CHAPTER 8

# INVESTIGATORY DUE PROCESS AND ARBITRATION

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In connection with my assigned topic of due process and arbitration, I have been asked to research whether there is a common trend in the arbitral community on this matter. After reviewing published cases of the last 10 years, after reading countless articles, and after talking with many of you, I can report that the answer to that question is no—there is no common arbitral trend. After that answer I should be able to sit down and enjoy the remarks of my fellow panelists. However, I understand that more is expected of me; therefore, I shall elaborate.

## The Issue

The issue of investigatory due process is illustrated by the following situation: Joe has worked on the loading dock for three years. One day a co-worker tells Joe's foreman that he and other workers just saw Joe loading $1,000 worth of company tools into his car. The foreman calls Joe into his office the next day and summarily fires him. When Joe protests, he is told to save his breath and file a grievance. At arbitration the evidence is overwhelming that Joe did, indeed, misappropriate company property. The issue here, of course, is one of process. When this matter gets to arbitration, the central question is: To what extent can, or should, an arbitrator determining just cause go beyond the merits of the case, i.e., did Joe do it, and is theft a dischargeable offense? This is a case in which arbitrators must consider their role not only as factfinders but also as monitors of the process of discharge.

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By no means do arbitrators agree that the standard just cause test requires, or permits, examination of the process of discipline as well as its merits.[1] While due process may seem like the flag and motherhood (who dares to criticize?), are employers who never agreed to procedural protections bound to provide due process involving impartial predisciplinary investigation and the right to respond? As Robben Fleming commented 30 years ago:

> All arbitrators are certainly concerned with fair procedure. However, the degree to which they should concern themselves with "good" industrial relations policy will be more debatable both among arbitrators and the parties.[2]

Before I discuss this question, let me highlight two scenarios I will not explore. First is the infrequent situation where the parties' labor agreement already contains negotiated process requirements. This is the easy case. We may not all agree with Willard Wirtz that procedural rules in contracts are usually enforced "to the letter," even when the result offends the arbitrator's sense of equity.[3] However, we recognize that interpreting and applying the parties' negotiated definition of due process is very different from superimposing our own notions of fairness onto an otherwise silent contract.[4] Second is the common situation where defective process has resulted in a failure of proof so that there is no just cause on the merits, i.e., where the employer has insufficient proof because it failed to conduct a fair and complete investigation.[5] Again, that is the easy case, different from today's topic.

What I will examine is the degree to which arbitrators are devising and imposing procedural ground rules on the parties, unguided and unrestrained by anything the parties have or have not done for themselves. To the extent this is happening, it is fair

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[1]*See, e.g.*, Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books, 1991), at 262.

[2]Fleming, The Labor Arbitration Process (Univ. of Ill. Press, 1961), at 135.

[3]Wirtz, *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books, 1958), 1, 9.

[4]As Daugherty has stated: "I'll apply their definition and not mine without hesitation. But if they choose not to define it, then what they bargain for is my interpretation of that standard weighed against the particular fact circumstances in their case." Quoted in McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, Lab. L. Rev. 387, 393 (July 1987).

[5]*See, e.g., Carpenters v. Bruce Hardwood Floors*, 139 LRRM 2774 (M.D. Tenn. 1992), where the court vacated an arbitrator's award, which conflicted with express terms of a labor agreement permitting the employer to discharge employees immediately and without warning for certain specified reasons.

to ask where we get that authority and whether we are violating the role the parties have assigned to us.

## Three Paths

In thinking about this matter, arbitrators can take one of three approaches:

1. We can conclude that investigatory due process is so intrinsic to just cause that an employer who fails to provide it will never meet that standard, no matter what the grievant has done. As Arbitrator Carroll Daugherty has argued, with clear reference to principles of criminal law:

> [B]efore the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure. Maybe X was guilty; maybe also there are many gangsters who go free because of legal technicalities. And this is doubtless unfortunate. But Company and government prosecutors must understand that the legal technicalities exist also to protect the innocent from unjust, unwarranted punishment. Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action.[6]

2. We can conclude that due process is a matter for the parties to define for themselves. Thus, unless the parties' agreement directs otherwise, an arbitrator has no right to superimpose due process requirements on them, whether those requirements are drawn from the U.S. Constitution, a sense of justice and fair play, or a perception of some "common law" of arbitration.

