CHAPTER 3

THE ROLE OF THE ARBITRATOR IN ENSURING A FAIR HEARING

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I.

The topic of this session is not a new one; under various headings, it has been discussed repeatedly and exhaustively at the annual meetings of the Academy. Yet we recur to the subject as predictably, if not as frequently, as the swallows return to Capistrano. What impels us to do so?

I suggest the reason is that the guarantee of a fair hearing lies close to the heart of our arbitration system. Ralph Seward reminded us over 30 years ago that arbitration "is primarily important because of its nature as a *process.*" It is, he said, "a *method* of settling disputes [that] . . . derives its importance and its lasting effects from its characteristics as a *method.*"[1] Arbitrators may make bad decisions without seriously damaging the process, but if arbitration hearings are widely perceived to be unfair, or—to state the same thing in different words—to be lacking in due process, the system cannot endure. The periodic reexamination of the requirements of a fair hearing is necessary if only because it compels us to rethink our basic premises, to question the validity of established practices—in short, to strive to add depth and clarity to our notions of fair procedure in the arbitration of labor disputes.

My problem, however, is not to explain the importance of the topic; rather, it is to say something new about it. Virtually every luminary of the Academy has addressed himself or herself to one or another aspect of the subject at some time during the past 35

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[1] *Arbitration in the World Today,* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 66, 69. Italics in original.

years, and one of our most distinguished former colleagues, Willard Wirtz, came about as close to presenting a definitive summation of the principal problems involved as anyone is likely ever to achieve.[2] I note, parenthetically, that although Wirtz presented his paper in 1958, the problems he addressed are still with us and encompass most of the important elements of a fair hearing. It behooves me, therefore, to state at the outset that little, if anything, I shall have to say is new. The best I can do is to crochet a little around the borders of the principal themes previously emphasized by others.

II.

Before getting down to specific situations, however, I want to raise a preliminary question. In discussing the arbitrator's role in ensuring a fair hearing, we must ask ourselves: fair in respect of whom or what? I suggest that fairness is owed not only to the grievant, but also to the parties and their representatives, as well as to the arbitration process itself. The views of the various participants in the arbitration process as to what constitutes the appropriate degree of fairness in each case are likely to cover a broad spectrum. No one can hope to pinpoint a fixed spot along that continuum as "correct"; the most one can do, it seems to me, is to find a reasonably narrow range that excludes insufficient safeguards, on the one hand, and unreasonable expectations, on the other.

There is a natural tendency to focus one's attention on fairness to the grievant—the person who has been discharged, disciplined, denied a promotion, refused a transfer, and so forth, although, as I shall seek to show a little later, there are many cases—perhaps a majority—in which principles of fairness alone do not seem to require his or her presence at the arbitration hearing.

I draw a distinction between the parties to the collective agreement and their representatives because, although lack of fairness to the latter is concededly an offense of equal magnitude against the former, representatives—especially lawyers—sometimes make procedural demands in the name of their clients that in my judgment do not rise above the level of indul-

[2] *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 1.

gence of their personal preferences. Such claims may safely be denied without prejudicing the fairness of the hearing.

The requirement of fairness to the arbitration process itself is, of course, a catchall, in the sense that any unfairness to the grievant, the parties, or their representatives does harm to the entire process. What I have in mind, however, is something else: the duty not to use the arbitration process for purposes for which it was not intended and which it cannot fulfill.

III.

Let us return now to the matter of fairness to the grievant. Whenever I ask my students what are the key elements of fairness, the first response is usually that the grievant must be given adequate notice of the time and place of the arbitration hearing and must be allowed to attend. That practice is observed under many procedures, but in many others it is not. It may be persuasively argued, of course, that allowing a grievant to attend the arbitration hearing is worthwhile, not only for its educational value, but also because in witnessing the employer's representatives being compelled to justify their behavior to a neutral party, in the course of which they may be subject to searching and often embarrassing cross-examination, the grievant experiences a kind of catharsis that helps to make even eventual defeat acceptable. As I have already suggested, however, there are a great many cases in which the grievant's presence at a hearing is certainly not required by law. Remember that the decision to process a grievance through the grievance and arbitration procedure is within the union's sole discretion, always assuming that it acts in full compliance with its duty of fair representation.[3] Thus, the union is free initially to reject a grievance as being without merit, to settle it on a compromise basis at some stage of the grievance procedure, or to refuse to appeal it to arbitration in the good-faith belief that the claim will not be sustained. In the frequent instances when the issue is one of contract interpretation and the relevant facts are not in dispute, a fair arbitration hearing can be held even if the grievant is not present.

Traditionally, the concern about providing a fair hearing to the grievant has focused on two types of cases. The first of these

[3] *Vaca* v. *Sipes,* 386 U.S. 171, 191, 64 LRRM 2369 (1967). *See* Aaron, *The Duty of Fair Representation: An Overview,* in The Duty of Fair Representation, ed. Jean T. McKelvey (Ithaca, N.Y.: Cornell University, 1977), 8.

is one in which two or more employees claim the right of promotion to a higher-rated job, the employer appoints one, and the union appeals the claim of someone else to arbitration. The second is one in which the grievant has been disciplined or discharged for some alleged misconduct. In both types of cases the grievant has a personal stake in the matter that must be recognized in addition to the union's interest in protecting the integrity of the collective bargaining agreement, but the requirements of a fair hearing in the two paradigms invoke differing considerations.

A.

Let us take the promotion case first. Typically, there is a provision in the collective agreement that says that as between rival candidates for the promotion, if skill and ability are substantially equal, the one with the most seniority shall be promoted. The employer promotes X, who has less seniority than Y. Y grieves, on the ground that his skill and ability are equal or superior to that of X. The union appeals Y's grievance to arbitration. Y appears and testifies at the hearing; X, now the incumbent of the disputed job, is not present. In order to remove any issue involving the union's duty of fair representation prior to the arbitration hearing, I shall assume that both X and Y are union members in good standing, and that before deciding to process Y's grievance the union had interviewed both employees, had carefully evaluated their respective records, and had concluded in good faith that Y's claim to the promotion was well founded.

Previous surveys of arbitral opinion as to whether fairness requires X's presence at the arbitration hearing have revealed a broad variance of opinion among arbitrators.[4] Some argue that given the assumptions I have made, the union has no obligation to call X as a witness or even to invite him to attend the hearing. Inasmuch as the union has satisfied its duty of fair representation toward X and has concluded in good faith that Y has a better claim to the disputed job, they feel that X has no right to participate further in the case, unless, of course, the employer calls him as a witness. Others are content to rely upon the assumption that

[4] *E.g.*, Fleming, *Due Process and Fair Procedure in Labor Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 69, 70–78; Wirtz, *supra* note 2.

whatever rights or interests X may have will be fully protected by the employer, which must defend its appointment of X to the disputed job. Still others, uncomfortable with the idea that X's right to remain in the disputed job will be attacked in a hearing at which he is not present, insist on calling him as their own witness, if both parties fail or refuse to do so.

This last approach is the one I follow, although I concede that it may do more to quiet my own squeamishness than to increase objectively the fairness of the arbitration hearing. I say that not because I think X will be fully and fairly represented by the employer; in fact, I believe that to be a very shaky assumption indeed. The employer will represent its own interests, and will do so with varying degrees of competence. Moreover, in advancing its own cause, it may make arguments or concessions that compromise X's legitimate claims. It seems to me, however, that if the union has met its duty of fair representation to X in the preliminary stages of the case, and fully explains at the arbitration hearing the basis of its decision to support Y's claim rather than that of X, fairness does not require that X be given another chance personally to argue the merits of his case to the arbitrator. The difficulty is that the arbitrator cannot always be sure that the union has dealt fairly with X prior to the arbitration—hence my practice of routinely calling X as my witness.

Another practical reason for protecting X's interests in the arbitration hearing is the sensitivity of the courts to issues of this kind, which has resulted in some rather bizarre and mischievous opinions in a long series of cases from *Clark* v. *Hein-Werner Corp.*[5] to *Smith* v. *Hussman Refrigerator Co.*[6] To ensure that the arbitration award, should it be in Y's favor, will not be vacated on review, I think the union would be well advised to include in its opening statement something on the order of the following:

> "The union has carefully reviewed and compared the seniority, skill, and ability of both Y (the grievant) and X (the incumbent). In our judgment Y's skill and ability is at least equal to that of X; therefore, Y, rather than X, should have been promoted to the disputed job, because Y has greater seniority than X.
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> "Accordingly, the union does not intend to call X as a witness. Should the arbitrator have any doubts as to the relative skill and ability of X and Y, however, the union urges the arbitrator to call

[5] 8 Wis.2d 264, 99 N.W.2d 132, 45 LRRM 2137 (1959), *rehearing denied*, 100 N.W.2d 317, 45 LRRM 2659 (1960).
[6] 619 F.2d 1229, 103 LRRM 2321 (8th Cir. 1979), *cert. denied sub nom. Local 13889, United Steelworkers* v. *Smith*, 449 U.S. 839, 105 LRRM 2657 (1980).

