitration procedure.[7]

I don't mean to suggest that parties to collective bargaining agreements never define by agreement aspects of their own arbitration practices. Surely that occurs sometimes, especially in large

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and Procedure, in The Common Law of the Workplace: The Views of Arbitrators, ed. St. Antoine (BNA Books, 2d ed. 2005) (hereinafter cited as Common Law), § 1.1 ("Most collective bargaining agreements do not contain extensive provisions concerning how arbitration cases are to be 'tried.'").

[4]National Academy of Arbitrators, *Interview with William E. (Bill) Simkin*, in Oral History Project (1982), 10 (hereinafter cited as Simkin). George Taylor himself wrote generally about the experience of arbitrating in relationships in which there was no formal written labor contract. Taylor, *Effectuating the Labor Contract Through Arbitration* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948–1954, ed. McKelvey (BNA, Inc. 1957), 29–30 (hereinafter cited as Taylor).

[5]Friedman, *The Wagner Act and More: Ida Klaus*, in Between Management and Labor: Oral Histories of Arbitration (Twayne 1995), 36–37. A 1939 study by the National Labor Relations Board found that verbal agreements existed in new collective bargaining relationships that had not yet evolved to produce a written agreement, in firms with few employees and in companies that feared that knowledge of an agreement would impair relationships with client businesses. National Labor Relations Board, Written Agreements in Collective Bargaining (U.S. Gov't Printing Office 1940), 37. The law did not require that collective bargaining agreements be in writing until 1941. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941). The employer in *Heinz* asserted in 1940, "A considerable percentage of the union contracts existing in the country today are oral contracts or contracts represented by an exchange of letters or a posted bulletin." Petition for Writ of Certiorari at 23, *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941) (No. 39–73).

[6]Simkin, *supra* note 4, at 11.

[7]Taylor, Arbitration Clauses in Connecticut Labor Contracts, Bulletin No. 6, Labor-Management Institute, Univ. of Connecticut (1954); Updegraff & McCoy, Arbitration of Labor Disputes (CCH, Inc. 1946), Appendix A (hereinafter cited as Updegraff & McCoy). A collection of typical arbitration clauses from 1938 reveals a similar absence of procedural specificity. *The First Year of the Voluntary Industrial Arbitration Tribunal*, 3 Arbit. J. 126, 133–34 (1939) (hereinafter cited as First Year).

bargaining units with significant numbers of grievances and arbitrations. For example, in a Fireside Chat at the 2001 Academy meeting, arbitrator Richard Mittenthal compared the arbitration procedures at Anheuser-Busch with those at the U.S. Postal Service. At Anheuser-Busch, a 5-member tripartite panel considered as many as 30 cases in a 3-day session on the basis of a documentary record, looking at affidavits, exhibits, and prehearing statements. The neutral arbitrator was called upon to rule only when the parties deadlocked. At the Postal Service, by contrast, the procedure was like a courtroom, with motions, briefs, reply briefs, endless exhibits, and lots of lawyers.[8] Rather, my point is that most arbitrations today follow an essentially uniform procedure that is not defined in the parties' agreement.

If parties did not establish arbitration procedures through negotiations and the drafting of collective bargaining agreements, perhaps arbitration procedures arose less formally as parties jointly defined their desired process for arbitrators. Although such informal party guidance may have been present in some labor-management relationships, the historical record instead suggests that parties usually agreed to arbitrate with little notion of what the process would entail.[9] A famous illustration of the lack of party familiarity with arbitration comes from the first collective bargaining agreement between Ford and the United Auto Workers (UAW) in 1942. In negotiations, the union had sought an arbitration provision but the company negotiators had refused to agree. When the time came for signing the contract, Harry Bennett, Ford's head of labor relations, said to the union's negotiator, "Well, did you guys get everything you wanted?" The union negotiator said, "No." Bennett then asked, "Well, what didn't you get?" The union official replied, "Well, one thing we wanted was an umpire." Bennett responded, "What the hell is an Umpire? Is this a ball game or something?" The union representative answered that an umpire is a person to whom you refer a grievance you can't get together on and the umpire decides which side is right. Bennett turned to his Ford negotiators and said, "What the hell's wrong with that.

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[8]Mittenthal, *Fireside Chat*, in Arbitration 2001: Arbitrating in an Evolving Legal Environment, Proceedings of the 54th Annual Meeting, National Academy of Arbitrators, ed. Grenig & Briggs (BNA Books 2002), 158–59.

[9]Wirtz, *supra* note 3, at 12; Simkin, *supra* note 4, at 31.

How come you guys didn't give them an Umpire. Well, give 'em an Umpire too."[10]

Other evidence that arbitration procedures did not derive from the mutual expectations of labor and management parties comes from the recollections of early arbitrators who reported that parties often had different expectations than one another, or even that individual parties changed their procedural desires depending on the case. Ralph Seward described being asked to conduct the first arbitration ever held at Sun Shipbuilding in the 1940s. He was called to a small room, with a settee crowded with union men and others sitting on chairs, with no table in the room, no place to put down any papers. The union representatives were shocked when Seward told them his role was to interpret their agreement rather than just to decide what was fair and right. The company, on the other hand, expected an adjudicatory proceeding, was represented by a lawyer and had a court reporter present to make a transcript.[11]

Even more sophisticated parties sometimes had different visions of the process. Seward noted that General Motors wanted an adjudicatory model while the UAW wanted him to mediate disputes.[12] Seward described a wartime arbitration in Chicago in the printing industry where neither side would speak because each insisted that the other side should present its case first.[13] George W. Taylor, summing up decades of experience as a labor arbitrator in 1949, said, "Each party has a tendency to switch from a demand for a fair and workable decision, not incompatible with agreement terms, to an insistence upon a so-called legalistic decision, depending upon the necessities for winning a particular case."[14]

The Academy's *Common Law of the Workplace* states that statutes and court decisions are among the sources of today's arbitration procedure.[15] But even that source is unable to cite a single statute or court decision that had such an effect on the development of

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[10]Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 Fla. L. Rev. 557, 569 (1983) (hereinafter cited as Nolan & Abrams) (quoting from an unpublished University of Michigan Ph.D. dissertation by Heliker, Grievance Arbitration in the Automobile Industry, 118–19, 1954).