3. We can adopt a compromise approach. Arbitrators taking this path view procedural due process so important as to be intrinsic to just cause, but they decline to make it decisive except in the most compelling circumstances.

## Parameters of the Debate

To explore the thinking that underlies these different views, it is helpful to consider arguments advanced by two of our most notable colleagues: Carroll Daugherty and John Dunsford.

Daugherty, who died in 1989, is the best-known spokesman for the proposition that the just cause standard encompasses not only the merits of a case but also its procedural aspects. For

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[6]*Grief Bros. Cooperage Corp.*, 42 LA 555, 557 (Daugherty, 1964).

Daugherty, the employer's duty to accord the grievant a fair and complete investigation prior to discipline is basic and fundamental. Many others share this view. For example, in 1957 the Academy's first president, Ralph Seward, stated that in arbitration the "means are more important than the ends."[7] Thus, the results can be trusted only if the channels of decisionmaking and action are clear, true, and right.[8]

On the other side of the spectrum is John Dunsford. In his excellent presentation to this body at the Annual Meeting in 1989, he argued that rigid adherence to Daugherty's technical procedural requirements threatens the arbitration procedure by "superimposing artificial problems of the arbitrator's own making upon the real issues which are separating the parties."[9] There is support for this view in Justice Felix Frankfurter's observations 30 years ago:

> The stuff of these [due process] contests are facts, and judgments upon facts. Every tendency to deal with them abstractly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities. . . .[10]

A related concern that has threaded its way through many of our debates is that arbitrators do not overstep their boundaries and "give way to that most seductive of perfidious impulses, the desire to do good."[11]

*Daugherty's Seven Tests*

With these positions setting the contours of the debate, I will explore the issues in more detail, beginning with Daugherty's seven tests of just cause. Since 1964, when Daugherty first set forth his classic seven questions in *Grief Brothers*,[12] his test has been embraced as the single most definitive statement of just

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[7]Seward, *Arbitration in the World Today*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books, 1957), 66, 68 (cited in Wirtz, *supra* note 3, at 34).

[8]Wirtz, *supra* note 3, at 34.

[9]Dunsford, *Arbitral Discretion: The Tests of Just Cause*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 29, 36.

[10]Frankfurter, *A Note on Advisory Opinions, reprinted in* Constitutional Law, Selected Essays (1963), 126, 127–29.

[11]Getman, *What Price Employment? Arbitration, the Constitution, and Personal Freedom*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, ed. Dennis & Somers (BNA Books, 1976), 61, 66.

[12]*Grief Bros. Cooperage Corp.*, *supra* note 6.

cause.[13] The seven questions, appealing for their apparent simplicity and ease of application, have been uncritically recited not only by countless parties and arbitrators but more broadly disseminated by influential organizations such as the American Arbitration Association[14] and the American Bar Association.[15] Further proving my point, the Bureau of National Affairs has recently released a new edition of a text entitled, conveniently enough, *Just Cause: The Seven Tests.*[16]

Few can deny that this widespread heralding and repeated recitation of the seven tests has affected the view of most of us—neutrals and advocates alike—as to the "conventional" wisdom concerning just cause. Few of us have never heard of them; most of us have them routinely recited to us, as if we need go no further. For that reason it is important to briefly revisit those tests (at least those that review the manner by which management ultimately decided to discipline the grievant) and to understand that these requirements, repeated and applied uncritically by so many, do in fact raise issues that are profoundly complex and controversial.

As you will recall, the test is comprised of seven questions, all of which Daugherty suggests require a "yes" answer in order to find just cause to discipline.[17] Four questions are directed at the merits of the case, while the remaining three address the manner by which the employer handled its investigation prior to discipline. In these latter three procedural questions, with their accompanying notes, Daugherty specifies the dimensions of the "common law" requirement of due process, which he believes is firmly ingrained in the just cause standard. The complete text of those questions was included in the Proceedings of the Academy's 42nd Annual Meeting as an addendum to Dunsford's paper,[18] and I will not repeat them here. Their abbreviated form will suffice:

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[13]*See, e.g.*, Baer, Winning in Labor Arbitration (Crain, 1982), at 45: "Carroll Daugherty's seven carefully reasoned standards are among the most comprehensive and succinct."

[14]American Arbitration Association, Training Manual.

[15]Barreca, Miller, & Zimny, eds., Labor Arbitrator Development: A Handbook (BNA Books, 1983), 408.

