of masters in Title VII litigation under certain circumstances.[131] Quite often arbitrators may be appointed as masters. One would hope that this provision will not carry with it the bad habits of arbitration described above and thus impede the effective implementation of employment discrimination law. One would also hope that the 1972 statute provides a vehicle for the judiciary to encourage arbitrators, unions, and employers to adopt the reforms advocated here and that this will have an impact even outside Title VII litigation.

Even though it is highly improbable that many bargaining relationships will adopt such procedures in the near future, adherence to the factors noted above is a minimum prerequisite to deference. Otherwise, the strong policy against interfering with federal court jurisdiction of employment discrimination claims would be eroded.

III. JUDICIAL REVIEW OF "MISCONDUCT" CASES *

BENJAMIN C. ROBERTS **

At the 24th Annual Meeting of the National Academy of Arbitrators, Alex Elson, in a paper on "The Case for a Code of Professional Responsibility for Labor Arbitrators," discussed the need of the Academy to take a fresh look at its Code of Ethics. He recommended that the immediate role of the Academy is to commence the draft of a Code of Professional Responsibility for Labor Arbitrators. He cautioned that not only should arbitrators avoid engaging in improper conduct, but that each individual labor arbitrator had to do everything he could to achieve the objectives of the arbitration process. The point was that acceptability was not a guarantee of impartiality.[1]

At the same meeting, in a sequel to an earlier article published

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[131] Section 706(f)(5) of the Act, as amended, stated that "[i]t shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the federal rules of procedure."

*The author is very grateful for the excellent research assistance provided by Wendy Kahn and Judith Schneider of the New York University School of Law.

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[1] *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 194.

in the *Arbitration Journal*,[2] Herbert L. Sherman, Jr., discussed the "Arbitrator's Duty of Disclosure," with particular reference to a survey he had conducted on the views of arbitrators and labor and management representatives on the need for revelations under 30 different sets of conditions.[3] He explained that the purpose of that questionnaire was to give some concrete meaning to the "legal, ethical, and moral abstractions that are used to characterize the arbitrator's duty of disclosure." In addition to his multiple analyses and correlations of the responses from these groups, Mr. Sherman also reviewed cases of disqualifications of judges and a series of commercial arbitration cases.

This reliance on commercial arbitration cases is characteristic of the literature on arbitrator misconduct.[4] The objective of my investigation was to fill this gap by examining the records for court cases in which labor arbitration awards were the subject of actions based directly or indirectly upon the propriety of the arbitrator's conduct, not only in matters of disclosure, but in other aspects of his responsibilities. I was warned by knowledgeable persons that the pickings would be meager. That was not a deterrent, however, since a finding that labor arbitrators hardly, if ever, erred at least in these respects would be refreshing and provide cause for pride by a fraternity that generally apologizes for its existence. Not surprisingly—and this distinguishes labor arbitration from commercial arbitration—the cases examined from 1955 revealed only two where the labor arbitrator's award was vacated on the grounds of an improper failure to disclose. The several other bases for attacks on awards in labor arbitration will be dealt with under separate headings below.

The personal code the arbitrator must follow was laid down as far back as 100 years ago,[5] as follows:

[2] Sherman, 25 *Arb. J.* 73 (1970).

[3] *Arbitration and the Public Interest*, at 203.

[4] See Martin Domke, *The Law and Practice of Commercial Arbitration* (1968); Merton C. Bernstein, *Private Dispute Settlement—Cases and Materials* (1968); L. A. Glick, "Bias, Fraud, Misconduct and Partiality of the Arbitratory," 22 *Arb. J.* 161 (1967); "When May an Arbitrator's Award Be Vacated," Comments, *DePaul L. Rev.* (1957-1958); Alan H. Rothstein, "Vacation of Awards for Fraud, Bias, Misconduct and Partiality," 10 *Vanderbilt L. Rev.* (1957); "Disqualification of Arbitrators: by court prior to award on grounds of interest, bias, prejudice, collusion or fraud," 65 ALR.2d 755 (1959); "Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of awards," 47 ALR.2d 1362; "Contra-Effect of vacancy through resignation, withdrawal or death of one of multiple arbitrators on authority of remaining arbitrators to render award," 49 ALR.2d 900. See also 11 *Am. Jur. Trials* 347.

[5] John T. Morse, Jr., *The Law of Arbitration and Award* (1872), Ch. XIX.

> "It is not alone the fact, but the aspect of perfect fairness which must be preserved, and an arbitrator cannot be too careful as to his conduct, holding this end in view.
>
> "It is not his [arbitrator's] own consciousness of rigid justice that can support his determination of the controversies nor his conviction in his own mind that he is so that can suffice. It is his external actions that will be subjected to scrutiny; and if these do not satisfactorily bear the test, the award will fall."

The research for this paper was to find federal and state court cases from 1955 that could be identified as involving labor arbitration awards that were attacked in the courts for failure to meet the tests which are currently spelled out in federal and state statutes in rather broad language. Some 40 cases were found to be in this category. A few involved the failure to disclose prior business relationships with one of the parties to the arbitration. None were attacked because of the other types of situations suggested in Professor Sherman's paper, including academic relationships, stock ownership, travel and hotel problems, prior social and civic contacts, membership in "conflict of interest" organizations, prior contacts in arbitration, hortatory expressions to the arbitrator, a fellow arbitrator representing one of the parties, or political maneuvering.

The explanation for this dearth of nondisclosure cases may be that professionalism in labor arbitration makes for more knowledgeable selections by the parties or their attorneys who, familiar with those who practice labor arbitration, choose them because of personal acquaintanceship with the designated arbitrator. The relatively small fraternity from which arbitrators in labor cases are selected, and whose general background and work are known to the specialized legal group in labor law, either nationally or in a geographic area, also militates against creating problems of disclosure.

It may also be that the parties to labor arbitration are more sophisticated about accepting awards as final. As many writers in the field have observed, labor and management are locked in a continuing relationship from which neither can escape. By contrast, the party to a commercial arbitration has not necessarily accepted arbitration as a way of life, nor is he required by law or logic to continue doing business with a supplier or subcontractor whose performance was unsatisfactory. The disappointed com-

mercial party is therefore more likely than is the loser of a labor case to run to court seeking reversal on any pretext.

More often than not, the losing party in a labor case accepts the loss and makes mental note not to use the same arbitrator again. He will notify the appointing agency that such person is no longer acceptable. I am fairly certain that the American Arbitration Association, the Federal Mediation and Conciliation Service, and the various state designating agencies have had many such "don't send me" letters. In any event, for whatever reason, a failure of disclosure did not surface as presenting any problem in labor arbitration.