[11]National Academy of Arbitrators, *Interview with Ralph Seward*, in Oral History Project (1982), 13, 40 (hereinafter cited as Seward).

[12]*Id.* at 21.

[13]*Id.* at 12–13.

[14]Taylor, *supra* note 4, at 39.

[15]Common Law, *supra* note 3, at 5.

labor arbitration procedure.[16] In the private sector, where today's model of labor arbitration emerged, state statutes are inapplicable because of the doctrine of federal preemption and no federal statute defines procedures for labor arbitration.[17] While the U. S. Supreme Court in 1957 declared the existence of a federal common law to govern labor arbitration,[18] the Court's common law jurisprudence never addressed arbitration procedures until 1987 when, in its *Misco* decision, it, far from mandating procedures, held that procedures were, in the absence of bad faith or gross affirmative misconduct, entirely within the discretion of the arbitrator.[19]

From this review, we can fairly conclude that the most obvious possible sources of today's labor arbitration procedures were not in fact its sources—not statutes, not court decisions, and not even the parties' negotiated agreements or even their informally conveyed common understanding. While the limits of what was acceptable to labor and management parties surely formed a perimeter around the development of arbitral procedures, historical evidence suggests that the derivation of those procedures came from elsewhere.[20]

My research identifies at least six sources: (1) the arbitrators before whom the cases were presented; (2) the World War II-era War Labor Board; (3) the National Academy of Arbitrators (NAA); (4) the publication of proceedings of the NAA, procedural guide-

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[16]The only statutory or judicial citations in the book's chapter on procedure are two California statutes inapplicable in private sector arbitration (the citation for one is no longer valid); one California court decision from outside the context of labor arbitration; and a federal court decision regarding judicial rather than arbitral authority. *Id.* at 37, 51, 63.

[17]Although state statutes, including the Uniform Arbitration Act, may govern procedures in public sector labor arbitration cases, labor arbitration procedures that are used today in both the public and private sectors were already well developed in private sector labor arbitration before adoption of the Uniform Act in 1955 and before public sector labor arbitration became widespread. Moreover, the original Uniform Arbitration Act, still in effect in most states, unlike the revised Uniform Arbitration Act (2000), adopted in only a few, has only very limited provisions regarding hearing procedure. See <http://www.nccusl.org> for information on the uniform acts.

[18]*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

[19]*United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

[20]Arbitrator Richard Mittenthal attributes perhaps a more significant role to the parties in the evolution toward an adjudicatory model of labor arbitration. In his view, as the parties over time became more sophisticated collective bargaining partners, their contracts became more detailed, and they began to perform for themselves the definitional task that they were earlier willing to leave to arbitrators. Mittenthal, however, acknowledges that parties generally did not make conscious choices about arbitral procedures nor articulate such expectations to arbitrators. Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 39–40, 43 (hereinafter cited as Mittenthal).

lines, and arbitration awards; (5) the power of the American Arbitration Association (AAA); and (6) the influence of lawyer advocates.

The Arbitrators

For the first several decades of labor arbitration, the demand for arbitrators was too small to support a large number of arbitrators and even among those who regularly arbitrated, few did so as their full-time profession. A 1954 report by the AAA identified 293 labor arbitrators nationally, of whom only 16 were full-time. The largest principal profession of the part-time arbitrators was educator and the largest group of those, 20 percent, were law professors.[21] These arbitrators clearly recognized that, if the parties negotiated contract provisions regarding arbitration procedure, arbitrators were obliged to follow them. Because, however, there generally were no such provisions, arbitrators also viewed it as their responsibility to define procedures for the parties.[22]

Early arbitrators commonly established arbitration procedures, not so much to match the parties' needs or desires but to match their own skills, personalities, and circumstances.[23] George W. Taylor, arbitrating in the hosiery industry in the 1920s and 1930s, would attend the parties' social events, sit at the head of the table during collective bargaining negotiations, mediate those negotiations, review and make suggestions for contract language drafted by their attorneys, and then later mediate and arbitrate disputes arising from that same agreement.[24] Walter Gellhorn, who started arbitrating in 1936, tended to conduct relatively formal evidentiary hearings in discipline cases but to handle other issues by informal colloquy and exchange.[25] Two early arbitrators under the

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[21]American Arbitration Association, Procedural Aspects of Labor Management Arbitration, 28 LA 933, 936 (1957) (hereafter cited as Procedural Aspects).

[22]Wirtz, *supra* note 3, at 8–9.

[23]Arbitrator Richard Mittenthal, on the other hand, believes the parties' influence was greater than that of arbitrators. He has written: "Arbitrators have not played a large part in this evolution. We are not ideologues. We accept the role the parties wish us to perform." Mittenthal, *supra* note 20, at 43. The role of parties, however, is much harder to find substantiated in the historical record, outlined generally in this article.

[24]National Academy of Arbitrators, *Interview With G. Allan Dash, Jr.*, in Oral History Project (1982), 3–4, 10 (hereinafter cited as Dash).