[16]Koven, Smith, & Farwell, Just Cause: The Seven Tests, 2d ed. (BNA Books, 1992).

[17]The seven questions are set forth in his most frequently cited decision, *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966).

[18]Dunsford, *supra* note 9, at 47–50.

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(3) Did the company, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
(4) Was the company's investigation conducted fairly and objectively?
(5) At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

In brief, Daugherty asserts it is not enough for the arbitrator to find that the grievant's actions and record warrant discipline. There must also be proof that, before the grievant was disciplined, an employer representative (unconnected with the events which are the subject of the arbitration) conducted a fair and objective investigation producing substantial and compelling evidence of guilt. An important element of these requirements is that Daugherty would impose them independently of anything the parties have negotiated. In his notes he freely admitted that, notwithstanding the contract's silence on these matters, he put the employer on trial. In other words, the employer has the burden of proving that it properly handled the matter in the earlier stages.

Daugherty's seven tests, first articulted in 1964,[19] were refined in 1966[20] and polished off in 1972.[21] They soon won a widespread and enthusiastic following. Contrary to earlier understandings that the grievance arbitration procedure itself provided due process through an employee's "day in court," Daugherty effectively shifted the responsibility to the employer to prove that it had already provided the necessary "day in court" during its investigation of the matter. Employers unable to prove that they had provided fundamental process, including an impartial investigation, notice, opportunity to defend, and "substantial" evidence of "guilt," would have otherwise appropriate discipline overturned on that basis alone. In short, the Daugherty view of arbitration (at least his stated view) is that, in

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[19]*Grief Bros. Cooperage Corp.*, *supra* note 6.
[20]*Enterprise Wire Co.*, *supra* note 17.
[21]*Whirlpool Corp.*, 58 LA 421 (Daugherty, 1972).

deciding just cause, investigatory due process is as important as the merits of the case.

Other arbitrators share this view, although they do not always expressly cite the seven tests in their opinions. For example, Arbitrator Dworkin stated: "The procedural aspect of just cause is not dogmatic ritual."[22] A number of courts (e.g., the Eighth Circuit) have affirmed that an arbitrator's determination of "just cause" includes procedural as well as substantive elements.[23]

*A Different View*

Given the widespread utilization of Daugherty's tests, as well as the related pronouncements of other arbitrators and some courts, it is fair to ask some tough questions: Is the method by which an employer handles a case at least as important as the proof that supports the ultimate discipline? If so, does this involve concern not only with due process for the individual grievant but also with "due process for the handling of a case?"[24] Does an employer really have an obligation to impose discipline consistent with "basic notions of fairness,"[25] beyond anything agreed to in the labor agreement? If so, where does this obligation come from?

One school of thought says "no" to all of these questions. For example, Philip Marshall got right to the point:

> The fundamental question is what do 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.[26]

Other critics have been equally harsh in their judgment. John Dunsford characterized Daugherty's "due process" tests as a "jarring note" that threatens to distort the entire process by "neglect[ing] to focus on the issues of central concern to the parties in the hot pursuit of questions which were not raised."[27]

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[22]*Meyer Prods.*, 91 LA 690, 693 (Dworkin, 1988).

[23]*See, e.g., Teamsters Local 878 v. Coca Cola Bottling Co.*, 613 F.2d 716, 103 LRRM 2380 (8th Cir.), *cert. denied*, 446 U.S. 988, 104 LRRM 2431 (1980); *Kewanee Mach. Div. v. Teamsters Local 21*, 539 F.2d 314 (8th Cir. 1979).

[24]As suggested by Wirtz, *Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books, 1958), 1, 7.

[25]Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books, 1985).

[26]*See* Wirtz, *supra* note 24, at 4 n.4.

[27]Dunsford, *supra* note 9, at 29, 36.