Before turning to the "misconduct" cases of labor arbitration awards that found their way into the courts (using this term in its *generic* sense), it should be noted that such proceedings usually are brought through an action to vacate an award or as a defense to a motion to confirm. Some of the selected cases were initiated as challenges to fair representation and where an award might ultimately be held defective for reasons that might be classed as misconduct.

The Uniform Arbitration Law, recommended by the National Conference of the Commissioners on Uniform State Laws in 1955, and as amended in 1956, has been adopted by many of the 30 states that have enacted modern arbitration statutes that make future disputes arbitration clauses enforceable. Its provisions on vacating awards as enacted by the states usually serve as the statutory framework in the litigation. The United States Arbitration Act contains comparable provisions.[6] Consistent with these provisions, and except for a few instances [7] based on equitable considerations, the courts will not act to remove an arbitrator on the grounds of misconduct prior to the issuance of the award.[8]

Under the statute, the action to vacate the award must be premised upon the claim that the award was "procured by corruption or fraud or other undue means," or that "there was evident partiality by an arbitrator appointed as a neutral, or

[6] *The Uniform Arbitration Act,* published by the American Arbitration Association; U. S. Arbitration Act, 61 Stat. 669 (1947).

[7] *West Hartford Education Assn.* v. *West Hartford Board of Education,* 241 A.2d 78, 27 C.S. 421, 68 LRRM 2371 (Conn. Sup. Ct. 1968); *Edmund E. Garrison, Inc., et al.* v. *Operating Engineers, Local Nos. 137, 137A, 137B,* 283 F.Supp. 771, 68 LRRM 2249 (S.D. N.Y. 1968).

[8] *Uniform Arbitration Act,* Sec. 12.

corruption in any of the arbitrators or misconduct prejudicing the rights of any party." [9] An award may also be vacated for refusal to postpone or to adjourn a hearing for sufficient cause shown, or for a refusal to hear evidence material to the controversy or to otherwise conduct the hearing in a manner substantially prejudicing the rights of a party.[10]

The act permits arbitrators to hear and determine the controversy upon the evidence produced, notwithstanding the failure of a party to attend after being duly notified, but the parties are entitled to be heard and to present evidence material to the controversy and to examine and cross-examine witnesses appearing at the hearing.[11] It also requires the hearing to be conducted by "all the arbitrators," although a majority may make the decision (unless otherwise provided in the agreement) and render a final award. If, for any reason during the course of the hearing, an arbitrator ceases to act, the remaining neutral arbitrator or arbitrators may continue the hearings and determine the controversy.[12] A party to an arbitration proceeding also has the right to be represented by an attorney at the hearings, and a prior waiver is ineffective.[13] Among other requirements, the award must be in writing and signed by those arbitrators joining in it and issued within the time fixed by the agreement, and when not, by the court on application of the parties. If exceeded, this limitation is waived unless there is notification to the arbitrator prior to the delivery of the award.[14]

Parenthetically, it should be noted that in New York, for example, there have been criminal penalties for arbitrator misconduct as distinguished from an arbitrator's immunity from civil liability.[15] Section 373 of the New York Penal Law specifically made "a person chosen as arbitrator . . . guilty of a misdemeanor" if he promised or agreed to give an award for and against any party, or willfully received any communication or documents relating to a pending matter or about to be brought before him rather than in

[9] *Id.*
[10] *Id.*, Secs. 5 and 12
[11] *Id.*, Secs. 5 (a) and (b).
[12] *Id.*, Sec. 5 (c).
[13] *Id.*, Sec. 6.
[14] *Id.*, Sec. 8.
[15] *Babylon Milk & Cream Co.* v. *Horvitz*, 151 N.Y.S.2d 221, *aff'd* 4 App. Div. 2d 777, 165 N.Y.S.2d 717 (1957); *Cahn* v. *Intl. Ladies' Garment Workers' Union*, 203 F.Supp. 191, 49 LRRM 2850 (E.D. Pa. 1962), *aff'd* 311 F.2d 113, 51 LRRM 2186 (3rd Cir. 1962).

the regular course of the proceedings, or if he willfully conversed or attempted to converse with anyone concerning the issue or the merits before him except in the regular course of the hearing. Section 374 of the New York Penal Law imposed a maximum sentence of not more than 10 years of imprisonment or a fine of not more that $5,000 for bribery of an arbitrator. However, these sections were not included in the revised New York Penal Law effective in 1965. This revised statute provides for criminal penalties for "official misconduct" and "misconduct of a juror" in its Sections 190.00 and 214.30, respectively. These are Class A misdemeanors. There is no guidance in the new law as to whether the old Sections 373 and 374 were absorbed into either or both of these new sections.[16]

In any event, despite the multiplicity of the misconduct findings in both commercial and labor cases in New York, and which previously could have been prosecuted under Section 373, in not a single instance to my knowledge has the Penal Law been invoked over the many years that this law was on the books. It is also of interest that, in some jurisdictions, an arbitrator may not be immune from court actions for damages resulting from his misconduct or due to his negligence in performing his duties other than in rendering the award. That is, he would not be immune if he refused to proceed or if he delayed the final resolution of a dispute, or if he withdrew prematurely and so caused additional expense to the parties.[17]

Failure to Disclose

In the few cases found under this heading, the courts underscored its views on the arbitrators' responsibility in disclosing relationships—that, like Caesar's wife, arbitrators must be above suspicion. Yet such cases in which labor arbitrators were involved would suggest none of the more subtle questions or the quantity of this type of cases that are found in commercial arbitration.

In one of the two cases under this heading of misconduct, the arbitrator failed to disclose that 10 years before the arbitration he had been a business partner of the employer in a race horse venture in which they won at least $4,500 in purses. The award was vacated, the court stating that if there had been a disclosure

[16] See California Penal Code, Sec. 92, for similar criminal provisions.

[17] Martin Domke, "The Arbitrator's Immunity from Liability: A Comparative Survey," *U. Toledo L. Rev.* (1971).

prior to the hearing, it was doubtful that the union would have accepted the ex-partner as the arbitrator.[18]

Similarly, and not surprisingly, an employer was successful in an action to vacate an award where the arbitrator had been an attorney for the union for several years, and only six months earlier had listed its address as his own. Moreover, less than two years before, the union had paid him over $10,000 for his services. To cap it all, a close relative of the arbitrator still was employed by that union.[19]

Although there was no claim of actual bias in making the award in the second case, the court vacated it because the failure to make the disclosure of his association with the union had deprived the employer of its rightful opportunity to make a valid and knowledgeable selection of an impartial arbitrator. But the court also went on to state that the mere fact that there had been a prior association with one of the parties did not of itself necessarily disqualify an arbitrator, but that the circumstances of this particular case made it reasonable to infer that the prior relationship constituted partiality.