X as his (or her) witness, subject to the right of both parties to cross-examine X."

Such a statement will not only support the union's claim that it acted in good faith, but will also prompt the arbitrator to do that which he probably ought to do routinely in this type of case.

B.

I turn next to the matter of ensuring a fair hearing for the grievant in a case involving discipline or discharge. This situation may give rise to a great many questions involving the fairness of the hearing, and time does not permit me to deal with all of them. Accordingly, I shall confine my discussion to those that seem the most important.

It has been many years since I have heard a disciplinary case in which the grievant was not present at the hearing or had not at least been given ample notice and the opportunity to be present. I believe it is now almost the universal practice to have the grievant present in such cases, but I remind you that the Chrysler-UAW Umpire System, over which our late colleague, David A. Wolff, presided so successfully, provided for two final appeal board steps without the presence of any witnesses—the appeal board members and, if necessary, the impartial chairman relying upon written statements rather than oral testimony.[7] Be that as it may, I believe that fairness requires that the grievant in a discipline or discharge case be given due notice of the hearing and the opportunity to be present. On the other hand, I do not think the arbitrator need refuse to proceed with the hearing in the grievant's absence, provided that there is satisfactory evidence that the necessary notice has been given and no timely or acceptable reason for the grievant's failure to appear has been presented.

Suppose, however, that the grievant is present. The employer presents its case first, and begins by calling the grievant as a hostile witness. The union objects and asks the arbitrator to uphold the grievant's right not to testify. Again, one finds a wide range of arbitral opinion on this question. Some arbitrators argue that the objection must be sustained in order to protect the grievant's asserted privilege against self-incrimination; oth-

[7]Wolff, Crane, and Cole, *The Chrysler-UAW Umpire System,* in The Arbitrator and the Parties, *supra* note 2, at 111. This practice was abandoned in 1963 with the mutual consent of the parties.

ers maintain that the employer should first be required to put on its "own" witnesses before calling the grievant; still others think that to uphold the objection would unfairly interfere with the presentation of the employer's case.

The first two positions seem to me to lack merit. An arbitration hearing is not a criminal proceeding, so the privilege against self-incrimination is not available, even assuming that the necessary state action is involved, which is rarely the case in the private sector. Requiring the employer to put on its case before calling the grievant as a witness is justified by its proponents on the ground that the employer should not be permitted to prove the existence of just cause out of the mouth of the grievant. Thus, the alleged justification is merely a restatement of the self-incrimination argument. Moreover, it ignores the very point at issue, because the grievant's testimony is very much part of the employer's case; indeed, it may be the whole of it.

The third position strikes me as being the only tenable one of the three, but I dislike it because allowing the employer to proceed is likely to create a good deal of bad feeling between the parties, as well as some disenchantment on the union's side with the arbitration process, whether or not such feelings are justified. In such a situation my preference is, first, to inquire whether the union intends to call the grievant as a witness. If the answer is yes, I then ask the employer not to call the grievant, pointing out that it can elicit the same testimony on cross-examination. This usually is satisfactory to the employer.

If, however, the union should indicate that it does not intend to ask the grievant to testify, other problems arise and will be handled by the arbitrator according to his notions of the purpose of the arbitration hearing. Mine are briefly stated. I believe that the purpose of an arbitration hearing is to come as close to the "truth" about the matter in dispute as is possible for fallible human beings to achieve in the circumstances. The word "truth" must be enclosed in quotation marks, for I follow Justice Holmes in asserting that the truth is only what I can't help believing, and I don't suppose that my "can't helps" are necessarily shared by others.[8] Having this point of view, I reject the

[8] "[W]hen I say that a thing is true I only mean that I can't help believing it—but I have no grounds for assuming that my can't helps are cosmic can't helps—and some reasons for thinking otherwise." Howe, ed., 2 Holmes-Laski Letters, 1916–1935 (Cambridge, Mass.: Harvard University Press, 1953), 1124.

idea of an arbitration hearing as just another adversary proceeding, although adversarial elements are inevitably present. Thus, when advised that the grievant will not be called by the union to testify, I am likely to observe that I shall feel free to draw unfavorable inferences from the grievant's silence, unless the evidence overwhelmingly supports one side or the other.

There are, I know, some risks in this approach. The grievant may, for example, be a person of so volatile a temperament, so inarticulate, and so excessively timorous or belligerent that his testimony will work to his serious disadvantage and at the same time fail to contribute materially to the evidence that the arbitrator must consider. I like to think that I will not be unduly influenced by such characteristics, should the grievant elect to testify, but I suppose that this is merely one of the delusions suffered by those of us who are of relatively advanced age and have had many years of arbitration experience. At any rate, in this instance, running the risk of prejudice to the grievant's case seems justified in order to be faithful to what, to me, is the higher obligation to serve what I have defined as the purpose of the arbitration hearing.

C.

Quite a different set of problems is presented by the attempt of either side to introduce written statements by parties who, for one reason or another, are not available to testify. In my own experience, such questions have most frequently involved reports of undercover agents, such as "spotters" in retail establishments or on streetcars or buses, and doctors' letters recounting diagnosis and treatment of grievants. The usefulness of undercover agents is automatically terminated once their identity is disclosed; employers who use them argue, therefore, that they should not be compelled to testify or, sometimes, that they be allowed to testify in camera, with only the arbitrator present. It has been my custom to reject both of those suggestions on the ground that to do otherwise would be to deny the grievant a fair hearing. The written reports of undercover agents, some of whom are really *agents provocateurs,* are notoriously unreliable, and without the supporting testimony of the writer, they are, in my opinion, entitled to no probative value. Usually, however, disciplinary action against a grievant based on such reports is predicated on a series of them submitted over time rather than

on just one. If it turns out that none of them has been revealed to the grievant at the time it was placed in his file, the union may rightly protest against them on those grounds, and the issue of the nonappearance of the undercover agent then becomes moot.

In my experience, doctors' letters are likewise of dubious value. On the relatively infrequent occasions when doctors have appeared to testify before me, I have been impressed by their poor performances as witnesses, particularly under cross-examination. Nevertheless, it often happens that both sides agree to submit such letters, and in those circumstances I think it improper for an arbitrator to refuse to admit them. Like the postnegotiation recollections of witnesses as to what the parties intended or actually agreed to, however, the medical evaluations of employers' and unions' doctors tend to cancel out each other.

D.

Another problem that arbitrators face—with increasing frequency, I suspect—is what to do when a grievant, either prior to or at the time of the hearing, requests the right to have his case presented by a representative of his own choosing rather than by a union spokesman. The usual justification for such a motion is that the union is hostile to the grievant and that it cannot or will not present his case honestly and effectively. In my experience, both the union and the employer have usually opposed the grievant's request.

From a purely legal point of view, the problem is not a difficult one. As the exclusive bargaining representative, the union is in full control of the grievance. The grievant has no legal right to bring in someone else to handle his case; if the union fails to represent him fairly, his remedy is to bring an action against the union and the employer under Section 301 of the Taft-Hartley Act.[9] The arbitrator is thus justified on legal grounds in denying the grievant's motion for separate representation. I suggest, however, that the arbitrator's dilemma is not so easily resolved, for he has a duty to try to make the grievance and arbitration procedure work for the benefit of all those involved. This is

[9] *Vaca* v. *Sipes, supra* note 3; *Humphrey* v. *Moore,* 375 U.S. 335, 55 LRRM 2031 (1964).

particularly true when he has reason to suspect that the union does not intend to present an effective case in support of the grievant. Suppose, for example, he is confronted with a situation similar to that in *Soto* v. *Lenscraft Optical Corp.*,[10] in which the grievants had been discharged for engaging in a wildcat strike that arose out of their activities on behalf of an outside union. The incumbent union's attorney had represented the employer in the latter's successful effort to have the strike enjoined. The grievants, who were guilty of treason in the eyes of the incumbent union, quite naturally had no confidence that its attorney would represent them fairly in the arbitration proceeding. When their request to be represented by their own attorney (who, coincidentally, was also the attorney for the outside union) was denied by the arbitrator, the grievants refused to participate in the hearing. Counsel for the incumbent union offered no defense on their behalf, and the arbitrator sustained their discharges. The grievants then brought suit to vacate the arbitrator's award. A lower court decision in their favor was reversed on appeal, on the dubious ground that because the grievants were not legal parties to the arbitration, they had no standing to challenge the award.