Some arbitrators, puzzled over the widespread and uncritical acceptance the Daugherty tests have enjoyed,[28] are equally reluctant to take this expansive view of predisciplinary requirements of just cause. Others assert that an employee is not entitled to a predisciplinary hearing unless the contract specifically provides for one, since arbitration itself provides a full de novo hearing.[29] Further concern has been expressed that rigidly imposing procedural "due process," as per the seven tests, sacrifices arbitration's flexibility and diminishes its worth as a viable means to resolve labor disputes.[30]

In addition, it has been successfully argued that imposing a procedural standard not found in the contract may violate the common prohibition against modifying the agreement.[31] For example, in *Carpenters v. Bruce Hardwood Floors*,[32] a district court vacated an arbitrator's award on the ground that it improperly violated the contract's not uncommon dictate that "no arbitrator shall have the authority to add to, amend, or depart from the terms of this written agreement." In *Carpenters* the arbitrator penalized an employer for failure to investigate an incident and to allow the grievant to give his side of the story before discharging him. In overturning the arbitrator's award, the district court adhered to a Sixth Circuit position:

> An arbitrator cannot add his or her own procedural prerequisites under the guise of fundamental "fairness" absent contractual authorization in the collective bargaining agreement.[33]

In *Carpenters* the court acknowledged that the Eighth Circuit, among others, has adopted a different approach, but argued that this goes "too far in its deference to the arbitrators."[34]

In short, we see from the above objections that many critics ask whether intrusion into these matters not only jeopardizes

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[28]For an excellent discussion as to why Daugherty's tests make sense in the context of the railroad labor disputes in which he developed them, but perhaps not elsewhere, see McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, Lab. Law. 387, 387 (July 1987), and Dunsford, *supra* note 9, at 34–35.

[29]Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 504 (1976).

[30]Edwards, *Due Process Considerations in Labor Arbitration*, 25 Arb. J. 169 (1970).

[31]Wirtz, *supra* note 24, at 8 (citing *Variety Stamping Corp.* (Dwarkin, 1956)).

[32]139 LRRM 2774 (M.D. Tenn. 1992).

[33]*Auto Workers Local 342 v. TRW, Inc.*, 402 F.2d 727, 730, 69 LRRM 2524 (6th Cir. 1968).

[34]139 LRRM at 2779.

arbitration's real strengths, but also—to put it bluntly—is none of our business.

## A Closer Look at Arbitral Decisions

My review of the published awards of approximately the last 10 years reveals that arbitrators by no means agree on their role as monitor of the process of discipline. Why is that? Are we ignorant of, or perhaps even disinterested in, what others are doing? Certainly it is true "that few arbitrators ever sit in on hearings conducted by their peers, and the sacrifice of time to read someone else's opinion is considered heroic."[35] The best answer to the question of whether there is a common trend in the arbitral community on this matter is that cases fit within three broad groupings: (1) cases in which procedural due process errors weigh very heavily, (2) cases in which arbitrators apply the "prejudicial error" test, and (3) cases in which arbitrators take a middle road. I have found no cases in which arbitrators have claimed that fair process is always beyond reach of arbitrators; even those who urge that process should be left to the parties hesitate in situations of egregious unfairness. Thus, arbitrators give evidence of unfair process either a lot of weight, a little weight, or something in between.

### *Investigatory Due Process as Essential*

The first approach, which closely parallels Daugherty's three procedural tests, views investigatory due process as far more than a technical requirement. Procedural errors as an integral part of the just cause clause are considered carefully for reasons of fairness as well as to advance the goals of collective bargaining. This view was well stated by Arbitrator Beck in *Osborne & Ulland, Inc.*:

> A primary reason arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline when there is little or no evidence upon which to base a just cause discharge. * * * For an arbitrator in construing a just cause clause, particularly where discharge is involved, to reach a determination without considering whether due process has been afforded a grievant is to invite the

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[35]Dunsford, *The Role and Function of Labor Arbitration*, 30 St. Louis U. L. Rev. 109, 110 (1985).

> very labor unrest the parties hoped to avoid in including such a clause in their collective bargaining agreement. * * * Further, the failure of an employer to make reasonable inquiry or investigation before assessing punishment is a factor, and in some cases the only factor, in an arbitrator's refusal to sustain a discharge.[36]

An example of just such a refusal is the decision in *Great Midwest Mining Corp.*[37] There, despite compelling evidence of the grievant's serious misconduct making it "possible, even probable" that the discharge would otherwise have been sustained, Arbitrator Mikrut found that the company had treated the grievant as "guilty until proven innocent" and reinstated him.

Similarly, in *McCartney's, Inc.*,[38] notwithstanding the possibility that procedural due process would have made no difference, Arbitrator Nelson stated that "the point is that a just cause proviso in a collective bargaining agreement provides for certain minimal due process. It is the process, not the result, which is at issue." Citing Daugherty's seven tests at some length, the arbitrator overturned the otherwise justifiable discharge on the ground that the employer had failed to give the grievant the opportunity to explain before discharge.