Partiality of Party-Appointed Arbitrators

It is currently recognized by statute and in practice that a party-appointed arbitrator who sits on a tripartite board of arbitration is not expected to be neutral. But there would appear to be limits even to permissible partiality. In a recent case, the employer appointed himself and his attorney as the company-designated arbitrators on the arbitration board on which the fifth impartial member was designated by the four party-appointed arbitrators. The union successfully opposed a motion to compel arbitration, the court holding that the employer and his attorney were barred from serving as arbitrators. The federal district court noted that the contract sanctioned and contemplated non-neutral members to the arbitration panel, but held that custom dictated that a party could not appoint himself, and that, as his attorney was as integrally related to the dispute as the employer himself, his serving would be equally repugnant to the collective bargaining agreement.[20]

[18] Application of Siegel, 153 N.Y.S.2d 673 (1956).

[19] *Colony Liquor Distributors, Inc.* v. *Local 669, Teamsters*, 312 N.Y.S.2d 403, 74 LRRM 2945 (1970), *aff'd* 28 NY.2d 596, 77 LRRM 2331 (N.Y. Ct. App. 1971).

[20] *Edmund E. Garrison, Inc., et al.* v. *Operating Engineers, Local Nos. 137, 137A, 137B*, 283 F.Supp. 771, 68 LRRM 2249 (S.D. N.Y. 1968).

Somewhat inconsistently, however, where a standard union employment contract provided that hearings were to be held before a five-member trial board of the local union and an employee's claim for the recovery of earnings resulting from a discharge was sustained by the local union trial board, the California court confirmed the award.[21] It rejected the employer's contention that the contract was one of adhesion and against public policy in that the trial board was not impartial. The court acknowledged that elementary fairness might demand that the proceedings be under the control of a neutral arbitrator, but it stated that where a state statute expressly permitted the parties to agree to have a non-neutral arbitrator conduct the proceedings, the law was controlling.[22]

Permanent Arbitrator Status

The fact that an arbitrator is named in a contract between an association and a union or acts in a neutral capacity in some other continuing relationship does not destroy his impartial status and disqualify him from hearing and determining disputes involving employers who are not members of the industry association or who are not participants in boards administering fringe benefits incidental to the collective bargaining relationship. When an "independent" employer was aware of the relationship of the impartial chairman to the union under contracts between the union and the employer association, the court refused to vacate an award. The relationship was deemed insufficient of itself to disqualify the impartial chairman as the arbitrator under the employer's separate contract with the union, absent any proof or suggestion of misconduct.[23]

Similarly, where the arbitrator was charged with being prejudiced in a dispute over payments into a union retirement fund, the court refused to set the award aside, even though the arbitrator was a trustee of the fund and chairman of the retirement council. It held that this did not make it improper for him to be the arbitrator in the submitted dispute since his sole function as chairman was to vote in deadlocks between the union and employer representatives.[24]

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[21] *Frederico* v. *Frick*, 84 Calif. Rptr. 74, 3 CA.3d 872, 73 LRRM 2810 (1970).
[22] California—Secs. 1280-1294, Code of Civil Procedure, Part 3, Title 9.
[23] *Pilchick* v. *Joint Board of Cloak, Suit, Skirt and Reefer Makers*, N.Y. Sup. Ct., N.Y. Co. Sp. Term, 156 *N.Y. L.J.* 9/1/66 at 15. See also 63 LRRM 2352 (1966).
[24] *Minkoff* v. *Kaufman*, Sup Ct. Sp. Term, *N.Y.L.J.* 5/5/55.

On the other hand, under a collective bargaining agreement with a named arbitrator, a group of employees disputed the union's position on bumping rights, and the court found that it would be improper for the contract-named arbitrator to hear the dispute. The union originally refused to process the grievance to arbitration, but during the pendency of the suit by employees charging a breach of duty of fair representation and that the union and employer interests were the same in the case and adverse to them, the union changed its position and agreed to take the matter to arbitration, allowing the dissidents to be represented by their own counsel. It requested the court to dismiss the fair representation action and to compel arbitration. In denying these motions, the federal district court stated that it would not order arbitration where the adversaries were not equal—that the union and management, who nominally were on the same side in this dispute, had named and paid the arbitrator who should not be placed in a position in which he would be open to the charge that he was interested in the results. The court felt compelled to preserve the integrity, reputation, and independence of labor arbitration systems by avoiding a possible charge of bias.[25]

Perhaps demonstrating the naïveté in arbitration in the newly developing public employment sector is a case where the state statute provided for advisory arbitration in education matters by an impartial board of arbitrators. The Connecticut Superior Court felt constrained to issue a temporary restraining order against proceeding with an arbitration where one of the appointed arbitrators had been school board chairman for six years, including at the time when the superintendent who was to represent the school board in the proceeding had been hired. He also had acted as the superintendent's private attorney and they were close social friends. He also was present at a social gathering where the case was discussed prior to his being named arbitrator. The court was of the opinion, not surprisingly, that even absent any claim that this arbitrator would have a conscious partiality or bias, that an unconscious bias or interest would be inevitable and he could not qualify as impartial.[26]

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[25] *Watson* v. *Cudahy Co.*, 315 F.Supp. 1286, 75 LRRM 2632 (D. Colo. 1970).

[26] *West Hartford Education Assn.* v. *West Hartford Board of Education, supra* note 7.