If the identical case were to arise today, I assume that the ultimate decision would be for the plaintiffs, but at the moment I want to focus on the arbitrator's role in such a situation. Although he would be justified in denying the grievants' request to be represented by their own attorney, I suggest that it would be equally proper and clearly desirable for the arbitrator to point out to the incumbent union's attorney that he could not represent the grievants fairly, and to propose to him that they should be allowed, on a nonprecedential basis, to use their own attorney. The effect of this would be to deprive the grievants of a claim that they were not fairly represented, and also to permit the incumbent union to remain silent, or perhaps even to support the employer's position on the merits of the dispute. Of course, the union or employer might reject the proposal, and the arbitrator would hardly be in a position to insist upon it, but at least he would have satisfied his responsibility of trying to make the arbitration process work.

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[10]137 N.Y.L.J. 6 (April 12, 1957), 7 App. Div. 2d 1, 180 N.Y.S.2d 388, *reversed sub nom.* Matter of Soto, 7 N.Y.2d 397, 165 N.E.2d 855 (1960).

E.

I shall conclude my discussion of the arbitrator's role in ensuring a fair hearing for the individual grievant with some remarks about "rigged" or "prejudiced" cases. The former term relates to those grievances which the union and employer have secretly agreed should be decided against the grievant and as to which they seek the arbitrator's equally secret concurrence; the latter refers to instances in which a representative of either the employer or the union, but most often the latter, lets the arbitrator know that he neither expects nor desires to win the case, but does not communicate that information to either the grievant or the opposing party. I am familiar with both types of situations, but the number of times I have experienced either one in over 30 years of practice as an arbitrator is so small that I sometimes wonder whether the magnitude of the problem has been exaggerated. Even so, that it exists at all should be of grave concern to all participants in the arbitration process.

The rigged award is the more reprehensible of the two types because it necessarily involves collusion between both parties and the arbitrator. The practice has occasionally been defended on the ground that the arbitrator is the mere "creature" of the parties and has no function other than to do their bidding when they are in agreement. This view is likely to be supported by the rationalization that the parties know much more about the case than does the arbitrator, and that it is safe to assume that if they are in agreement, they are acting in the best interests of the labor-management relationship. To me, at least, such arguments are totally unconvincing and morally unacceptable. Unaccustomed as I am to associating myself with any of the observations of the late Judge Paul R. Hays in his celebrated polemic against labor arbitration,[11] I must concur with his denunciation of rigged awards as "so vicious that no system including such a practice can have any proper claim to being a system of justice."[12] The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, although perhaps not quite as explicit on this point as one might wish, can certainly be read as condemning the practice.[13]

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[11]Labor Arbitration: A Dissenting View (New Haven: Yale University Press, 1966).
[12]*Id.*, at 113.
[13]The following paragraphs of the Code are relevant: [11] "Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters."

The incidence of unilateral attempts by one party or the other to prejudice a case is not only probably more frequent than that of rigged awards, but also infinitely more troublesome. The arbitrator asked to participate in a rigged case has a clear obligation to decline and to withdraw immediately from the situation. What his or her obligations are after hearing a prejudicial comment, however, is a much-vexed question. It is clear that an arbitrator ought, in the words of Sir Matthew Hale, a seventeenth-century Lord Chief Justice of England, "[t]o abhor all private solicitations in matters depending,"[14] but sometimes the solicitation is made before the arbitrator can prevent it. The Academy's Committee on Professional Responsibility and Grievances wrestled with this problem for two years before handing down an advisory opinion that represented a compromise of varying views among the committee members, all of whom, however, eventually endorsed the opinion. The facts before the committee were as follows:

> "Prior to the start of a discharge hearing, the Union representative approached the arbitrator and remarked, out of earshot of the Company representative: 'I've got a loser. I don't expect to win this one.' The arbitrator admonished him that he had misbehaved, and that his remarks could prejudice the grievant's rights. The arbitrator stated that he would excise the remarks from his evaluation of the dispute and would decide the case on its merits without regard to them. Before the hearing began, the arbitrator disclosed to the Company the Union representative's remarks and the arbitrator's response. Neither the Company nor the Union interposed any objection to the arbitrator's continued service in the case."

Some committee members thought the arbitrator had no choice but immediately to withdraw from the case; others felt

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"[18] An Arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties."

"[26] Such understanding [of the significant principles governing each arbitration system in which he or she serves] does not relieve the arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose."

"[65] Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it."

"[66] *Before complying with such a request, an arbitrator must be certain that he or she understands the suggested settlement. . . . If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to insure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.*"

[14] *Things Necessary to Be Continually Had in Remembrance,* Bartlett, Familiar Quotations, 12th ed. (Boston: Little, Brown, 1948), 1039.

that the arbitrator was under no duty to disclose the incident to anyone and could properly continue to serve, so long as he felt that his judgment had not been affected; still others believed the arbitrator was bound to disclose the incident to the grievant, to the employer, or to both; and the views of some members embodied variations of these main themes. Although the opinion is too long to be quoted in full, I shall summarize the main points. The first duty of the arbitrator is to determine whether a remark of the type cited in the example does or does not reflect an effort by the union to induce the arbitrator to sustain the discharge. If he concludes that it does manifest such an effort, he should not continue to serve without the informed consent of the discharged employee. The arbitrator's second duty is to decide whether he can disregard the remark and render a fair decision in spite of it. If he concludes that he can, he may continue to serve; if he has any doubt about his ability to do so, he must withdraw. Those duties are the same for ad hoc arbitrators and permanent arbitrators.

Whether the opinion correctly states the full dimensions of the arbitrator's responsibility in this type of situation remains a matter for consideration. Although, as a member of the Academy committee that issued that opinion, I supported it, I have never felt entirely comfortable with it. Can an arbitrator who has heard the manifestly improper comment by the union representative ever erase the incident from his subconscious? Suppose that rather than being influenced against the grievant as a consequence, he leans over backward to be fair: is he any less biased in his judgment? On the other hand, would he always be justified in disclosing to the grievant and to the employer an ill-advised remark that might poison the relationship between the parties for years to come? Could he not better serve the parties and the process by remaining silent but subsequently impressing upon the offending representative the seriousness of his misconduct? Or suppose the arbitrator feels that he must withdraw: should he, nevertheless, in the interest of protecting the integrity of the arbitration process, inform the grievant and the employer of the union representative's remark, or would this be an act of officious meddling? Inasmuch as I cannot resolve these questions to my own satisfaction, I can hardly presume to do more than leave them with you without further comment.

IV.

I should like to turn now to the arbitrator's duty of fairness to the parties and their representatives, bearing in mind the distinction between the two groups I mentioned earlier.

A.

There is, or should be, no need to dwell in detail on the points emphasized in the Code of Professional Responsibility, but it may be useful to comment briefly on the following two paragraphs of the Code:

> "[106]a. Within the limits of [the] . . . responsibility [to provide a fair and adequate hearing], an arbitrator should conform to the various types of hearing procedures desired by the parties.
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> . . .
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> "[108]c. An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately."

I cite these provisions not because I disagree with them but because I think they do not reach certain related and more troublesome problems. Particularly in the case of relatively new collective bargaining relationships, the parties are not sure what kind of hearing procedure they want, and often they look to the arbitrator for guidance. In my view, the arbitrator has the obligation to provide such guidance rather than to sit back and allow the parties to flounder. Surely one of the most valuable services an arbitrator can perform is to cut off irrelevant or superfluous testimony, and to refuse to accept evidence he knows he will not credit, rather than to admit it "for what it's worth."

One does not frequently hear of incidents in which an arbitrator prevented a party from "putting forth its case fairly and adequately," but what about the situation in which a party gives ample demonstration of its inability to present its case in a competent or even intelligible manner: is it the arbitrator's duty to remain silent while a grievant's complaint or an employer's response is butchered beyond repair? I think not. Indeed, I believe an arbitrator has a duty to intervene—either by examining witnesses or calling additional witnesses—whenever it appears that this is necessary to develop the relevant facts and to get at the "truth." I am aware that many parties' representatives, especially lawyers, object to this point of view; I suspect it is

because they regard arbitration as a purely adversarial exercise in which the only reasonable goal is winning the decision. With respect, I disagree and prefer to think of arbitration as a cooperative effort not only to get at the "truth," but also to find an appropriate solution to a problem. I hope it isn't necessary to add that by "appropriate solution" I do not necessarily mean a compromise, but rather one that is reached through a process that helps to develop acceptance on the part of the losing party.