*Requiring Prejudice*

Taking a different approach, some arbitrators have applied a "prejudicial error" rule to these matters. They neither ignore procedural fairness nor penalize management's missteps unless those errors have prejudiced the grievant in a very concrete way. Contrary to the cases discussed above, these arbitrators place greater emphasis on the end result: Was justice served in the grievant's case? In evaluating this approach, I have found that the "prejudicial error" standard lessens substantially an employer's burden of proof. Notwithstanding Arbitrator Byars's generous observation that "if there is a possibility, regardless of how remote, that the grievant was prejudiced by the employer's omission, the employer's action should be set aside,"[39] it is the exceptional case where labor can make this showing.

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[36]77-2 ARB ¶8321 (Beck, 1977), at 4378.
[37]82 LA 52, 54 (Mikrut, 1984).
[38]85-1 ARB ¶8207, at 3871 (Nelson, 1985).
[39]*Gold Kist*, 89 LA 66, 70 (Byars, 1987).

The "prejudicial error" (also known as "harmless error") approach is illustrated by a U.S. Postal Service[40] case, where the National Association of Letter Carriers alleged that the employer's investigation of the grievant's misconduct was flawed in that the employer did not discharge the grievant until four months after the triggering incident. Arbitrator Nolan agreed but held that, because the employer's delay had not caused substantial harm to the grievant's perceived position, just cause could not be defeated on that ground. Similarly, in *Beatrice/Hunt-Wesson*,[41] the arbitrator acknowledged that "it may well be right that the Company should have heard the Grievant's story promptly and before deciding upon his discharge." Nevertheless, given the fact that the union filed a grievance immediately after the company suspended the grievant pending its investigation, and given the parties' practice of according employees ample opportunity to respond at the first grievance meeting, Arbitrator Bickner concluded:

> I see nothing . . . that leads to a plausible presumption that the Company might have come to a different conclusion about the Grievant's culpability, or that the Company might have chosen a lesser discipline if the Company had proceeded in a different way.[42]

In summary, this approach applies the test of materiality. The question is: Is there a nexus between the employer's procedural irregularities and a detrimental impact on the union's ability to defend the grievant? This approach places an additional and demanding burden upon labor.

*The Balancing Approach*

The greatest number of arbitrators take a more pronounced middle road. They balance competing tensions of rigidity and fairness by treating procedural failures as relevant to but not necessarily invalidating the discipline. Thus, due process concerns are dealt with as an aspect of remedy, generally by mitigating otherwise appropriate discipline. Examples of this third approach include awards where a grievant was not reinstated but was given back pay from the date of the procedural violation to the date of the award, where an employer was assessed the cost

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[40]87-2 ARB ¶8490 (Nolan, 1987).
[41]89 LA 710, 715 (Bickner, 1987).
[42]*Id. See also Tastybird Foods*, 88 LA 875 (Goodstein, 1987); *Amax Coal Co.*, 85 LA 225 (Kilroy, 1985).

of the proceeding, and where relevant evidence was excluded because it had been improperly obtained.[43]

For instance, in *Southern California Edison Co.*[44] Arbitrator Collins reduced discipline, concluding that the company had failed to meet its burden to conduct a thorough and fair investigation. Notwithstanding the contract's silence on the matter and the obviousness of the grievant's guilt, noncompliance with procedural requirements was considered detrimental to the grievance procedure and the agreement itself. Such failure could not be entirely ignored, and therefore an otherwise appropriate suspension was reduced to a written reprimand. Similarly, in *Southwest Airlines*[45] management was found "procedurally unreasonable in the virtually nonexistent notice of the fact finding meeting," and for this reason alone the grievant, who had "reached the stage which called for termination," was reinstated to her job and to her seniority but was denied back pay.