Board of Arbitration Meetings and Decisions

This would seem to be a sector in which impartial arbitrators frequently have stubbed their institutional toes in attempts to expedite awards without calling meetings that, as a practical matter, would serve no useful purpose. The general rule would appear to be that in cases to be heard by a panel or board of arbitrators, they must meet together not only to hear the parties but to review the testimony and arguments and to make their decision. The most flagrant reported violation occurred in a case where the collective bargaining agreement provided for each party to appoint two arbitrators, who were to designate an impartial chairman. The majority decision of the board was to be final and binding. The four members did meet for 10 minutes during which they were unable to agree on the impartial chairman, and they took no further action. The union then requested the state department of labor to designate the fifth member. This was done and the designee then conducted the entire proceedings himself and rendered a decision without any conferences or discussions or reviews of the evidence with any of the other members. As could be anticipated, the award was vacated for diverging from the requirements of the collective bargaining agreement and the methods authorized by it.[27]

But in another case, the hearings were held before the full five-member board that could make a decision by a majority vote. After the impartial chairman received the briefs from counsel, he prepared his opinion and award and sent them to the employer-designated arbitrators with instructions to forward them to the union-appointed arbitrators for their concurrence or dissent. The two employer arbitrators concurred with the impartial chairman's opinion and decision, but the union arbitrators did not sign the award, either in concurrence or dissent. In defending against a motion to vacate the award, it was claimed that inasmuch as the union-appointed members of the board had continually voiced their opinion at the hearings, there was no need for an executive meeting. The state court vacated the award, holding that it was improper to assume that the attitude of the "so-called union members" would remain unchanged; that all arbitrators should hear the proofs and must be notified of meetings to deliberate and participate in full consultations; and that the minority

[27] *Local 227, Hod Carriers* v. *Sullivan,* 221 F.Supp. 696, 54 LRRM 2548 (E.D. Ill. 1963).

could not be excluded from the board's deliberations without fault on its part, even where a majority decision would be valid. The court added as well that it was contrary to judicial and arbitral procedure to send the award to the employer members before the union members of the board knew of its content.[28]

Nevertheless, despite this general rule, the courts have made exceptions, some of them rather broad. Where the members of a tripartite arbitration panel hearing a series of cases arising out of a long, drawn-out strike changed periodically, in one proceeding the management representative did not always appear at the hearing but was given a full report and the conclusion and never expressed a dissent. That award was enforced in the federal district court and affirmed by the Sixth Circuit Court of Appeals.[29] In another case the contract provided for a majority decision of a tripartite board and permitted the substitution of arbitrators "at any time" during the proceeding, but within three days of a resignation. When one arbitrator resigned after the hearing and the executive meetings of the arbitrators and after a draft award had been prepared, but before the signatures were put on the award, the state court held that it was not necessary to wait for a substitute arbitrator to be appointed to make the award valid.[30]

A rather unusual situation created a real problem for the court which, it appeared, had bent over backwards to sustain the award. A tripartite board was unable to reach a majority decision after hearings that produced almost 600 pages of testimony and 60 exhibits. They then voted unanimously to terminate the arbitration. The union-appointed arbitrator later resigned and was replaced over the objection of the company that the union had no power of substitution. In the meantime, the company-appointed arbitrator went on vacation, but the impartial arbitrator nonetheless called a meeting, notice of it arriving at the company-appointed arbitrator's office on the same day the meeting was scheduled. At the executive session, the impartial arbitrator and the union-appointed arbitrator arrived at a majority award. The state court sustained the award.[31]

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[28] *Simons* v. *News Syndicate Inc.*, 152 N.Y.S.2d 236 (1956).

[29] *Retail Clerks, Local 954* v. *Lion Dry Goods, Inc.*, 67 LRRM 2871 (N.D. Ohio 1966), *aff'd* 67 LRRM 2873 (6th Cir. 1967).

[30] *Street, Electric Railway & Motor Coach Employees* v. *Connecticut Co.*, 112 A.2d 501 (1955).

[31] *West Towns Bus Co.* v. *Div. 241, Street, Electric Railway & Motor Coach Em-*

The court ruled that the original arbitrators lacked any authority under the collective bargaining agreement to agree, even unanimously, to nullify the arbitration agreement and to terminate the proceedings and dissolve the board without notice or the consent of the parties. The court reiterated the rule that all arbitrators must act together and be present or be given the opportunity to be present at every meeting, whether for the hearing of evidence or argument or for consultation and determination of the award, even where a majority award was valid. It noted that unless there was clear and unequivocal waiver, the absence of an arbitrator was valid grounds for setting aside the award.

But the court then proceeded to find that there was no violation of employer due process in this case when the union-appointed arbitrator who had not heard the evidence and argument signed the award, because the agreement permitted substitution "at any time." The short notice of the executive session to the employer-appointed arbitrator, who was out of the jurisdiction at the time it was held, was said not to be prejudicial to the employer on the reasoning that the provision for a majority decision was intended to preclude one arbitrator from nullifying the award, and that it followed that the employer-appointed arbitrator's absence could not negate the authority of the others to make an award. The planned departure of the company arbitrator for an extended period, even in good faith, was deemed a distinct waiver of the employer's right to a "full hearing by a full board."

Evidentiary Problems

Some of the cases before the courts provide guidance on the meaning of a full and fair hearing before the arbitral tribunal, as distinguished from the application of the strict rules of evidence in a trial court. In an instance in which the arbitrator precluded the introduction of new material on rebuttal on the grounds that it should have been presented as part of the case in chief, the court held that the arbitrator could not impose the technical rules of evidence without prior warning that they were to be followed, and particularly where they had not been invoked in prior pro-

ployees, 26 Ill. App.2d 398, 168 NE 473 (1960). See *United Transportation Union* v. *Soo Line Railroad Co.,* 457 F.2d 285, 79 LRRM 2727 (7th Cir. 1972), holding an ex parte interpretation by the chairman of a tripartite special board under the Railway Labor Act was not improper considering the "inherent informality of arbitration proceedings."

ceedings between the parties. According to the federal district court, absent a contract restriction, the parties at a hearing have the right to assume that they will be afforded the opportunity to present all of their material evidence, and that before closing the hearing, the arbitrator would inquire of all the parties as to whether they had any further proof to offer or witnesses to be heard.[32]

In another case, two critical witnesses were sequestered, but their isolation was violated during an adjournment when counsel for one of the parties informed one of them as to what the other had testified. The arbitrators nevertheless permitted the second witness to testify. The federal district court denied the challenge to the award, holding that the board's failure to enforce its sequestration order was not prejudicial and did not deny a fair hearing, although it served to weaken its own image as an impartial tribunal. It pointed out that what was at issue was the credibility of the witnesses and that this was a matter for the judgment of the arbitrators.[33]

In a deviation from the normal rule against private inquiries by the arbitrator without the opportunity of the parties to comment on the findings, a court upheld an award and rejected a claim of misbehavior when the arbitrator made his own check of certain facts alleged at the hearing that were not made subject to question or dispute by the parties. The contract permitted nonunion employees to institute arbitration proceedings. The employer's defense to their claims was based primarily on an agreement it had with the union. In the court action to vacate the award, the employer argued that the arbitrator recognized that his decision would affect all employees in the bargaining unit and, after informing the parties, he sent a copy of the company's claim to the union for comment. The state court held that this was not improper under the circumstances because the material sought by the arbitrator was of such a nature as to preclude reasonable contest.[34]

In another case, the state court held that it was improper for the impartial chairman of a board of arbitration to have received

[32] *Harvey Aluminum, Inc.* v. *Steelworkers,* 263 F.Supp. 488, 64 LRRM 2580 (C.D. Calif. 1967).