[25]Friedman, *Development of Arbitration: Walter Gellhorn*, in Between Management and Labor: Oral Histories of Arbitration (Twayne 1995), 28. Similarly, in 1946, the common procedure for the hearing of a nondisciplinary language case was described in an early arbitration textbook as the parties sitting around a table discussing the issue "very much as they would if no arbitrator were present" with "back-and-forth argument . . . until the subject was exhausted." Updegraff & McCoy, *supra* note 7, at 95.

General Motors-United Auto Workers contract, Allan Dash and George W. Taylor, made it a practice to have a conference with the parties to discuss a forthcoming arbitration decision before it was handed down. When Ralph Seward became the arbitrator under that contract he didn't know about the conference practice until after he decided his first case. After learning of it, he decided not to continue pre-award conferences because he wasn't used to the procedure and, as he was then living in New York, making additional trips to Detroit was inconvenient.[26] David Wolf, who arbitrated for ALCOA and Chrysler, preferred written proceedings to oral ones. He never had hearings and just decided cases on the basis of briefs and written statements by witnesses.[27] Yale Professor Harry Shulman, who arbitrated for the UAW and Ford Motor Company from 1943 to 1955, thought it was his responsibility, rather than the parties, to develop the facts and to find solutions to their problems. He would go into the factory to investigate issues independently. Shulman was so sure that he knew what was best for the parties that at the time of death he had 307 cases he had not decided, not because he was derelict in his work but because he had concluded that it was better for the parties if he left those particular issues unresolved. Shulman's approach was clearly far too personal to withstand the test of time. His successor at Ford, Harry Platt, took over Shulman's caseload and held arbitration hearings of a conventional nature.[28]

When arbitrators were more reflective than just instinctive about their development of procedures, not surprisingly for a group dominated by teachers and scholars, they viewed their responsibility quite broadly. The writings of the first generation of labor arbitrators tell us that they developed procedures with three objectives in mind.

First, their own sense of integrity demanded procedures that they themselves considered fair. For example, it became commonplace for arbitrators at hearings to follow-up direct and cross-examination with the arbitrator's own questions of the witness so that the arbitrator would be assured the necessary factual information for making an informed decision even if the parties had

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[26]Seward, *supra* note 11, at 16, 20–21.

[27]*Id.* at 37.

[28]*Id.* at 24, 38; Gruenberg, Najita & Nolan, Fifty Years in the World of Work (BNA Books 1998), 54 (hereinafter cited as Fifty Years); National Academy of Arbitrators, *Interview with Harry H. Platt*, in Oral History Project (1982), 7. Certainly the parties' desires as well as the arbitrators' personalities played some role in that procedural change. *Id.*; Mittenthal, *supra* note 20, at 40.

failed to ask all relevant questions.[29] George W. Taylor emphasized that while arbitrators' immediate obligation was to the parties, it was also their task to "take steps gradually to evolve standards for their own conduct which are important to the maintenance of a professional and impartial standing."[30]

Second, arbitrators saw themselves as teachers, trying to define procedures that would promote a healthy relationship between the parties, not just in hearings, but in their day-to-day relationship. Although arbitrators wanted to hear all relevant information, they recognized the need to balance that adjudicatory interest with the desire to create procedural rules that promoted the parties' ongoing relationship. Arbitrators' balancing of these concerns led to evidentiary practices such as excluding evidence that should have been presented at pre-arbitration stages of the grievance process and excluding evidence of prior offers of settlement or compromise.[31] In an address to the First Annual Meeting of the National Academy of Arbitrators in 1948, charter member and University of Wisconsin Economics Professor Edwin E. Witte emphasized that the role of a labor arbitrator was distinct from that of a judge in civil litigation or of a commercial arbitrator. He said, "[L]abor arbitration must be concerned not merely with the decision of particular disputes but with the development and maintenance of friendly, cooperative labor-management relations."[32]

Third, belying the notion that procedure in labor arbitration is exclusively the product of the desires of the parties, those arbitrators whose practices formed the basis of contemporary procedure tell us that they always also kept in mind the interests of the individual worker and the public even though neither were parties to the collective bargaining agreement. With regard to the interests of individuals, there might, for example, be a worker needing independent procedural protection, as when a union sought to overturn the promotion of an arguably more skilled worker in

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[29]Wirtz, *supra* note 3, at 14.

[30]Taylor, *supra* note 4, at 24.

[31]Wirtz, *supra* note 3, at 15–16.

[32]Witte, *The Future of Labor Arbitration—A Challenge,* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948–1954, ed. McKelvey (BNA, Inc. 1957), 12–13. Arbitrator Benjamin Aaron, also an academic, in 1957 noted that lawyers often made inappropriate procedural objections in labor arbitration because they failed to recognize that the process was designed not only to resolve the particular dispute but also to educate the parties and promote the growth of their collective bargaining relationship. Aaron, *Some Procedural Problems in Arbitration*, 10 Vand. L. Rev. 733, 747 (1957) (hereinafter cited as Aaron).

favor of an employee with greater seniority while the employer was largely indifferent as between the two, or where the union and the employer shared a similar racial bias against an employee.[33]

The writings of the early arbitrators also tell us that they were concerned, as they developed procedures, with the effect of their decisions upon the public outside the collective bargaining relationship.[34] Arbitrators recognized that those disputes that were not settled by the parties or decided satisfactorily in arbitration would cause work stoppages with harm extending beyond the factory's walls. A report from the NAA that led to the drafting of its first code of ethics said that a labor arbitrator was "the custodian of the public interest in industrial peace."[35] Thus, arbitrators wanted procedures that would serve not only the interests of labor and management but would also best encourage resolution of disputes without economic disruption. The arbitrators' commitment to the public interest was especially salient because most of them started their careers as employees of the federal War Labor Board, whose responsibility it was to keep labor disputes during World War II from interfering with vital wartime defense production.