A somewhat touchier aspect of the intervention question concerns the arbitrator's suggestion of arguments not advanced by either party. My rule of thumb has been to confine myself to inquiries about the relevance of provisions in the collective bargaining agreement which seem to bear upon the issue, but which have not been cited by either side. Most parties agree that the entire agreement is applicable to any issue, and I seldom encounter any more the argument that because the union has rested its case on an alleged violation of Article Y, the arbitrator must decide the issue on that basis, even when it's obvious that Article Z, not Y, is involved. I do not favor suggesting arguments on external common or statutory law or administrative regulations, because I feel strongly that the arbitrator's job is primarily to interpret and apply the collective bargaining agreement even when, in his judgment, it is contrary to external law.

In any event, if an arbitrator does propose arguments not advanced by either party, he is obligated to do so in the presence of both. The cardinal sin is to base his decision upon a theory not relied upon by either party and not presented by the arbitrator for their consideration at the hearing. If the arbitrator decides, subsequent to the hearing, to base his decision on a theory not raised or argued by either side, he is obligated to disclose it to the parties and to allow them to present their views, either at a reconvened hearing or in briefs. In general, however, I think arbitrators would be well advised to avoid such situations except in especially compelling instances.

Fairness to the parties' representatives assuredly requires courtesy in allowing them to put on their respective cases with a minimum of interference, so long as they stick to the issues. Some representatives, however, whether legally qualified or not, have a habit of dragging out the presentation to unreasonable lengths, punctuating it with requests for unnecessary recesses, continuing with cross-examination long after it has ceased to be productive, burdening the record with superfluous evidence,

and constantly interrupting the presentation by the opposing party with technical objections. The arbitrator may firmly put a stop to such tactics without fear of prejudicing the right to a fair hearing.

B.

Under the heading of miscellaneous instances of an arbitrator's violation of the parties' right to a fair hearing, a particularly egregious example is the arbitrator's announcement, after he has agreed to set aside at least one day for a hearing, that he must leave by noon, and his insistence that the parties' presentations be shortened on that account or that an additional day of hearing be scheduled. I was recently informed of such an instance in which the arbitrator not only refused to stay for the extra few hours that would have been required to complete the hearing, but gave as his reason that he had scheduled another hearing for the afternoon, on the assumption that the first would have been concluded by lunch! The mounting costs of arbitration have become a matter of general complaint. Although I believe that arbitrators' fees usually represent only a modest proportion of those costs, I also think that the arbitrator's duty to ensure a fair hearing includes the obligation to avoid the unnecessary extension of hearing time. The arbitrator's conduct in the instance just described seems to me a gross violation of the Code of Professional Responsibility.

C.

The remaining issue I shall consider under the heading of the arbitrator's duty of fairness to the parties and to their representatives concerns a challenge to the arbitrator's qualifications to serve in a particular case. Such a challenge may rest on solid or on quite insubstantial grounds. An example of the former would be the arbitrator's financial interest in the employer's business, whether or not disclosed by him; an example of the latter would be that the arbitrator had previously decided an issue on all fours with the one presently under consideration in a totally unrelated case. The problem, of course, is with situations falling somewhere in between the obvious cases at one or the other end of the spectrum.

The Code of Professional Responsibility deals with some aspects of the problem and makes the arbitrator responsible for

disclosure of circumstances not expressly mentioned therein if he thinks they might have a bearing on his acceptability to one or both of the parties.[15] Although I have never been asked to recuse myself and cannot speak from experience, my inclination would be to accede to any request that has even a slight color of validity. It frequently happens, for example, that one of the advocates appearing before me is an old acquaintance. Although I am convinced that this circumstance will not affect my judgment, I can appreciate that counsel for the other side may not share this conviction. Should he ask me to withdraw for that reason, I would be prepared to do so.

A more troublesome question is when to disclose the relationship. Often one does not know until one shows up for the hearing who will be representing the parties. My practice is to mention it at the hearing, before the proceedings begin.

Some arbitrators feel that if a party does not wish them to serve, however objectively groundless the reason, they should withdraw. One can understand and sympathize with this feeling without agreeing with it. In such situations, the arbitrator should remember that he has a duty of fairness to both sides. Recusing oneself for an obviously insufficient reason advanced by one party is unfair to the other. It may needlessly extend the duration of the case and result in extra expenses to the parties. To withdraw under those circumstances seems to me as wrong as to refuse to do so for good cause shown.

V.

I come finally to the arbitrator's duty of fairness to the arbitration process itself which, as I have previously suggested, includes the obligation not to permit it to be used for purposes for which it was not intended and which it cannot fulfill.

A.

Perhaps the principal example of what I have in mind is an attempt by the arbitrator, *without the consent of the parties,* to mediate a dispute submitted to him for decision. The qualifying phrase is critical; the last thing I intend is to revive the sterile debate over whether it is ever appropriate for an arbitrator to

[15] *See* "Required Disclosures," paragraphs 27–38, relating generally to disclosures to the parties and appointing agencies of personal relationships and pecuniary interests.

mediate. That matter was settled long ago, and the Code of Professional Responsibility recognizes the propriety of an arbitrator mediating at the request, or with the consent, of both parties.[16]

The distinction between arbitration and mediation is clear, however, and in the great majority of cases involving ad hoc arbitrators, the parties do not want the arbitrator to mediate. If he insists upon trying to do so against their wishes, he is violating his obligation under the Code and is doing a great disservice to the arbitration process. The case of an impartial umpire is different only in the greater likelihood that the parties may desire him to mediate in at least some of the cases coming before him. If they do not clearly indicate that preference, however, the umpire has no greater warrant to mediate than has the ad hoc arbitrator.

B.

In recent years there has been an increase in the number of requests by the parties that arbitrators render so-called bench awards, by which is meant an oral decision delivered immediately after the conclusion of the hearing. Such a procedure has a number of clearly discernible advantages: it saves considerable delay in the resolution of the grievance, as well as the added expense of paying for the time spent by the arbitrator in studying the record and writing his decision and opinion. It also obviates any need for posthearing briefs. The resort to bench awards also has equally apparent disadvantages. Of necessity, the arbitrator's decision will be less well considered than if he had more time to reflect upon it. The procedure is obviously unsuited for complex cases in which, if I may use myself as an example, the arbitrator may not finally decide how to rule until after he has written down a summary of the facts and of the parties' arguments. It is also arguable that the parties may lose something valuable when they dispense with a formal written opinion that analyzes their respective positions and explains in greater detail than would ordinarily be possible in a bench opinion why the arbitrator decided the way he did—but that choice, after all, is one they are entitled to make for themselves.

However an arbitrator weighs the arguments in favor of or

[16]*See* "Mediation by an Arbitrator," paragraphs 53–58.

against bench awards, his primary obligation to the arbitration process, in my view, is to do the very best job he can, and if he feels uneasy or insecure about issuing bench awards, he should so advise the parties, even if this means that they will turn to someone else. If the arbitrator has some sort of continuing relationship with the parties, the problem can be rather easily resolved. He and the parties can agree on guidelines for resort to bench awards, thus permitting the arbitrator to use that procedure in the kinds of cases in which it presents no difficulties for him, while reserving his right to prepare written decisions and opinions in the more complex matters.

VI.

In the course of paying his profound disrespects to members of a calling which he himself had long pursued before he was elevated to the federal bench, Judge Hays branded all but a "handful" of arbitrators "wholly unfitted for their jobs" and lacking "the requisite knowledge, training, skill, intelligence, and character."[17] Basing his indictment "upon observation during twenty-three years of very active practice in the area of arbitration and as an arbitrator, and upon the hints I pick up in the literature here and there,"[18] Hays proceeded to paint a picture of arbitrators and the arbitration process that calls to mind the revelations of Jimmy (the Weasel) Fratiani about the folkways of organized crime. In one of his more restrained comments, Hays observed:

> "The literature of arbitration today, and it is among the dullest and dreariest, consists almost entirely of subjective discussions of arbitration written by arbitrators, who are likely to know very little about arbitration outside their own experience—and about their own experience are not inclined to frankness."[19]

As a remedy, he recommended "frank and thoughtful studies" of the arbitration process by its "clients."[20]

With the rise of a new literature of "critical labor law theory" by a small group of talented legal thinkers on the Left,[21] we can expect further criticism of the arbitration process, although one

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[17] *Supra* note 11, at 112.
[18] *Id.*, at 111.
[19] *Id.*, at 38
[20] *Ibid.*
[21] *See, e.g.*, the Forum devoted to this subject in 4 Ind. Rel. L.J. 449 (1981).