[33] *Transport Workers Union of Philadelphia, AFL-CIO* v. *Philadelphia Transport Co.,* 283 F.Supp. 597, 68 LRRM 2094 (E.D. Pa. 1968).

[34] *Herman* v. *N.Y.C. Transit Authority,* 188 N.Y.S.2d 282 (1959). See also 32 LA 635 (1959).

briefs from counsel for each of the parties and to have considered them where the briefs were not made available to the party-designated representatives. The court characterized it to be a "grievous" error to assume that counsel to the parties would apprise their representatives of their contentions contained in their memoranda.[35]

A problem of evidentiary admissibility also arose in a different context involving the issuance of a subpoena duces tecum after a hearing was closed and before the briefs were filed. During the hearing, the employer refused to produce certain records that the union felt were material to its case. Upon request, the arbitrator agreed to issue the subpoena, but it was overlooked and the hearing was closed without the issuance of the subpoena. After the employer left the hearing room, the union recalled its request and the arbitrator agreed to rectify this oversight, and upon his direction the union immediately notified the employer by telephone. The employer did not acquiesce or consent to the reopening, but the arbitrator issued the subpoena and then reopened the hearing to receive this material, explaining that he had closed the hearing in error after granting the union's request for the subpoena. The employer challenged the subpoena as a nullity and argued that the arbitrator had no authority to reopen the hearing for this purpose. The federal district court ordered compliance with the subpoena duces tecum, pointing out that the employer had not been harmed or prejudiced, since it had immediate notice, no briefs had been filed, and no decision had been rendered. It held that as a matter of discretion, the arbitrator had the right "as well as the obligation" to reopen the hearing sua sponte to receive evidence he deemed necessary and relevant to a disposition of the issue. The court stated that a hearing closed under a mutual mistake of fact by the arbitrator and the parties is not closed and the arbitrator's correction of the error was well within his discretion.[36]

Adjournment Pending Criminal Proceedings

There have been many troublesome questions in dealing with requests either to proceed or to adjourn where a criminal prosecution is pending on the same subject matter that is submitted for determination in arbitration. The general tendency is to

[35] Also see *supra* note 28.

[36] *Local Lodge 1746, Machinists* v. *Pratt & Whitney Div., United Aircraft Corp.*, 329 F.Supp. 283, 77 LRRM 2596 (D.C. Conn. 1971).

attempt, where possible, to allow a reasonable time in which the criminal case may be tried. But how does one proceed where the matter drags out and one of the parties insists that the hearing must go ahead under the contract? In a relatively recent case that was appealed up to the U. S. Supreme Court where certiorari was denied, the union had initiated an arbitration proceeding to recover contributions owed to trust funds for the benefit of its members. During the hearings, the employer was indicted for the alleged failure to make these contributions and requested an adjournment until the indictment was disposed of, or there could be no possibility of another. The arbitrator denied this request, and the employer then claimed the privilege of self-incrimination and refused to testify in his own defense. An award against him required a payment of $18,500. In his action to vacate that award, the employer contended that the denial of the adjournment violated his constitutional rights because he was compelled to choose between testifying at the arbitration hearing and giving information that might incriminate him in a criminal prosecution, or to assert his privilege against self-incrimination. This claim was rejected by the court. The union could prove its claim by independent evidence.[37]

Again, when the subject matter for which the appellant was indicted was also the basis for an arbitration, after several adjournments were granted that delayed the hearings for 16 months, the arbitrator refused to grant another and held a hearing. The employer did not appear, but an award was rendered. The state court found no abuse of discretion or statutory misconduct in refusing to grant this additional adjournment. It noted that if the employer had appeared, he could have asserted his privilege against self-incrimination.[38]

In another type of situation where the employer moved to stay the proceeding under statutory provisions providing that the hearing shall be adjourned pending the disposition of the motion, and the papers were served on the union and the arbitrator before the last hearing, the arbitrator nevertheless issued his award, which the court vacated. The state court emphasized that the statute was a mandate and the arbitrator had no discretion to act contrary to its provisions. The court denied the stay, but it

[37] *Langmeyer* v. *Campbell (as pres. of Local 964, Carpenters)*, 21 NY.2d 796, 288 N.Y.S.2d 629, 235 NE.2d 770, 69 LRRM 2558 (1968), modified 290 N.Y.S.2d 195, 21 NY.2d 969 (1968), *cert. denied* 393 U.S. 934, 69 LRRM 2623 (1968).

[38] *Local 964, Carpenters* v. *Giresi*, 287 N.Y.S.2d 954, 29 AD.2d 768 (1968).

reminded the arbitrator that he did not have the power to substitute his judgment for that of the court by continuing the arbitration.[39]

The Right of Intervention

On occasion, dissenting union members seek to intervene in arbitration proceedings between the parties where the contract confines the right to arbitrate to the employer and the union as the parties. They can be permitted to participate where the parties consent. But there are arbitrators who feel that the rule should be more liberal. Significantly, there have been few cases in the courts on this problem. In one, a motion by employees in the bargaining unit to intervene in a proposed arbitration was denied by the state court because they had no statutory right to intervene and no property rights that would be considered in the arbitration proceedings between the union and employer. Unless they could establish that their bargaining agent had not or may not adequately represent their interests, or that they might be adversely affected by the distribution or other disposition of property in the custody or control of the court, they could not intervene.[40]

In a later case in New York that was finally decided in its highest court of appeals, a group of employees moved to vacate an award rendered by an arbitrator who they claimed had prejudiced them by his refusal to allow them to be represented by independent counsel. The attorney representing the union in the arbitration previously had appeared for the employer in an injunction proceeding against picketing by these employees and other union members. The trial court vacated the award and the appellate division affirmed, treating them as parties because their jobs were at stake and holding that they were either beneficiaries of the contract or beneficiaries of a trust. The New York Court of Appeals reversed, holding that the award was rendered in a controversy between parties to a valid collective bargaining agreement and could be vacated only upon the initiative of one of these parties and only pursuant to the stated provisions of the statute; no exceptions could be created by the judicial application of equitable principles.[41]

[39] *Dalcro* v. *Wilkinson,* 213 N.Y.S.2d 66, 48 LRRM 2265 (1961).