The War Labor Board

Although the role of the War Labor Board in spreading the growth of arbitration is sometimes overstated, this federal agency played a powerful role in defining the nature of arbitration practice. Labor arbitration was already well established before World War II, with arbitration provisions estimated to exist in between 62 percent and 76 percent of collective bargaining agreements.[36] Federal involvement in wartime labor relations commenced immediately following the attack on Pearl Harbor. Within two weeks of the attack, President Roosevelt persuaded the nation's unions and employers to enter an agreement prohibiting strikes and lockouts for the duration of the war. The War Labor Board was established in January 1942 to assist the parties in the peaceful resolution of disputes that they could not themselves resolve by negotiation. By

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[33]Wirtz, *supra* note 3, at 22–23.

[34]*See, e.g.*, Taylor, *supra* note 4, at 24.

[35]Committee on Ethics or Standards of Conduct for Labor Arbitrators, *Standards of Conduct for Labor Arbitrators* (1949), in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948–1954, ed. McKelvey (BNA, Inc. 1957), 136, 139.

[36]Nolan & Abrams, *supra* note 10, at 576.

May 1942, the Board employed a thousand part-time staff members for mediation, fact-finding, and arbitration.[37]

This massive operation had several profound effects upon the development of labor arbitration. With regard to arbitration procedures, perhaps its most significant effect was largely to end the debate about whether labor arbitration would be exclusively rights arbitration or whether it would include elements of mediation and of interest arbitration. In the early years of labor arbitration, collective bargaining agreements were brief and often arbitrators were not merely interpreting the parties' written agreement but extending it by articulating new rights and responsibilities. Many of the early arbitrators saw their role as helping to settle the parties' disputes by the most efficient techniques that would best develop the parties' relationship and their ability, in the future, to settle their own disputes without the need for a neutral. These arbitrators, including some of the most famous arbitrators of their generation, George W. Taylor and Harry Shulman, thought that arbitrators should mediate disputes where appropriate rather than arbitrate. A rather vigorous debate arose within the arbitration profession as to whether mediation and arbitration were consistent roles or whether, once having mediated, a neutral was precluded from being an unbiased decisionmaker for the same dispute.

The War Labor Board came out strongly on the side of the adjudicatory model, insisting that arbitrators actually arbitrate rather than mediate and that their awards could only interpret or apply, rather than modify, the terms of the written agreement. The War Labor Board drafted a model arbitration clause that included such limitations on the authority of the arbitrator and recommended, and in some cases mandated, its inclusion in wartime collective bargaining agreements.[38] Although some arbitrators, including George W. Taylor, continued to reject the adjudicatory model, the power of the Board effectively resolved the issue. Nearly all contemporary collective bargaining agreements include language restricting arbitral authority that parallels the War Labor Board

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[37] *Id.* at 564–65.

[38] 3 National War Labor Board, The Termination Report of the National War Labor Board (Government Printing Office 1947), 65 (The standard arbitration clause adopted by Region 1 of the Board in Boston included the following language: "Jurisdiction of the Arbitrator shall be limited to the grievances arising out of the application or interpretation of this agreement.")

contract language.[39] Although the War Labor Board's insistence on an adjudicatory model for labor arbitration may have been motivated by an assumption that this more limited arbitral role would enhance the procedure's acceptability to employers,[40] there is no question that it was the power of the War Labor Board and not merely the desires of employers that ensured ascendency of the adjudicatory model.

One can measure the contribution of the War Labor Board by citing this description of arbitration before the war: "Wise counsellors selected by the parties were permitted to decide issues of great magnitude on little more basis than their own sense of justice and acceptability."[41] The War Labor Board's contribution to the development of arbitration procedure was to ensure that thereafter arbitration meant the adjudicatory arbitration of preexisting rights and not either mediation or interest arbitration.

The National Academy of Arbitrators

Although the War Labor Board helped solidify the adjudicatory nature of labor arbitration, historians consider the Board's primary contribution to labor arbitration to be its creation of a large group of experienced arbitrators, many of whom remained active after the war and became the core of the post-war arbitration profession.[42] After the war, both the AAA and the U.S. Conciliation Service, a predecessor of the Federal Mediation and Conciliation Service (FMCS), urged the creation of a professional organization of labor arbitrators.[43] The director of the federal agency called a meeting in Washington, D.C., in April 1947, to discuss the idea of such an organization. One of the arbitrators in attendance later said of this meeting, "For most of us, it was the first time we had discussed with fellow arbitrators the decisional and procedural problems that troubled all of us."[44] Later, in September 1947, about a

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[39] *See generally*, Nolan & Abrams, *supra* note 10, at 568–77. Language "prohibiting the arbitrator from adding to, subtracting from, or in any way altering contract language" was found in 92% of collective bargaining agreements among a representative sample of agreements in 1995. Basic Patterns in Union Contracts (BNA Books, 14th ed. 1995), at 38.

[40] Nolan & Abrams, *supra* note 10, at 576. *See also* Asch, *The Voluntary Arbitration of Labor Disputes*, 4 Arbit. J. 187–88 (1949).

[41] Nolan & Abrams, *supra* note 10, at 629.

[42] *Id.* at 577.

[43] Fifty Years, *supra* note 28, at 17–18.