hopes it will be more carefully researched than was Hays's irresponsible diatribe. Meanwhile, those of us who still believe that, despite its faults, our grievance-arbitration system is a praiseworthy and successful social invention ought to make sure that we are not deluding ourselves, and that our perceptions are true reflections of reality. Exercises of the type we are engaged in this morning are useful; they also support an observation I made some years ago that no other group of specialists seems "to take such perverse delight as do arbitrators in examining their own real or imagined deficiencies in private sessions and inviting criticisms by others in public meetings."[22]

It must be admitted, however, that we usually end up giving ourselves passing grades. Perhaps the time has come for the Academy, in company with other organizations, to sponsor a searching and objective inquiry into the arbitration process, with special emphasis upon the conduct of arbitration hearings. The research team should include persons having no connection with arbitration. Such an inquiry should provide us with valuable information—some of it probably unpleasant—about how arbitration actually works, and it would give us, in the words of the poet, the priceless gift

> "To see oursels as others see us!
> It wad frae monie a blunder free us,
> An' foolish notion."[23]

Comment—

ANDREA S. CHRISTENSEN*

Issues relating to the duty of fair representation and conduct of the hearing are generally viewed as primarily union concerns. But if an arbitration award is challenged, the issue of the underlying fairness of the hearing becomes equally important to the employer. Thus, if the arbitrator fails to conduct what is perceived by any of the participants to be a fair hearing, the company will normally become a participant in any subsequent court challenge. The costs related to any rehearing that may result

[22]Aaron, Book Review (Hays, Labor Arbitration: A Dissenting View), 42 Wash. L. Rev. 976, 978 (1967).
[23]Burns, "To a Louse" (1736).
*Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y.

from an unenforceable award as well as the costs of any court litigation will be borne equally by the employer. If the award is overturned, the employer stands liable for any back pay, damages, or remedial action that is ordered by the court.[1] Some courts have also directed that the company pay or participate in the payment of the challenger's legal fees and costs.[2] Cases have also been remanded to arbitration before a new arbitrator where the original arbitrator's decision cast doubt upon his impartiality toward the contested terms of the collective bargaining agreement.[3] It is, therefore, of critical importance to a company representative that the conduct of an arbitration hearing be perceived by all participants as being fair and in compliance with fundamental principles of due process.

In preparing for this presentation, I have reviewed various state and federal judicial and administrative decisions that have been critical of, or have vacated, arbitration awards on the grounds that the conduct of the hearing was procedurally defective. Increasingly, the losing party in an arbitration proceeding is resorting to the courts to try again. In order to avoid multiple hearings on the same issue, we must become sensitive to what courts believe to be a fair hearing and under what standards the courts will enforce an award as having emanated from a fair arbitral proceeding.

An area of increasing concern to the parties, the courts, and Professor Aaron is the role of the grievant and/or his personal representative at the arbitration hearing. Not only because of its cathartic effect but also because of the likelihood that the process will be better served, I believe that a grievant should be asked to attend the hearing. In cases where the grievant has a personal stake in the outcome, I, as an employer representative, would object to the commencement or continuation of a hearing if the grievant were absent. Most arbitrators with whom I have worked have agreed with me. Not only does the grievant's presence at the hearing eliminate one ground for subsequent challenge, but even though the grievant may not be convinced of the correctness of the result if he loses, there is a faint hope that his observation of, and particpation in, the hearing may persuade

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[1]*Grane Trucking Co.*, 241 NLRB 133, 139, 100 LRRM 1624 (1979).
[2]*Holodnak* v. *Avco Corp.*, 381 F.Supp 191, 206–207, 87 LRRM 2337 (D. Conn. 1974), *aff'd in part, rev'd in part on other grounds*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1975).
[3]*Grand Rapids Die Casting* v. *Local 159*, 111 LRRM 2137 (6th Cir. 1982).

him of its inviability. Therefore, absent extraordinary circumstances, the arbitrator should decline to open the hearing in the absence of a grievant who will be personally affected by the decision.[4]

The issue as to whether a grievant should be called as the employer's first witness, or as any witness for the employer, is not a concern of mine, since I view such activity to be unnecessarily abrasive and foolhardy. It has not been my experience that witnesses who are hostile to your point of view provide helpful or predictable testimony for your case. If the union elects not to call the grievant as a witness, that carries its own message.

In the case where the interests of the grievant and union diverge or where they are two union employees with conflicting interests, I have found it to have a salutary effect (albeit expensive) for the union to provide counsel for both employees.[5] Alternatively, a request can be made of the second concerned employee (if he is not the one the union is currently representing) to intervene in the proceedings. It has been held by one federal court that an arbitrator's refusal to permit such intervention rendered the award unenforceable.[6] Questions then arise as to whether the intervening employee should be represented by his/her own counsel. Due process would seem to require it since the union has already stated that it does not represent the individual's interests, and obviously the arbitrator cannot represent the individual.

The alternative proposed by Professor Aaron of calling the individual employee as his own witness has several practical drawbacks. Most significant is the obvious discomfort of the employee who is called out of the plant without notice and without preparation and is expected to testify as to matters on which his recollection may be weak and which may be very complicated and difficult to articulate. This individual's testimony will be pitted against that of other witnesses who, at a minimum, have a representative at the hearing and most likely have been prepared for their testimony. The end result may well be the same as if the nonrepresented employee had never been asked to testify.

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[4]*Grane Trucking Co., supra* note 1, at 137–138.
[5]*See, Russ Togs, Inc.*, 253 NLRB 767, 106 LRRM 1067 (1980).
[6]*Sedita* v. *Board of Education*, 82 Misc.2d 644, 371 N.Y.S.2d 812 (1975). *aff'd in part*, 53 A.D.2d 300, 385 N.Y.S.2d 647, 93 LRRM 2467 (1976), *rev'd on other grounds*, 43 N.Y.2d 827, 402 N.Y.S.2d 566 (1977).

The issue of whether the grievant should have his own lawyer at the hearing and, if so, what role the lawyer should play during the hearing is not a problem that generally concerns management. I have never objected to the presence at the hearing of the grievant's personal lawyer. In my view, if the grievant is represented by his own lawyer instead of the union, the grievant assumes the risk that his retaining personal counsel may affect the arbitrator's view of the case.

Where the grievant's lawyer is not permitted to participate actively in the arbitration proceeding, the arrangement has the salutary effect of reducing the length of the hearing, but there is the possibility that the grievant's lawyer will subsequently challenge the award on the ground that the union's lawyer failed to represent the grievant properly. Obviously, lawyers are adept at finding fault in the trial techniques of their colleagues.

One alternative used by some arbitrators is to ask the grievant's lawyer, at the conclusion of the hearing, to state his views as to the fairness of the hearing vis-à-vis his client. This is a novel approach, but offers the lawyer something of a Hobson's choice since he has to choose between offending the arbitrator before a decision is rendered or creating a record that would defeat a subsequent challenge under a duty of fair representation claim.[7]

Another area of concern to the courts, and I am sure to arbitrators as well, is the one in which an arbitrator's intervention in the hearing has led to a challenge of the result. Thus, questions have been raised where arbitrators have cross-examined witnesses too vigorously at the hearing, a technique that also has the drawback of unnecessarily prolonging the hearing.[8] Also suspect are arbitral comments at the hearing as to a witness's credibility and instances where the arbitrator is openly critical of the contractual procedures negotiated by the parties or where he gratuitously advises the parties as to revisions that should be made in their contract language. In one case the court found the arbitrator's comment that the contractual procedures "shocked his conscience" raised serious questions as to whether the final award was dictated by his personal bias against the contractual procedures or by the merits of the case. Absent other independent grounds to sustain such an award, it would be vacated.[9]

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[7]*Liotta* v. *National Forge Co.*, 473 F.Supp. 1139, 1145, 102 LRRM 2348 (W.D.Pa. 1979), *aff'd in part, rev'd in part on other grounds*, 629 F.2d 903, 105 LRRM 2636 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).
[8]*Holodnak* v. *Avco Corp.*, *supra* note 2, at 198–199.
[9]*Grand Rapids Die Casting* v. *UAW Local 159*, *supra* note 2 at 1156.

In another case an arbitrator stated in his award that he was unable to make any credibility findings because he found that none of the witnesses had clean hands; he refused to make any factual findings and, instead, referred to the critical facts in the case as "alleged incidents"; and he noted that he would put the case in his files under the caption "Swiss Cheese" because it had so many holes in it. Though the arbitrator may be praised for his candor in chastising the parties' representatives, the result was an award that was viewed as unacceptable by the NLRB.[10]

Arbitrators should try to advise the parties as to their understanding of the evidence that has been presented and should, where appropriate, outline the parties' respective positions without commenting on their validity. On the other hand, any comment an arbitrator makes at the hearing that can be interpreted as critical of one side's position forces that party to scurry around to find additional witnesses or documents to shore up what he believes to be a weakened case.