[40] *General Warehousemen's Union* v. *Glidden Co.,* 169 N.Y.S.2d 759 (1957). See *Vaca* v. *Sipes,* 385 U.S. 895, 64 LRRM 2369 (1967), on rights of intervention.

[41] *Soto* v. *Lenscraft (Intl. Jewelry Workers Union, Local 122),* 7 NY.2d 400, 198 N.Y.S.2d 282 (1970), *reversed* 7 NY.2d 1, 180 N.Y.S.2d 388 (1959).

In another proceeding involving a conflict of interest between two groups of employees, the union consistently had favored an integrated seniority list. The employees who would be adversely affected sought to intervene at the arbitration hearing, but were denied entry. The state court held that the refusal of the arbitration board to permit them to intervene where the union acted in good faith and no fraud was committed did not invalidate the award. The court added, however, that to have allowed them to participate would have been the better course even though the denial was not a fatal error.[42]

Right to Counsel

Modern arbitration statutes usually guarantee the right to be represented by counsel. A waiver prior to the proceeding or hearing is ineffective. But does the arbitrator have any affirmative duty to advise a party of these rights? In one case, fellow union members had advised the grievant that he did not need a lawyer. He appeared without counsel and the arbitrator did not inform him of his right to be represented by an attorney. The state court held that his appearance without one was not a waiver but merely a failure to avail himself of the right to counsel, and that there was no obligation on the part of the arbitrator to advise him of those rights.[43] In another proceeding, the employer discharged his lawyer early in the hearings and appeared without an attorney at later meetings. He did not request any adjournment for the purpose of having counsel present. The state court denied the motion to vacate, holding that the employer had merely deprived himself of the right to counsel.[44]

Ex Parte Hearings

Arbitrators frequently are concerned about the desirability or propriety of conducting an ex parte hearing. This problem also arises when one of the parties fails to participate in the designating procedure. As one federal district court pointed out, where the collective bargaining agreement expressly sets out the required procedure and one of the parties refuses to participate in choosing the disinterested arbitrator, the arbitrator selected pursuant to the contract terms can render a decision that is final and

[42] *O'Brien* v. *Curran*, 106 NH 252, 209 A.2d 723, 59 LRRM 2252 (1965).
[43] *Rosengart* v. *Armstrong Daily*, Misc.2d 174, 169 N.Y.S.2d 723 (1965).
[44] *Spector* v. *Morry Hats, Inc.*, 23 Misc.2d 946, 199 N.Y.S.2d 764.

binding.[45] And when the contract provided that in the event the parties could not agree on an arbitrator, either party could request the American Arbitration Association to designate the arbitrator, and this was followed and the award rendered, a motion to vacate the award because an ex parte hearing was conducted was denied. The court commented that it could not comprehend what purpose the provision would serve unless the arbitrator appointed pursuant to its provision would have the right to make an award.[46]

In a unique departure, the contract called for each party to designate an arbitrator and if they could not resolve their dispute within 10 days, either could request the Federal Mediation and Conciliation Service to submit a panel from which they would jointly select a third arbitrator. A majority decision would be binding. The company failed to appoint its arbitrator within the time designated in the contract, and the union-designated arbitrator thereupon proceeded to make his own ex parte award. The Kentucky Court of Appeals held that without an alternative plan in the contract when one party did not appoint its arbitrator, an ex parte award could not be issued.[47]

Withdrawal of Grievance in Arbitration Before Hearing

It is not unusual for the initiating party to inform the arbitrator that it was withdrawing its claim either just before the hearing or at its outset. If it does so with prejudice, there is no problem. But frequently the withdrawal is accompanied by the condition of "without prejudice." There is some guidance in a case where two days before a hearing the union sought to withdraw its grievance without prejudice. The employer refused and insisted upon going on with the hearing. The union did not attend and failed to designate its members of the board of arbitration. The impartial chairman and the two employer-designated members joined in the award, which the court sustained. The state court reasoned that once the arbitration process was set in motion, the union could not set the terms under which it could withdraw and that the controversy was still before the

[45] *Local 385, Meat Cutters* v. *Penobscot Poultry Co.*, 200 F.Supp. 879, 49 LRRM 2241 (C.D. Maine 1961).

[46] *Harbison-Walker Refractory Co.* v. *United Brick Workers*, 339 SW.2d 933, 47 LRRM 2077 (Ky. Ct. App. 1960).

[47] *Fuller* v. *Pepsi Cola of Lexington, Ky.*, 406 SW.2d 416, 63 LRRM 2220 (Ky. Ct. App. 1966).

board of arbitration unless the board consented or approved a conditional withdrawal.[48]

Ex Parte Proceedings After Hearings Begun

The courts have made it clear that withdrawing from the hearing after it has begun does not nullify the award rendered ex parte. In the case referred to above, the union argued that the award was a nullity because the board was not fully constituted. This was rejected, the court stating that the remaining members of the board were under a duty to resolve the dispute.[49]

In another proceeding involving the same employer but with a different union, the impartial chairman of the board of arbitration would not acquiesce in the union's position and the union withdrew its representatives and its appointed arbitrators. The hearing continued before the impartial chairman and the employer-designated members. Later, the union-designated members were invited to attend the executive session of the board to consider the decision, but they did not attend and the award was made by a majority decision. The state court refused to set aside the award, pointing out that arbitration could be completely undermined if awards could be defeated by the strategy engaged in by this union.[50]

But a state court vacated an award where the employer chose not to attend an arbitration on the union's request to discharge an employee for failure to maintain membership in good standing in violation of a union-shop agreement. During the hearing the arbitrator permitted the union, without notice to the employer, to amend its notice of the hearing to change the dispute from discharge to a claim for back dues and other fees. Acknowledging that the arbitrator may have acted in good faith, the court found it nevertheless was misbehavior to permit the union to change the nature of the proceedings without any notice to the employer and giving him an opportunity to litigate it. It philosophized that misbehavior, even in the absence of any taint of corruption or fraud, may result from indiscretion.[51]

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[48] *Simons* v. *N. Y. Herald Tribune*, 152 N.Y.S.2d 13 (1956), *aff'd* 163 N.Y.S.2d 400.

[49] *Id.*

[50] *Publishers Assn. of New York City* v. *N. Y. Stereotypers, Union No. 1*, 181 N.Y.S.2d 527 (1959), *aff'd* 197 N.Y.S.2d 402.