[44] Alex Elson, in a June 15, 1995, letter to Dennis Nolan, quoted in Fifty Years, *supra* note 28, at 25.

hundred arbitrators, most veterans of the War Labor Board, met in Chicago to found the National Academy of Arbitrators as a professional organization for labor arbitrators.[45] The founders articulated three purposes for the organization that contributed to the development of and national standardization of arbitration procedures. The new organization would seek to (1) establish high standards and competence for arbitrators, (2) promulgate a code of ethics, and (3) promote the study and understanding of labor arbitration.[46]

The Academy brought arbitrators together on a regular basis to talk informally about their work and, in particular, the procedural questions that they previously would have considered alone at their hearings. Their code of ethics articulated uniform expectations of hearing behavior, not just for arbitrators but, initially, also for parties. At annual meetings, arbitrators gave lectures and participated in debates about the important questions in their professional lives. The requirement for membership in the Academy came to be defined by the number of cases one had heard, ensuring that widespread acceptability in the eyes of both unions and employers would demonstrate empirically the arbitrator's competence and fairness. As membership in the NAA came to signify professional distinction to parties selecting arbitrators, persons aspiring to careers in labor arbitration modeled their professional conduct on standards defined by the Academy, extending the influence of the Academy beyond its membership. The Academy's impact was further broadened by the AAA and the FMCS adopting the Academy's Code of Ethics as applicable to both member and nonmember arbitrators.[47]

Publication

Publication has also played a role in developing and promoting uniformity in arbitration procedure. These publications were of three principal types: (1) scholarly writings, (2) procedural guidelines, and (3) published arbitration awards.

From its first meeting, presentations at annual meetings of the NAA were of high quality, resembling academic presentations of scholars. After a few years, Academy members recognized that

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[45] Fifty Years, *supra* note 28, at 25.
[46] *Id.* at 26.
[47] *Id.* at 48.

their presentations, if published, would be an important resource for arbitrators, as well as union and management representatives. In 1957, the Academy selected ten of the most significant presentations at its first seven annual meetings to be published in a book[48] and thereafter books have been published annually by the Bureau of National Affairs (BNA), containing all of the annual meeting presentations.[49] The topic of arbitral procedure has been addressed regularly in presentations published in these volumes.

The move toward uniform arbitral procedures was also likely hastened by the publication of suggested guidelines for arbitration procedures. In 1950, when the NAA, the FMCS, and the AAA joined in promulgation of a Code of Ethics for Arbitrators, the drafters included two additional sections in the document that were designed as "general guides" rather than as a code: "Procedural Standards for Arbitrators" and "Conduct and Behavior of Parties."[50] The standards for arbitrators, for example, permitted arbitrators to question parties and witnesses "to clarify the issues and bring to light all relevant facts necessary to a fair and informed decision of the issues," disapproved of ex parte communications with the parties, and permitted exclusion of evidence "which is clearly immaterial."[51] Guidance to the parties included such things as a directive not to pursue ex parte communications with arbitrators, procedures for reopening records to submit new evidence, and delineation of the kinds of information to be included in post-hearing briefs.[52]

During the same period that these standards were being drafted, a group of 29 Philadelphia labor arbitrators met informally at dinner meetings for three years to draft some more detailed recommended procedures for labor arbitration. The result was the 1953 publication of a 15-page pamphlet, "Guides for Labor Arbi-

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[48]The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948–1954, ed. McKelvey (BNA, Inc. 1957) (hereinafter cited as First Seven).

[49]An index of presentations at the first 50 annual meetings of the National Academy of Arbitrators is included in Fifty Years, *supra* note 28. The presentations of the next five annual meetings are indexed in Arbitration 2002: Workplace Arbitration: A Process in Evolution, Proceedings of the 55th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2003).

[50]Code of Ethics and Procedural Standards for Labor-Management Arbitration, Appendix B, First Seven, *supra* note 48, at 151.

[51]*Id.* at 157–58.

[52]*Id.* at 160–61.

tration."[53] With great specificity, the pamphlet addressed a wide range of procedural issues including transcripts, use of oaths, submission agreements, admission of evidence, arbitrator participation in the hearing, briefs, and awards.

Apart from these publications written for the purpose of promoting specific procedural practices, a common definition of fair process in labor arbitration has also been advanced by the publication of actual arbitration awards. Publication of arbitration awards began with the War Labor Board. At the end of the war, in 1946, BNA commenced publication of *Labor Arbitration Reports*, a series that continues today.[54] Publication of arbitration awards was substantially facilitated by the FMCS that, for about a decade in the 1970s and 1980s, required arbitrators on its list to submit four copies of each arbitration award, which it then turned over to the BNA and other private publishers. When the FMCS ended the practice, for cost reasons, in the 1980s, the NAA revised its code of ethics to facilitate arbitrators' direct submission of arbitration awards to publishers with party consent.[55] Later, in the 1990s, when the Academy concluded that an insufficient number of Academy members were submitting awards for publication, it created a blackletter statement of arbitration practice, modeled after restatements of the American Law Institute.[56] This book, *The Common Law of Arbitration: The Views of Arbitrators*, first published in 1998 and now in its second edition, includes a chapter on arbitration procedure.

Talks at annual meetings of the Academy and published guidelines defined the procedural best-practices for arbitrators. The publication of awards permitted parties, in selecting arbitrators, to assess whether particular arbitrators were acting in accordance

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[53]Labor Relations Council, Wharton School of Finance & Commerce, Guides for Labor Arbitration (University of Pennsylvania 1953). The full extent of distribution of this particular pamphlet is unknown, but the phenomenon of distribution of pamphlets by academics, nonprofit organizations, unions, and employer organizations was apparently a common method for communication among labor relations professionals in the first decades after World War II. The Labor Relations Council of the Wharton School at the University of Pennsylvania distributed this pamphlet, along with nine others, as the "Labor Arbitration Series," edited by George W. Taylor. The Wharton School's Industrial Relations Unit and Labor Relations Council: Report on Progress (1987), 69 (Table 12). Wide contemporary distribution of Guides for Labor Arbitration is suggested by the fact that, according to the electronic WorldCat catalogue in 2005, the pamphlet was in the collection of 69 libraries in all regions of the country.