An arbitrator's brief questions to clarify factual issues are helpful to the parties, but he/she should raise new contractual arguments not mentioned by the parties only after notice to, or consultation with, both representatives. The arbitrator need not agree with the parties, but he/she should be aware of their respective positions before launching into uncharted waters in the parties' agreement. Indeed, in any case where an arbitrator is concerned as to whether one side's case is being properly presented, the arbitrator can speak privately, in camera, to the representatives and should do so before jumping into the fray, with the resulting risk of appearing partisan.

Although an arbitrator's refusal to admit relevant evidence will constitute reversible error, arbitrators should not seek refuge by admitting any evidence proffered "for whatever it's worth." Particularly troublesome to the process are the massive exhibits that have not been marked by the party introducing them for specific areas of interest and which normally the arbitrator has no intention of considering in the final award. If the arbitrator is going to accept such exhibits, he/she should notify the parties whether or not he intends to look at them and, if so, what significance he thinks the exhibits might have. Otherwise, the opposing party may feel compelled to create competing and

[10] *Triple A Machine Shop, Inc.*, 245 NLRB 136, 102 LRRM 1559 (1979).

equally voluminous exhibits that will ultimately be totally irrelevant to everybody. It is understandable that arbitrators will continue to admit the "kitchen sink" since courts are more likely to vacate an award where evidence has been excluded than where it has been unnecessarily admitted.

In my research, I found that arbitrators have tripped over a variety of what would appear to be obvious procedural hurdles to the point where their awards have been rendered unenforceable. The following are some examples of what may not be normal arbitral practices, but which have occurred with disturbing frequency.

In one case an award was vacated where the arbitrator disregarded the testimony of an eyewitness on the grounds that the testimony should have been provided as part of the employer's case in chief and not as rebuttal testimony.[11] Citing favorably Professor Aaron's view that an arbitrator will accept any information "that adds to his knowledge of the total situation," the court found that the employer had been denied a fair hearing since the arbitrator had not announced in advance, and the collective bargaining agreement did not specify, that strict courtroom rules of evidence would be applied. The court also seemed dismayed that the arbitrator had not been called to testify at the trial—presumably unaware of the possibility that the American Arbitration Association and the arbitrator most likely would have opposed any such appearance.

Although normally it is the practicing lawyers who represent the parties in arbitration hearings who have been accused of burdening the process with technicalities, their brethren who sit at the head of the table have also been found guilty of insisting upon the observance of hypertechnical rules of evidence and procedures,[12] or enforcing strict rules of evidence with which at least one of the parties is unfamiliar.

An arbitrator's refusal to grant an adjournment when the employer's chief witness became ill at the hearing, and where the employer and his remaining witnesses thereafter walked out, rendered unenforceable the arbitrator's award of $100,000 damages to the union.[13] Though the arbitrator was understand-

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

[12] *Western Electric* v. *Communication Equipment Workers*, 554 F.2d 135, 95 LRRM 2268 (4th Cir. 1977), *aff'g*, 409 F.Supp 161, 91 LRRM 2621 (D. Md. 1976).

[13] *Allendale Nursing Home* v. *Joint Board*, 377 F.Supp. 1208, 87 LRRM 2498 (S.D.N.Y. 1974).

ably irritated by the numerous delays occasioned by the parties, his peremptory conduct was viewed as "overkill." Similarly, an arbitrator's refusal to accept one party's reply brief where the controversy had been submitted by briefs was grounds for vacating the award and directing that the case be heard by another arbitrator.[14] In still another case, an arbitrator's failure, because of multiple hearing dates, to allow cross-examination of a critical witness rendered the proceeding unfair and subject to rehearing, in the NLRB's view.[15]

An arbitrator's award was overturned on the grounds of bias in a case where the arbitrator questioned a union dissident as to his political and personal views and badgered him to the point where he finally admitted that he now supported the union.[16] The announcement by the union at the outset of the hearing that they did not represent the grievant and the subsequent failure of the arbitrator to provide any procedural safeguards for the grievant resulted in an unenforceable award.[17] Finally, where an arbitrator failed to issue his award for six years after the close of the hearing, a federal court ordered the arbitrator removed, directed him to return all exhibits, and enjoined him from collecting any fee for his services.[18]

Although, obviously, some of these cases are dramatic aberrations, it is still clear that as losing parties discover that courts will be sympathetic to their challenges of arbitral results, the challenges will become more frequent and the grounds for them more sophisticated.

Comment—

JUDITH P. VLADECK*

To take issue with Ben Aaron is a formidable, intimidating process. Respect for him as an outstanding scholar and practitioner in the world of labor arbitration is inhibiting. Of equal, or perhaps more, concern is that, in challenging his views about

[14]*Green-Wood Cemetery* v. *Cemetery Workers*, 82 LRRM 2894 (N.Y. Sup. Ct. 1973).
[15]*Versi Craft Corp.*, 227 NLRB 877, 94 LRRM 1207 (1977).
[16]*Holodnak* v. *Avco Corp.*, *supra* note 2, at 198–199.
[17]*Russ Togs, Inc.*, *supra* note 4, at 767.
[18]*Local 508, Graphic Arts International Union* v. *Standard Register Co.*, 103 LRRM 2212, *motion denied*, 103 LRRM 2214 (S.D. Ohio 1979).
*Vladeck, Waldman, Elias & Engelhard, P.C., New York, N.Y.

"The Role of the Arbitrator in Ensuring a Fair Hearing," one is required to quarrel publicly with expressions of support for fairness, truth, and due process. One might as well say harsh words about motherhood and the flag. But, with due respect to Professor Aaron, and due process, I am obliged to dissent.

I start with an area of agreement. The subject of fair hearing and the arbitrator's role has been well and fully debated in prior meetings of this body. Reading the 1958 Willard Wirtz paper and that of Robben Fleming in 1961,[1] as well as the comments that followed them, makes one aware that arbitrators and representatives of the parties have struggled with these questions for decades and anticipates many of the issues that Ben has addressed.

So what is new? What is new is that today we are dealing with an institution that is sufficiently mature to warrant a fresh analysis. It behooves us to keep examining and reexamining the process because whatever disagreements we may have—the arbitrators and the "clients"—the consensus remains firm: the labor-arbitration system is useful. It deserves to be nurtured and kept alive.

I suggest that in the new examination, we should focus on the following:

1. Is the view, expressed by Professor Aaron, that the arbitrator is concerned with balancing the interests of *three* parties—the employer, the union, and the grievant—correct? Or is it an arbitrator-created fiction?

2. Is the purpose of an arbitrator hearing, as Professor Aaron described it, "to come as close to the 'truth' about the matter in dispute as it is possible for fallible humans to achieve in the circumstances"?

3. Is the view of fairness in the arbitration context as requiring the equivalent of "due process" correct, or is fairness in the arbitration context something else?

I.

In addressing these questions, it is my view that we mouth, but fail to hear, the basic principles that underlie the process: that

[1]Wirtz, *Due Process of Arbitration,* in The Arbitration and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 1; Fleming, *Due Process and Fair Procedure in Labor Arbitration,* in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 69.

grievance arbitration is a method of settling disputes, that it is the result of a voluntary agreement of the parties in a collective bargaining relationship, that it is an extension of that relationship, and that the arbitrator is a creature of the parties. We forget what we once all knew: the process is an integral part of the collective bargaining relationship of the employer and the union, adopted by them to serve as a terminal point in their grievance procedure. It can be as broad or limited as they choose—who the arbitrator is, what issues he may hear, what remedies he may award, how his decision shall be treated. All of these are for the parties to determine.

I believe that in the past two decades the process has been subverted, taken away from its creators, and is being made into some bastardized version of what was intended—now neither fish nor fowl nor fine red herring.

The departure from its essential characteristics was signaled in the Wirtz article, where Wirtz said he was prepared to argue for the proposition "that the discharge of the arbitrator's function of determining the ground rules for the arbitration proceeding requires a broad balancing of interests, including recognition of independent individual interests even where this means . . . piercing the institutional, representative veil."[2]

Wirtz acknowledged that this was a view not shared by many of his colleagues, and he cited Harry Dworkin, Herbert Blumer, Philip Marshall, and others. Indeed, Wirtz quoted Dworkin who had said:

> "Arbitration usually results from a voluntary agreement of the parties in which they bind themselves in advance to observe the terms of the award. Thus, whether the results be good, bad, or indifferent . . . such effects are calculated risks which the parties have seen fit to assume. . . . The decision is not unfair where it results from the application of standards agreed to by the employee's duly authorized collective bargaining agent. . . . Everything has been handled according to due process, including the award in which the employee is 'thrown to the wolves' since it results from the employee's voluntary action."[3]

The Wirtz view of arbitration as involving three parties, with the arbitrator in the paternalistic position of protector of the individual grievants, has, by passage of time, and with the tacit or passive acquiescence of the real parties, appeared to have acquired legitimacy. If unchecked, I predict it will kill the pro-

[2]Wirtz, *supra* note 1, at 35.
[3]*Id.*, at 4.

cess. Professor Aaron does not question the proposition. He assumes it, saying, for example, that in promotion or discipline cases, the grievant has a personal stake that must be recognized in addition to the union's interest in protecting the integrity of the collective bargaining process. This is a backward proposition if ever one was uttered, since the grievant has no personal stake *without* collective bargaining.