[51] *Goldman Bros.* v. *Local 32K, Building Service Employees*, 8 Misc.2d 653, 166 N.Y.S.2d 19 (1957).

In the case where the arbitrator refused to grant additional adjournments to an employer who was under indictment for the subject matter involved in the arbitration, and he did not appear at a hearing, the state court held that it was not improper for the arbitrator to have issued his award.[52]

In a dispute with a slightly different twist under the Railway Labor Act that in Section 7 provided for an arbitration panel of either three or six members, the employer named one arbitrator and asked the union to designate one. The union designated an arbitrator for each of two different unions involved in the dispute and the employer named a second. The National Mediation Board designated a single neutral and the hearings proceeded before the five-man board without objection. The award was rendered against the union which moved to vacate on the grounds that the proceedings violated the statutory requirements. The federal district court granted the motion. On appeal the circuit court of appeals reversed, holding that the unions had waived their right to object to the statutory departure by participating in the proceedings without objection. This decision was appealed to the Supreme Court of the United States but certiorari was denied.[53]

Ex Parte Proceedings

Under what condition is it "safe" to hold the hearing and issue an award when one of the parties failed or refused to appear? Where a contract providing for a tripartite board did not specify the procedure to be followed and the employer did not designate its member so that the third impartial member could not be selected jointly, the union requested the FMCS to designate the impartial arbitrator. The company refused to participate in the selection from the submitted panel, and an arbitrator was appointed and conducted a hearing attended only by the union. The award was vacated, the court stating that absent any provision permitting one party to initiate and prosecute the arbitration to a conclusion without any participation by the other party, the proceeding was invalid.[54]

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[52] *Supra* note 38.

[53] *Railway Conductors & Brakemen* v. *Clinchfield RR Co.*, 278 F.Supp. 322, 67 LRRM 2318 (E.D. Tenn. 1967), *reversed* 407 F.2d 985, 70 LRRM 3076 (6th Cir. 1969), *cert. denied* 396 U.S. 841, 72 LRRM 2243 (1969).

[54] *Food Handlers, Local 425* v. *Pluss Poultry, Inc.*, 260 F.2d 835, 30 LRRM 1232 (8th Cir. 1958).

But when the arbitrators under a collective bargaining agreement that had no express provisions permitting ex parte arbitration went ahead to conduct the hearing without one of the parties being present and issued an award, it was sustained because of the preceding events. Notices of the hearings were returned as refused by the employer, personal service was refused, telegrams were sent with the date of the hearing as well as registered letters and a subpoena to appear at the hearing. All of the letters were refused. The federal district court held that an ex parte proceeding resulting in such circumstances of refusal to accept notice and to attend was valid and the award was binding.[55]

Late Awards and Waivers

It has been generally accepted that absent an express notification to the arbitrator against accepting an award that exceeded the prescribed time limit, it would be binding. However, courts have not always acted consistently with this precept. In one case the award was vacated when it was issued after the contractual time limit of 15 days following the final submission of the controversy. The state court there held that the arbitrators' authority to act expired with the time limits and they had no power to issue the award. The failure to raise the same objection to prior awards was not considered a waiver of the time limitations.[56]

Prior to 1968, the Connecticut general arbitration statute also presented special problems. It required the award to be rendered within 60 days from the date on which the arbitrator or arbitrators were empowered to act unless there was an express written extension or specific provision in the arbitration agreement on this subject.[57] When a hearing was held on May 5 and the brief submitted by June 13 and the award was rendered on August 8, even though no objection was raised to the timing of the award before it was issued, the award was vacated by the state court, no express written extension having been exercised.[58]

Nevertheless, the Second Circuit Court of Appeals upheld an award made in Connecticut and issued more than 100 days after the submission where no objection was made to its lateness until

[55] *Garment Workers, ILGWU, Joint Board of Cloak, Skirt & Dressmakers* v. *Senco, Inc.*, 289 F.Supp. 513, 69 LRRM 2142 (D.C. Mass. 1968).

[56] *In re Manhattan News Co. (Newspapers and Mail Deliveries Union of N.Y.C. & Vicinity)*, N.Y. Sup. Ct. Sp. Term, *N.Y. L.J.*, 7/10/61, col 7. See also 36 LA 1232 (1961).

[57] Amendment to Conn. Statutes, 1969 (Conn. C.G.S.A. 352-416).

[58] *Marsala* v. *Valve Corp. of America*, 254 A.2d 469, 157 Ct. 362 (1969).

after the award was rendered. The court found that the Connecticut general statute was inapplicable to labor arbitration, but added that in any event the need for uniform federal standards precluded the adoption of the Connecticut statute. The court expressed the opinion that any limitation on the time within which an arbitrator could render his award would be "directory" and not mandatory, and that it always should be in the court's discretion to uphold an award that was late either by contract or statute, where no objection was made prior to the rendition of the award and when there was no showing that the delay caused any actual harm to the losing party.[59] Consistently, the Fifth Circuit Court of Appeals, when an award was to be rendered within three days after hearing the grievance but was issued 44 days later without any grant of an extension, the employer's failure to object to the delay prior to receiving the adverse award was said to constitute a waiver.[60]

Further, under an agreement specifying that the arbitrator had to render a decision in writing within 15 days after the close of the hearing, the close being defined as the date of his receipt of the transcript, the arbitrator issued a tentative award, withholding final disposition pending the receipt of some additional material. He then issued a final award much beyond the 15-day limitation. In practice, the parties had not held the arbitrator to the time limits in the past. The award against the union was sustained, the federal district court finding that the appellant had known that the final award would not be rendered within the required 15 days but made no timely objection, and there had been a general course of dealing that did not hold to the time limits. Silence was deemed to constitute a waiver of any objection, the court explaining that it was adopting the rule that to preserve rights there must be a protest against the continuance of the arbitration proceedings after the stipulated time had elapsed—that mere nonparticipation in the continued proceeding was not sufficient. There was the further holding that it was not alleged nor did it appear that the delay was material, unreasonable, unjustified, or prejudicial.[61]

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[59] *West Rock Lodge 2120, Machinists* v. *United-Greenfield Corp., Geometric Tool Co., Div.*, 406 F.2d 284, 70 LRRM 2228 (2d Cir. 1968).

[60] *Lodge No. 725, Machinists* v. *Mooney Aircraft, Inc.*, 410 F.2d 681, 71 LRRM 2121 (5th Cir. 1969).

[61] *District Lodge 71, IAM* v. *Bendix Corp., Kansas City Div.*, 218 F.Supp 742, 53 LRRM 2854 (W.D. Mo. 1963).