[54]Nolan & Abrams, *supra* note 10, at 625.

[55]Fifty Years, *supra* note 28, at 209.

[56]St. Antoine, ed., *Preface to the First Edition*, in Common Law, *supra* note 3, at ix.

with those practices. These publications also guided other arbitrators toward a greater uniformity of procedural practices.

American Arbitration Association

The American Arbitration Association, or Triple A, is a nonprofit organization founded in New York in 1926 by the merger of two groups, one that had focused on research regarding arbitration and the other on the promotion of the practice of arbitration.[57] Its services initially focused on commercial arbitration (disputes between businesses), but in some of the industries in which it arbitrated, such as the entertainment industry, some cases were essentially labor disputes. The AAA's labor arbitration caseload increased during the Depression in the 1930s as collective bargaining agreements proliferated, especially following passage, in 1935, of the National Labor Relations Act. By 1937, the AAA recognized that arbitration of labor disputes warranted somewhat different administrative practices and arbitrator lists so it established a Voluntary Labor Arbitration Tribunal.[58] The use of the term "voluntary" in the title was an important means for the organization to signal that, although it was entering the labor field, it was rejecting there, as it had in the commercial arena, any compulsory use of arbitration.[59] The distinction was especially important in labor where enactment of state laws employing compulsory arbitration to prevent strikes had been highly controversial.

The AAA promoted arbitration in many settings, including labor, business, and international relations, with the fervent self-confidence of religious zealotry. Indeed a history of the organization, written in 1948 by Frances Kellor who served as its Vice President, uses overtly religious language—speaking of its founders as "missionaries" with "very real devotion" of an "almost fanatical degree" who "felt the call of the spirit of arbitration" and others who acted from their "belief and faith in arbitration."[60] Because the American common law, borrowed from the English common law, was early on hostile to arbitration, refusing specifically to enforce contractual agreements to arbitrate, the mission of the AAA also had the characteristics of a military campaign against a formidable

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[57]Kellor, American Arbitration: Its History, Functions and Achievements (Harper & Brothers 1948), 17 (hereinafter cited as Kellor).
[58]*Id.* at 83–91.
[59]*Id.* at 87.
[60]*Id.* at 181.

foe—a carefully planned effort to make the case for acceptability in the eyes of American judges and legislators. Because the AAA believed that uniform adoption of improved arbitration procedures would help to insulate arbitration from the courts, and even if that failed, promote its acceptability within the general public, establishment of common procedures was central to the AAA's struggle for acceptance.[61]

Within the public, lawyers were a special focus of the organization's persuasive efforts. Knowing that lawyers played such a key role in advising clients about contracts and dispute resolution, the AAA's campaign was designed specifically to assure lawyers that arbitration was a predictable and safe forum for the resolution of client disputes.[62] Indeed, the AAA has used the proportion of its cases involving attorneys as a measure of its success in developing a general practice of arbitration.[63]

In the eyes of the AAA, though, the practice of labor arbitration looked like the misbehavior of an unruly child disrupting the order of a first-class restaurant. As labor arbitration proliferated, the AAA feared that labor arbitration would give commercial arbitration a bad name. (The AAA's fear seems particularly ironic under present circumstances when labor arbitrators fear that employment arbitration procedures, viewed as less fair, will undermine the credibility of labor arbitration and result in greater judicial scrutiny of labor arbitration awards.)[64] One labor arbitrator at the time said that the AAA was "very suspicious of everything that labor arbitration . . . stood for" and especially troubled by its occasional inclusion of mediation that AAA viewed as "something vile."[65] It was certainly true then, in the late 1930s, that some labor arbitrators mixed mediation and adjudication and that the line between rights arbitration and interest arbitration was sometimes blurred. The AAA feared that irregular procedures, mediation, and compromise decisions would frustrate well-prepared lawyers seeking a reliable private system of adjudication and would undermine the AAA's effort to persuade the courts that commercial arbitration outcomes should be afforded judicial deference.[66] The AAA launched its Voluntary Labor Arbitration Tribunal with the

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[61] *Id.* at 24, 67–69.
[62] *Id.* at 67–69.
[63] *Id.* at 171.
[64] *See, e.g.*, Dunlop & Zack, Mediation and Arbitration of Employment Disputes (Jossey-Bass 1997), at 34–35.
[65] Seward, *supra* note 11, at 9.
[66] Kellor, *supra* note 57, at 86.

hope of transforming labor arbitration into a worthy companion for its commercial arbitration system. A report on the first year of the new labor arbitration tribunal described the AAA's task as "hew[ing] a path through the wilderness of amicable undertakings toward a real use of arbitration."[67]

The Vice President of the AAA, looking back a decade later at the quality of labor arbitration procedure at the time of creation of AAA's labor tribunal, maintained the same vocabulary of condescension:

> Custom has predisposed both management and labor to the settlement of labor disputes without rules of procedure. They were accustomed to informality and irregularity and time-consuming processes; they were afraid that the introduction of rules would lead to rigidity of proceedings. They were unaware of the function of rules in preserving the rights of parties and of allocating duties in a manner to encourage freedom.[68]

Procedural rules were vital in commercial arbitration to make sure that arbitration conformed to judicial expectations, but because labor arbitration operated entirely outside judicial constraints in the 1930s, that justification for procedural uniformity was inapplicable to labor arbitration. Nevertheless, instead of promulgating separate procedural rules for labor arbitration, the AAA insisted that its labor tribunals would function under the same rules as those applied to commercial arbitrations with only the most modest of amendments, such as ones simplifying pleading practices. As for the hearings, the same format would be expected in labor as in commercial arbitration—a presentation of witnesses by direct and cross-examination, numbered exhibits, and the arbitrator's receipt of a written statement of the claim and an answer.[69] This was to be exclusively an adjudicatory procedure. Notions of an arbitrator offering mediation or a compromise solution had to be obliterated.