As a practical matter, what difference does it make if the arbitrators who now adopt such an approach as a given differ with the views of the union "client"? To me, the difference is fundamental. Governed by such an unstated rule, the arbitrator no longer acts as an umpire, serving to resolve issues between the actual parties—the union and the employer—but, instead, is a surrogate representative of the grieving employee, skewing the hearings to achieve what he considers fairness for the individual. Apart from the offense implicit in the arbitrator's notion that he can and will do a better job for the workers than their union, it disserves the fundamental purpose—the extension and preservation of the collective bargaining process.

The arbitrator who sees the individual grievant as having a "personal stake" as separate from his union, and for humanitarian reasons elevates the grievant's "interests" to that of a contending party, risks the ultimate destruction of the union, without which no worker in the plant will have any right.

We cannot for one moment afford to forget—without unions, workers have no due process in their employment. Workers leave their constitutional rights at the factory gate. From the moment they enter, they may be searched, spied upon, eavesdropped on, photographed, interrogated, subjected to lie detector tests and psychological exams, fired without cause, or sometimes even worse, fired for having exercised a constitutional right. Only if the union is the representative of all of the members of the unit, and only if it speaks for them in one voice can it be effective. No one questions the authority of the management spokesman to speak authoritatively for the employer; only the same acknowledgement of the union as representative will preserve the status of the parties to the collective bargaining process as coequals in that process.

I suggest that arbitrators have unwittingly tread where Congress and the NLRB have not. In collective bargaining, the union has the legal power and authority, as well as the duty, to serve as the exclusive representative. In those circumstances in which the courts or the Board may find that the union has not

fairly represented the member, the remedy is with the courts or the Board. The arbitrator should not arrogate to himself the authority to create his own duty of fair representation jurisprudence.

II.

Stemming from the confusion engendered by the Wirtz view that the arbitrator should be endowed with "the obligation and authority to look, in the protection of certain individual interests, to standards that are unaffected by the individual's election of representatives and by the actions of those representatives," we have come to the Aaron view of the arbitrator as activist, an independent pursuer of truth, regardless of what the parties present to him. This thinking is expressed in three suggestions made by Professor Aaron:

1. That an arbitrator is free to draw a negative inference from the union's decision not to call the grievant as a witness (or perhaps worse, to voice such an intention during the hearing).
2. That in cases where he "suspects that the union does not intend to present an effective case in support of the grievant,"[4] it would be desirable for the arbitrator to recommend to the union attorney that he cannot fairly represent the grievant and to propose that the grievant be permitted to choose his own counsel.
3. In a promotion case where the grievant has been passed over for someone less senior, where the union does not do so, that the arbitrator should (and Aaron says he does) call the employee who was promoted as the arbitrator's own witness.

Professor Aaron explains that this is necessary because the arbitrator "cannot always be sure that the union has dealt fairly with the promoted member in explaining why it is supporting the challenge to the company's decision to promote him."

For those who are caught up in the notion that they have been appointed as independent searchers for the truth, and who are not acquainted with it, I recommend a brilliant disquisition on the subject of the search for truth in another forum—Judge Marvin Frankel's great essay, "The Search for Truth, an Umpirecal View."[5]

Judge Frankel seems to suffer from the same pangs that afflict

[4] *Id.*, at 5.
[5] Frankel, 123 U. Pa. L. Rev. 1032 (1975).

Professor Aaron, "that our system of justice, adversary as it is, rates truth too low among the values that institutions of justice are meant to serve."[6] (I do not accept Professor Aaron's disclaimer that labor arbitration is not an adversary proceeding.)

Judge Frankel explains that the process is not designed to ferret out truth by pointing out that in our judicial system an advocate's prime loyalty is to his client and not to the truth as such—that in the last analysis, truth is not the only goal. If it were, he suggests, there are other more efficient methods of pursuing it, for example, as with research in medicine or history.[7]

Judge Frankel addressed proposals for controlling adversary excesses in the trial process which are relevant to our discussion: intervention by the judge, and better training and regulation of counsel. I will not address his second point since, in my view, the parties to the labor arbitration process have the right to choose their own representatives, at whatever level of competence, just as they have the same right in choosing their arbitrators.

But his examination of the intervention by judges deserves substantial attention from those arbitrators who have decided, in their quest for the truth, that they may call witnesses, interrogate those called by the parties, and in other ways insist on controlling what evidence is presented to them by the parties.

Judge Frankel starts his discussion with my favorite lines. Referring to the statement that in a trial in the federal courts, the judge is not a moderator, he says: "It is not inspiring to be a 'mere' anything. The role of moderator is not heady" (p. 1041). He goes on to say:

> "The fact [is] that our system [which prohibits a judge from investigating or exploring the evidence before the trial] does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored and abandoned after fuller study. He risks at the minimum the supplying of more confusion than guidance by sporadic intrusions.
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> . . .

[6] *Id.*, at 1036.
[7] *Id.*, at 1042.

> "Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times."[8]

While Judge Frankel raises the question of whether the virginally ignorant judge is always to be preferred to one with an investigative file, at least in our larger system of justice, these questions are asked. It is not assumed that they may be definitively answered by the judges.

III.

"Due process" is used loosely in our discussion. Due process is not an abstract doctrine: it varies with the subject matter and the situation; it depends on the circumstances. If we mean the right to be heard, we should say so. If we mean those elements which have been considered as part of due process in a criminal case—presumptions of innocence, right of confrontation—we should say so.

In labor arbitration, your notion of due process and mine may differ. We are bound by the rules of law—in New York there are statutory requirements—and, generally, we are bound to the rules of the agency administering the process.

But let us not trade charges of lack of due process, or denials, without more care. If we believe that the parties may develop their own procedures, then we have to concede that absent any statutory or tribunal rules, the parties are free to decide what is fair. Arbitrators may not, I submit, select blindly, and at random, from rules developed for other procedures and other forums, those parts of due process they prefer.

Philip Marshall, who was also quoted in the Wirtz paper, said, and I agree:

> "The fundamental question is what the parties expect of the arbitration process. I believe that they have the right to get what they expect and that if what they expect does not conform to the niceties of 'due process,' it is not the arbitrator's function to alter their voluntary arrangement in the absence of any applicable law which demands otherwise."[9]

If what I have said is heard as reducing the arbitrator's role to "mereness," I do not so intend it.

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[8] *Id.*, at 1036.
[9] Wirtz, *supra* note 1, at 4, n. 4.

You may ask what it is I want of arbitrators. In general, I hope for intelligence, integrity, impartiality, sufficiently secure egos so that they do not need the process as a vehicle for self-promotion. Sufficient kudos will come to those who can serve the function for which they have been named.

What is a fair hearing in my view? It is not bits and pieces of what in the trial courts we call due process, but it has the same root—a fair-minded trier, an opportunity to be heard, to be listened to, to be judged without fear or favor.

The particular kind of hearing is within the control of the arbitrator—we take our chances with his personality. It will be long or short, formal or relaxed, largely as a result of what he or she prefers at the moment.

But what I want is someone who, in his or her own style, knows what the process is, knows what his place in it is—someone who will not try to do my job for me or tell me how to do it. I don't want someone who thinks he is there to police my conduct or, indeed, that of the employer, except to the extent that we ask him to do so.

This is not a *mere* cipher's job. It is vastly important to the peaceful, orderly relationship of the parties to the agreement. The arbitrator is indispensable; his judgment is what is bargained for and relied upon.

As a final point, to bolster an unpopular position, I rely on a higher law, the Torah, which reminds us: "Each was given a task, for each individual will not find the center of gravity of the universe within himself, but in the whole of which he is an essential part."