A waiver was also held to have occurred in a case before the Supreme Judicial Court of Maine which refused to vacate an award under a contract that provided for a 30-day time limitation in rendering the award. After the time had expired, the objecting party participated in a meeting it had requested and at which additional evidence was offered. This was deemed a waiver of the time limitation.[62]

Finally, in a case where a 10-day time limit after the close of the hearing was prescribed and with a requirement that any extension be agreed upon by the parties prior to the conclusion of the hearing, an award rendered more than a month later was nevertheless confirmed. The state court remarked that the parties had the power expressly or impliedly to waive defects or irregularities in the proceeding, including the fixed time limits, and that they may be estopped by their action or inaction from claiming the time bar, dependent on the facts in each case. It stated that the extension did not have to take any particular form, either oral or written, provided there was the consent by both parties.[63]

Questions Concerning Signing Awards

Chairmen of tripartite boards of arbitration sometimes run into difficulties in obtaining the disagreeing member's signature on the award in dissent after he had participated in the decision-making process. Frequently, in desperation, an award is issued with the signature of the concurring members only. Despite several decisions on nonsignature, the court cases on this subject deal only with unanimous awards. In one case, only two of the six-member arbitration committee signed and acknowledged the award, although all heard the testimony and participated in the determination that had been unanimous. When this was challenged in a court action, the six members thereafter issued an amended decision signed and acknowledged by all of them. It was identical to the original decision. The state court held that technical omissions that did not reflect upon or affect the decision itself or the manner in which it was arrived at should not be permitted to impeach the award. Any defect was said to have been cured by the execution and filing of the amended decision

[62] *Lewiston Auburn Shoe Workers Protective Assn.* v. *Federal Shoe,* 114 A.2d 248 (Sup. Jud. Ct. Maine 1955).

[63] *Librascope, Inc.* v. *Precision Lodge No. 1600,* 10 Calif. Rptr. 795 (1961).

signed by the full arbitration committee.[64] In another case in which the award was not signed by the arbitrators in each others' presence, the state court held that this was not necessary as long as they all participated in the decision-making and knew what it was.[65]

In another situation, the practice had been for the chairman of the three-member board of arbitration to sign the awards. This procedure was followed in a unanimous decision by that board. The New Hampshire statute, consistent with the Uniform Arbitration Act (Section 8 (a)), required that it be signed by the arbitrators joining in the award, and certain union members sought to have it set aside, relying, in part, on this statutory infraction. Prior to a hearing before a master assigned by the state court to hear the case, the other members signed the award. The court held that in view of the unanimity and prior practice, the actual recording of the signatures of the other two members was administrative and could be supplied at a later date without affecting the validity of the board's decision.[66]

Awards Without Consulting Members of the Board of Arbitration

I am certain that no member of the Academy could be charged with the arrogation of total responsibility for an award to be made by a board of arbitration. But such things have happened. For example, in one case the impartial chairman of a tripartite five-member board of arbitration prepared the award and opinion and sent it to the two employer-appointed members with instructions that they forward them to the union-appointed arbitrators for their concurrence or dissent, without an executive session of the board. This omission was defended on the grounds that the union-appointed members continually had voiced their opinion at the hearings so that a board meeting was not necessary. The state court disagreed. It ruled that all the arbitrators had to be notified to meet for deliberations, so that there could be full consideration. It was held improper to assume that the attitude of the so-called union members would remain unchanged.[67]

Nevertheless, another state court, after restating the principle that even where a contract permitted a majority decision, all

[64] *Palizzotto* v. *Local 641, Teamsters,* 170 A.2d 57 (1961), aff'd 177 A.2d 538.
[65] *Supra* note 62.
[66] *Supra* note 42.
[67] *Supra* note 28.

arbitrators had to be present or be given the opportunity to attend each and every meeting for hearing of evidence, for argument of the parties, and for consultation or determination of the award unless there was a clear and unequivocal waiver, proceeded to sustain an award determined by a majority in an executive session conducted in the absence of the employer-appointed arbitrator. The employer-appointed member had been notified of the executive session called by the impartial chairman on the same day it was held and while he was out of town on an extended vacation he had previously planned. The court felt that the departure for this extended vacation, even in good faith, constituted a distinct waiver, and his absence could not nullify the authority of the others to make the award.[68]

Prejudice by Mediation or Alleged Advocacy

At this point I must deviate from my stricture to confine myself to labor arbitration cases because none could be found on the effect of an arbitrator's efforts at mediation during a hearing. Since there are arbitrators who, in the appropriate circumstances, engage in such activity, this commercial arbitration case does give some guidance. Because of its particular pattern that the courts emphasized, it would represent a straw in the wind and not a formulated general principle. Here, the chairman of a board of arbitration, after prolonged hearings and when they almost were at the conclusion, had an off-the-record discussion with counsel in which he indicated his tentative views and unsuccessfully encouraged settlement. During the course of the hearing, he also had asked many questions on his own. The losing party's challenge of the award in the federal district court on the grounds of partiality and misbehavior by the chairman failed. On appeal to the Second Circuit Court of Appeals, it had no more success.[69]

The losing party had supported its motion to vacate on the grounds that the chairman had indicated his tentative views and encouraged settlement, and favored the other party by his questions during the hearing that in effect "usurped the office of [their] counsel." Among other things, the circuit court held that the conduct of the hearing had been consistent with the standards of informality and expedition appropriate to arbitration proceedings, and that the chairman would have been remiss

[68] *West Towns Bus Co., supra* note 31.
[69] *Ballantine Books, Inc.* v. *Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962).

if he had not participated in questioning to speed the proceeding and to eliminate irrelevancies. It pointed out that an arbitrator should act affirmatively to simplify and expedite a proceeding before him. It also expressed the opinion that it was expected that after a judge or arbitrator had heard considerable testimony, he would have some views of the case, and as long as they arose from the evidence and conduct of the parties, it could not be said that such expressions of a view amounted to bias. However, the court cautioned that it was better in most cases for arbitrators to be chary in expressing any opinion before reaching their ultimate conclusion, and to avoid discussing settlement, but that it did not follow that such discussions were proof of bias.

In closing I should like to lay down a very important caveat to arbitrators as illustrated in a case involving a widow in whose favor the arbitrator had made an extremely generous monetary award. Shortly afterward he divorced his own wife and married the widow. The award was vacated for such misconduct. By coincidence, this was the case of *Woods* v. *Roberts*.[70]

[70] *Woods* v. *Roberts*, 185 Ill. 489, 57 NE 426 (1900).