## The Arbitrator's Role

From these cases one broad theme emerges: Most arbitrators are imposing notions of due process on the parties. In doing this, we have a duty to acknowledge some additional truths:

1. We are imposing our own ideas of fairness on parties who have remained silent on these matters. We have seized upon just cause to go where the contract does not and have imposed minimal standards of fairness on parties who have not addressed these issues whether by choice or by default.
2. We must recognize that, although well intentioned, we are giving the parties conflicting messages. We often differ, even contradict, one another.
3. We have a responsibility to give the parties a clear idea of what we expect.[46]

Given the substantial authority we possess (our "common law" which some courts have approved),[47] we have a concomitant

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[43]Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books, 1991), at 264.
[44]81-1 ARB ¶8129 (Collins, 1987).
[45]89-1 ARB ¶8019 (Williams, 1988).
[46]*See Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 UCLA L. Rev. 603 (1959).
[47]*See, e.g., Teamsters Local 878 v. Coca Cola Bottling Co.*, 613 F.2d 716, 103 LRRM 2380 (8th Cir.), *cert. denied*, 446 U.S. 988, 104 LRRM 2431 (1980), where the court noted that

responsibility to exercise it knowledgeably and responsibly. We must carefully consider how we decide these questions because the answers we choose reflect, consciously or not, value judgments about the essential nature of our role as arbitrator. This involves two tasks. First, we must define our role more precisely. Second, if we conclude that the arbitrator's role includes overseeing the disciplinary process as well as the results, we must articulate more clearly what we expect of that process. The parties deserve more guidance on these matters than we have given them in the past.

Those who adopt the Daugherty approach must recognize the implications for their role as arbitrator. Daugherty imposes procedural standards on the parties although they themselves have not done so. Under this view the arbitrator sits not as a finder of fact (which is how most of us see ourselves) but as an appellate court. Daugherty made clear that an arbitrator applying the seven tests sits in judgment not on the disciplined employee but on the employer. Thus, the employer is a "sort of trial court," and the arbitrator is an "appellate court" reviewing decisions for error. As Daugherty has clearly stated:

> [A]n arbitrator "tries" the employer to discover whether the latter's own "trial" and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand new trial of the employee.[48]

If we are indeed an "appellate court," we must also acknowledge that our role is necessarily limited to deciding whether the "trial court" (i.e., management) acted arbitrarily, capriciously, or discriminatorily. If it did not, then Daugherty submits that we have no authority to second-guess management's decisions either as to discipline or as to the severity of the penalty.[49]

From this it should be clear (although many advocates probably do not see it this way) that Daugherty's procedural requirements favor neither side in arbitration. On the one hand,

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arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. *See also Johnston Boiler Co. v. Boilermakers Local 893*, 753 F.2d 40, 43, 118 LRRM 2348 (6th Cir. 1985), where the court declared that "[t]he determination of procedural fairness is sufficiently integral to 'just cause' to sustain the arbitrator's decision to decide that issue, when the submission did not make it clear that procedural fairness was not in question." Other cases are discussed in Hill & Sinicropi, *supra* note 43, at 248–55.

[48]Whirlpool Corp., 58 LA 421, 427 (Daugherty, 1972).

[49]*Id.* at 418.

arbitrarily imposed predisciplinary requirements create hurdles for employers which unions can argue to advantage. On the other hand, employers who successfully run that course can argue with conviction, citing Daugherty, that managerial judgment should not be disturbed absent evidence of abuse. It is my opinion that most arbitrators do not view their role as so circumscribed. Published decisions and these conferences suggest that most view their hearings as de novo reviews of the evidence. We do not limit ourselves to deciding whether management successfully ran the procedural hurdles or abused its discretion; we judge the facts for ourselves. And we do this even when we say we are applying the seven tests.

Given this inconsistency, I am uncomfortable with this approach because the seven tests seem to force a square peg into a round hole; therefore I define my role as arbitrator in the following way: I see myself as a trial court, not as an appellate court. My primary job is to determine whether the evidence of the grievant's conduct and employment record supports discipline and, if so, whether the discipline imposed "fits the crime."[50] I am reluctant to impose on the parties my own philosophy of what is good for them. However, I am not prepared to silently acquiesce when management has been blatantly unfair to the grievant (even a clearly guilty grievant) in the predisciplinary handling of the matter. My willingness to consider procedural issues, apart from the merits, stems from the following concerns:

I believe that an employer has the responsibility to make at least a modest effort to avert full-blown arbitration. In our earlier hypothetical, the employer's denial of Joe's right to tell his side of the story before kicking him off the premises created two problems. Not only did it foreclose management's ability to determine whether Joe had a defense that should be further investigated, but it also denied Joe knowledge of the evidence against him so that he could reasonably weigh pursuing a grievance against accepting the inevitable and getting on with his life. These are important concerns. Grievants suffer financially, socially, and professionally while their grievances inch toward final resolution in arbitration. This is true not only for the grievant but also for the grievant's family. Furthermore, even

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[50]Note that the question of an arbitrator's authority to modify a management decision as to the appropriate penalty is itself the subject of much debate. I do not explore that question in this paper.

successful grievants often experience continuing tribulations after they win in arbitration.[51] Make-whole remedies rarely put Humpty Dumpty back together again. Arbitrators should not ignore the very real suffering that results when a grievant has been denied an opportunity to provide or receive information that might have averted this process.