The AAA had a variety of means to ensure its desired transformation of labor arbitration. To ensure party conformity, the AAA simply refused to handle any arbitration case unless the parties agreed to abide by the AAA's rules.[70] The AAA had several mechanisms to ensure arbitrator conformity to its standards of conduct

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[67] First Year, *supra* note 7, at 127.
[68] Kellor, *supra* note 57, at 86.
[69] *Id.*, at Annex 1, 219–30 (presenting combined "Commercial and Labor Arbitration Rules" with footnotes indicating the few provisions of the commercial rules that were inapplicable in labor arbitration).
[70] *Id.* at 86.

and procedure. It could use the gentle techniques of training and education, as well as the more powerful one of arbitrator discipline. Such discipline included removing from its panels those arbitrators who failed to conform to its models of conduct, as well as branding arbitrators as unethical if they did such things as communicate with the parties outside of the hearing, something that had previously been entirely commonplace among labor arbitrators.[71]

Moreover, the AAA had a method to facilitate conformity to its standards by obtaining information if arbitrators strayed. The AAA assigned staff members to serve as clerks at hearings and gave them the task of reporting to AAA administrators if arbitrators violated the AAA's rules or engaged in conduct thought to impair impartiality.[72] Arbitrator Ralph Seward, in an oral history, described AAA clerks telling him how to rule on evidentiary issues.[73] Arbitrator Allan Dash recalled arbitrating at the Philadelphia AAA office in the mid-1940s. The parties had about 30 cases and expected their hearings might last more than a week. After hearing a few cases, Dash discerned that many of the union's cases were weak, and that the parties might benefit from some direct discussion of the issues, rather than the formal adjudicatory process in which they were, and would be for days, engaged. When Dash sent off the parties to talk about their cases on their own, Dash was chastised by the AAA clerk who said that Dash should not have behaved that way. "This is not the way we approach it at AAA," the clerk told him. Dash's technique, though, was a success. The parties came back to Dash saying that they had resolved the few cases he had already heard, and that the company would yield on a few of the others and the union would withdraw the rest. By Dash's method, the 30 cases were concluded in a day and a half without his having to write a single decision. Nevertheless, a while later an official from the AAA's New York headquarters called Dash to say again that Dash was not conducting himself in conformity with AAA philosophy and that they hoped he would not follow such an approach in the future.[74] The AAA's effort to enforce its model for labor arbitration was evidently not welcomed by the arbitrators.

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[71] *Id.* at 108–09; Simkin, *supra* note 4, at 30.

[72] Kellor, *supra* note 57, at 107. A 1954 report found that AAA clerks were present at more than 75% of its labor arbitration hearings. Procedural Aspects, *supra* note 21, at 937.

[73] Seward, *supra* note 11, at 9.

[74] Dash, *supra* note 24, at 38.

Edwin Witte, a founding member of the NAA said, "Dissatisfaction with the policies of the American Arbitration Association toward labor arbitration was one of the factors leading to the organization in 1947 of the National Academy of Arbitrators."[75]

A dozen years after the AAA's creation of its labor arbitration tribunal, the organization was still actively policing the scope of labor arbitration to ensure adherence to its adjudicatory model. In January 1949, at the second annual meeting of the NAA, George W. Taylor offered a description of his ideal arbitrator that differed significantly from what had become the more adjudicatory norm. Taylor maintained that the ideal arbitrator was "first of all a mediator" who viewed the arbitration task as an extension of the collective bargaining process; arbitration was at least in part the work of "agreement-making."[76] The AAA responded by convening a conference, in March 1949, of 60 experienced arbitrators to discuss Taylor's vision of the arbitral role. J. Noble Braden, the AAA's Tribunal Vice President, who had for many years been carrying on a debate with Taylor about the proper role of labor arbitrators,[77] published an article that included a long list of criticisms that conference participants had directed at Taylor's vision. Braden said that the "large majority of those at the conference" were in agreement that management and labor "desire to do their own legislating and to limit the function of the arbitration to judicial determination of disputes."[78]

Lawyers

As we have just seen, the AAA viewed standardizing arbitration procedures to mirror judicial procedures as necessary to encourage lawyers to practice in the arbitration forum. As lawyers increasingly appeared as representatives of the parties in labor arbitration, lawyer advocates became an independent and additional force defining labor arbitration procedures according to a lawyer's model, rather than one designed by the parties.

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[75]Witte, Historical Survey of Labor Arbitration (University of Pennsylvania 1952), 52.

[76]Taylor, *supra* note 4, at 35. For further discussion of Taylor's arbitral philosophy and practice, *see generally* Gershenfeld, *Early Years: Grievance Arbitration*, in Industrial Peacemaker: George W. Taylor's Contribution to Collective Bargaining (University of Pennsylvania 1979).

[77]Nolan & Abrams, *supra* note 10, at 611–13; Mittenthal, *supra* note 20, at 35–39.