Discussion—

MR. AARON: I hadn't intended to make an instance-by-instance reply to the various points being made, but I feel that I have been negligent in not making it very clear at the outset that I assumed everybody realized that the expression of these views is inevitably idiosyncratic. I am not trying to say what every arbitrator should do. I indicated what I thought was comfortable for me, and I tried to explain, in giving my examples, that the spectrum of views on this subject was very, very broad. If you happen to disagree with the suggestions I made and what I said I would do, you have a perfect right to do so. Although I am full

of admiration for Judith's excellent presentation, I must say that I am totally unconvinced. I adhere to the views that I expressed, and I really feel, in some respects, that we are talking about quite different things. I don't think the arbitrator is like a judge. I don't think an arbitration hearing is like a judicial trial. For that reason, there are a lot of things about her presentation that seemed to me to indicate that we are sort of passing each other in the night rather than meeting head on on certain of these problems.

RALPH SEWARD: In spite of Ms. Vladeck's well-taken reminders that arbitration should be a process created by the parties, but that it often is not, what is being discussed today should be issues less for arbitrators than for labor and management, because it is for them to decide what kind of arbitration they want, to what extent grievants, if necessary, should have separate representation, whether or not independent counsel can be invited and under what conditions, and to what extent an arbitrator should have investigative powers. Many arbitrators have been granted investigative powers by their parties. I think that the extent to which these issues are being discussed as though they were primarily for arbitrators to decide represents what is unfortunately a great vacuum in the field that should be filled by joint decisions of labor and management.

NEIL BERNSTEIN: Related to what Ralph has said, I think one of the strengths of the arbitration process is the great diversity of arbitrators and arbitrators' philosophies that are available. Those parties who want an activist arbitrator can find activist arbitrators all over the country who will come in and take over a hearing for them and show them how a case should be handled. Those who want something closer to a mere moderator can also find plenty of arbitrators who will serve according to that model. I would suggest that the parties who do have strong feelings as to what they want or don't want from an arbitrator should take that into account in making their selection, and those arbitrators who are too far out of line in their images will find that the marketplace will take care of them in due course.

J. E. ISAAC: I find myself completely on Professor Aaron's side, as I view it very much in the context of the arbitration system as it operates in Australia, which is a compulsory arbitration system concerned with interest as well as grievance disputes. It seems to me that the difference between Professor Aaron and Ms. Vladeck may be given some solution if, so to speak, it's

borne in mind that my acceptance of Professor Aaron's position is based on the view that an arbitration process is concerned not only with the parties before the arbitrator, but also with the public interest, which is the basis on which the Australian public arbitration system operates. The question, therefore, is whether a collective bargaining agreement can or should ignore the public interest or should be more narrowly based on the immediate interests of the parties concerned.

WILLIAM SIMKIN: I would like to ask Ms. Vladeck to comment on this problem. I think I can state with fair accuracy that all of us who have been around for a while get a sizable proportion of grievances submitted by unions where the responsible union officials desperately want to lose, but where they feel forced to bring a case to arbitration either for internal political reasons or in reaction to some of what I think is unfortunate legislation that has been enacted in recent years. If that is the case, would you comment on the arbitrator's problem in that kind of situation, assuming that he is able to detect it.

MS. VLADECK: Of course we have cases such as that. You have them. We have them. The arbitrator has to be guided by some conscience. I don't ever ask any arbitrator to stultify himself. I think the arbitrator, as a realist, takes into account the environment in the shop, and if he knows that the person whose case is being brought is a problem, it may well affect his judgment—but I'm not asking that it do so. That's his problem. I give it to him. That's why I have an arbitrator.

MR. SIMKIN: I shouldn't add any more, but I've always felt that one of the greatest crimes an arbitrator can commit is to let a union win a case that they want to lose. There is some kind of crazy psychology in labor relations where if a union loses an arbitration case that they desperately want to win, when it comes to the next negotiation, they have a chance to get their rights through negotiations, whereas if they win a case they desperately want to lose, they are almost disbarred from getting that corrected in the next negotiation.

PETER SEITZ: We've heard a great deal to our advantage and profit about truth. Of course we all search for it, and we hardly ever get a piece of it ourselves. Arbitrators pursue truth perhaps no more than others in the population, or attorneys for management or union. I'm sure that Judith Vladeck doesn't want to put us in the position of Pontius Pilate who is alleged to have said, "What is truth?" and stopped not for an answer. But we're not

here to look for truth, and I think that she misconstrued Ben Aaron's remarks when he talks about the search for truth. We're there to make a decision, and we hope that the decision will be a correct and fair one. We are doing it frequently under extremely difficult circumstances where the level of advocacy unfortunately can be quite low. When the arbitrator sits there and has to make decisions on credibility and decisions on facts, he's not looking for truth, he's looking for accuracy. He has to make findings. I think a great deal of the difference between Mr. Aaron and Ms. Vladeck is related to a failure to recognize that distinction.

BEN FISCHER: I've been sitting next to Dave Feller and, modest fellow that he is, he didn't take issue with the misinterpretation of the Court decisions known as the *Trilogy*. We know, of course, that the *Trilogy* said that arbitration does not carry with it some obligation to protect the public interest. I think our friend from Australia really did well by this proceeding by pointing out what they have in Australia because it illustrates what we do not have here. I don't think the arbitrators have any interest in protecting the public interest except as citizens, nor do they have an obligation to do for the parties what the parties are so incompetent in doing. I am sympathetic with their problems, but nevertheless I think arbitration must resist trying to correct the inadequacies of collective bargaining or trying to defend individual workers through a process that is not designed to do that. As Judith has pointed out, it is designed as an extension of the collective bargaining procedure. It is part of that procedure, and it seems to me that Ben Aaron's philosophy—the notion that an arbitrator somehow has to protect the individual's interest—can really destroy the whole process. That's not what it's for *unless* through legislation or other means we decide on a whole new system of labor-management relations. I think that Ben's point of view is entirely respectable, but it is not the one we have, and it seems to me that we have to proceed with what we have. What we have is not arbitration as protector of the public interest or of the individual's interest.

ARCHIBALD COX: It seems to me that it is a matter of degree. As an arbitrator, I don't believe that I'm there in some independent role as the guardian of individuals or of the public. But if the parties want my name on a piece of paper, there are certain things that I think I owe to myself, and to some degree to the process, not to do. There are some things that the parties ought

to do themselves, by collective bargaining. If these things are out of the range of what I regard as reasonably fair and decent, they can't ask me to take the responsibility. But if they are within that circle, which is awfully hard to define abstractly, then I think my philosophy would call on me to help. I think Ben's case about the leaders of the wildcat strike is one where it is very tempting to say to the union counsel, "You have a right to drop these grievances, but if you really want to go through a process of having what purports to be an independent decision as to whether the grievants were fairly treated, the only way we'll get that is to have the grievants' lawyer, if they want one, present their case. You can do it the way you want, but I don't think I want to be part of the charade that, in a sense, is going to deceive them and the rest of the world." But I don't know. The other half of me says that maybe counsel for the union are being very responsible, and I confess that I would be influenced by who they were.

MR. AARON: I realize that I am having more than equal time, but I would like to tie together what I understand to be the main drift of the discussion. Lest I seem to be donning the guise of a wild man who's recommending that the arbitrator take over every hearing and tell the parties what they can and cannot do, I should like to reassure you on that point. Going back to the point Ralph Seward made, it seems to me that if the parties really want to keep control of the proceeding down to the last detail, they can agree on their procedural rules. Then, if the arbitrator is unhappy with these rules, he ought to withdraw. He should not override what the parties have agreed they want to do. These problems arise only because the parties haven't done that, and it is therefore up to the arbitrator to decide what to do in the absence of any specific rule to the contrary. Judith and Ben Fischer express a basically different philosophy, and to me it is just a different aspect of the whole problem we had when we got the first interpretation of Section 301 of the Taft-Hartley Act. There were those, like Harry Shulman, who argued that the courts shouldn't have anything to do with the arbitration process, that arbitrators' decisions ought not to be enforceable in the courts, and that the need to enforce them meant that there had been a breakdown in the process—that it wasn't serving the function for which it was intended. That meant that the only way you could enforce an award, if it was in favor of the union, was by strike and other means of self-help on the part of the parties.

That was it. Well, the courts decided otherwise. Now we have statements that the arbitrators ought to do simply what they're there to do—what the parties want them to do. They're not to exercise any independent initiative except to reach a decision, which is what the parties want; everybody else should leave them alone, and the idea that there is some broader public policy at work here is wrong, contrary to the situation in Australia. But the courts have decided otherwise. Now when we come to the question of what is the future of the arbitration process, Judith says that if it proceeds along the way that she thinks my ideas will lead, the process will collapse. My perception is that if the arbitrator is the mere creature of the parties and no attempt is made to take into account the interest of the individual employees, regardless of how that may jibe with your notion of what the collective bargaining process is about, then I think that the process is going to collapse or, what is perhaps worse, it will be made over by legislation or by judicial decision into something far less useful than it is today. I think that is the basic difference between us.