[78] Braden, *The Function of the Arbitrator in Labor-Management Disputes*, 4 Arbit. J. 35, 40 (1949).

Even in the 1920s there were some industries in which lawyers represented parties, particularly management, in labor arbitration. By the 1940s, after the Supreme Court upheld the constitutionality of the National Labor Relations Act and the National Labor Relations Board began to develop doctrines that imposed legal consequences on parties' conduct in collective bargaining and on contract language, parties began to use lawyers to a greater extent in negotiating agreements and in drafting contract language. Not surprisingly, when questions arose in arbitration over the meaning and application of that language, parties increasingly looked to lawyers to represent them in arbitration.[79] When the first generation of labor law professors met in 1947 to think about what law students most needed to study to prepare themselves as labor lawyers, the professors concluded that the students needed to learn how to represent parties in collective bargaining negotiations and labor arbitration.[80]

By 1954, the AAA reported that, in its labor arbitration cases, at least one party was represented by a lawyer in nearly two-thirds of the cases and that both sides had lawyers in about half of the cases.[81] As the proportion of lawyer advocates at labor arbitration hearings had increased, procedural formality and uniformity increased as well. An early arbitrator looking back on the procedural changes that came with the lawyers said, "The persons who used to handle the arbitration cases . . . have been shoved down the table. . . ."[82] Rather than the lawyers adapting their behavior to the new context, they tended to adapt the new context to their lawyering traditions. For example, it is hard to believe that we would have seen a 100 percent increase in the use of briefs over the last 50 years had lawyers not become so prevalent at arbitration hearings.[83] The proportion of arbitrators who are themselves lawyers likely contributed to arbitration's receptivity to these litigation-like procedures.[84]

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[79]Brundage, *Discussion, The Role of Lawyers in Arbitration*, in Arbitration and Public Policy: Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA, Inc. 1961), 124–25.

[80]Cooper, *Teaching ADR in the Workplace Once and Again: A Pedagogical History*, 53 J. Legal Educ. 1, 1–7 (2003).

[81]Procedural Aspects, *supra* note 21, at 936–37.

[82]Dash, *supra* note 24, at 39–40.

[83]*Compare* Procedural Aspects, *supra* note 21, at 938 (briefs in 41.9% of AAA cases in 1954), *with* <http://www.fmcs.gov> (briefs in 81% of FMCS cases in fiscal 2004).

[84]In 1954, 42% of arbitrators on the AAA labor panel were either attorneys or law professors. Procedural Aspects, *supra* note 21, at 936. The varying scope of studies of the arbitration profession make it difficult to track over time the proportion of arbitrators possessing law degrees. Studies since the 1980s have reported that about half of

The influence of lawyer-advocates went beyond their numbers because non-lawyer advocates, sensing they were being outclassed, sometimes in imitation tended even to out-lawyer the lawyers rather than demand that lawyers conform to the earlier informal traditions of labor arbitration.[85] As Arbitrator Benjamin Aaron has written:

> Some of the wildest irrelevancies, most frustrating procedural roadblocks or detours and most patently unfounded objections I have ever encountered in an arbitration proceeding were prefaced by the fateful words: "Of course, Mr. Arbitrator, I'm not a lawyer, but . . . ."[86]

To many, the changes lawyers brought to labor arbitration were not welcome ones. There is a considerable literature from the 1950s and 1960s decrying what was perceived as lawyers' adverse effect on labor arbitration's procedures. Indeed, even the AAA, which had initially enthusiastically welcomed the lawyers and used their numbers as a measure of its success, came also to believe the trend had gone too far. In 1958 it joined the chorus when it published an editorial in its journal under the title, "Creeping Legalism in Arbitration."[87] By then, though, the trend was irreversible. The lawyer-latecomers ended up having a vastly greater influence on the final design of labor arbitration procedures than did the parties who negotiated the arbitration agreements in the first place.

Conclusion

In summary, the procedures we observe today in labor arbitration, although existing in thousands of independent labor-management relationships, have a remarkable similarity. That uniformity did not emerge magically from thousands of parallel negotiations. Rather, those procedures evolved over decades through the combined influences of arbitrators, the War Labor Board, the American Arbitration Association, the National Academy of Arbitrators, the practice of publication, and the conduct

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arbitrators are attorneys. Coleman & Zirkel, *The Varied Portraits of the Labor Arbitrator*, in Labor Arbitration in America: The Profession and Practice, ed. Bognanno & Coleman (Praeger 1992), 20–22, 26.

[85] Dash, *supra* note 24, at 40; Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy: Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA, Inc. 1961), 107–08. *See also* Aaron, *supra* note 32, at 733 n. 1 ("no one can be so legalistic as a layman").

[86] Aaron, *Labor Arbitration and its Critics*, 10 Lab. L. J. 605, 607 (1959).

[87] *Creeping Legalism in Arbitration: An Editorial*, 13 Arbit. J. 129 (1958).

of lawyers. The procedural practices of labor arbitration managed to evolve to a point where they are universally accepted as fair by workers, unions, employers, and courts, without their having been the product of negotiations between parties of equal bargaining power.

Perhaps the historical lesson we can take from the evolution of procedure in labor arbitration is that fair procedure does not necessarily depend entirely upon negotiations between parties of equal bargaining power. Although the parties' bargaining power helped ensure that the procedures would be fundamentally fair, forces external to the parties have had a far greater influence on procedural design. That lesson may give, at least the optimists among us, reason to hope as we watch the now-ongoing, and often-discouraging, evolution of procedure in employment arbitration. External institutions, such as the National Academy of Arbitrators, may yet have another opportunity to promote fair procedure in workplace arbitration.