We must recognize that the stakes are also high for management. After all, the employer has invested time and money in the employee on the job. Responsible management seeks to avoid liability for discharging an employee on grounds which evidence discovered after the fact does not support.[52] Management must also recognize that failure to conduct a proper predisciplinary investigation is likely to hinder its ability to prove the case at hearing. Many arbitrators limit an employer's proof of misconduct to what was known at the time of discharge. Belatedly discovered evidence, uncovered while preparing for arbitration, is often not admitted.

In short, I believe that defective procedure imposes unfair costs on all participants and fails the collective bargaining process in important ways. An arbitrator should not ignore those costs, even in the case of the "guilty" grievant.

## Developing a Test

For considering these issues, I have arrived at a very simple test. When confronted with claims of a failure of investigatory due process, arbitrators should merely ask: Were the grievants given a meaningful opportunity to tell their side of the story before discipline was imposed? This test may not be perfect, but it is interesting to note the response it has received since I ran it up a flagpole to see if anyone would salute. Not only has no one saluted, but there has been absolutely no agreement on a better approach. Criticism of my test has come from all directions and can best be summarized as either "it falls too short" or "it goes too far." This wide divergence among arbitrators points up the need

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[51] Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, Reprint 94 (Berkeley: Univ. of Cal., 1957) (cited in Tobriner, *An Appellate Judge's View of the Arbitration Process: Due Process and the Arbitration Process*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books, 1967), at 39).

[52] *See, e.g., Paramount Unified School Dist.*, AAA Case No. 72-390-0334 (E. Jones, 1988), discussed in Hill & Sinicropi, *supra* note 43, at 252.

for a critical review of these questions, and I offer my test as a concrete starting point for further discussion.

A test requiring that grievants be given a meaningful opportunity to tell their side of the story is not really so astonishing. In fact, it is probably more notable for what it omits than what it includes. Therefore, first let me note what this test does not require:

1. My test avoids the term "due process." While there is nothing fundamentally wrong with that phrase, it is heavily laden with legal definitions best left to the courts, especially the criminal courts.[53] I am more comfortable with the simple term "fairness." For related reasons I do not consider as part of my test Constitutional claims, such as the right against self-incrimination, the right to privacy, or the right to be free from unreasonable searches and seizures. Rather, those claims are aspects of the parties' substantive cases. My test is a minimum; some cases might require more. I leave those complex and controversial issues to another day and another speaker.

2. The opportunity to respond does not require a full predisciplinary adversarial hearing, with the right to confront and present witnesses. Rather, it is enough that grievants have the right to informally provide their side of the story, either in person or in writing. In this approach I agree with the U.S. Supreme Court's statement in *Cleveland Board of Education v. Loudermill*[54] that the employer's consideration of the grievant's response "need not definitively resolve the propriety of the discharge," but is better viewed as an initial check against an incorrect decision. It should be "essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed actions." In this same vein, I do not believe that a grievant must be afforded the right to cross-examine witnesses or to present favorable witnesses during the predisciplinary phase.

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[53]To explore the appropriateness of applying criminal standards of due process to arbitration, see Kadish, *Criminal Law and Industrial Discipline Sanctioning Systems: Some Comparative Observations*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1964), 146.

[54]470 U.S. 532, 118 LRRM 3041 (1985). See also *Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988), where the court held that the hearing need not be formal. It is enough if employees are given: (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity to present their side of the story.

3. The employer should not be required to prove that it conducted an impartial investigation and concluded that there was substantial evidence to discipline. By rejecting this feature of the seven tests, I may leave the door open for the employer merely to go through the motions of hearing the grievant, with no intention of rescinding decisions already made. Although many may be uncomfortable with this approach, I have concluded that my role does not extend to second-guessing management's good faith for the following reasons:

First, I find such questions too nebulous. (In saying this, I admit that this concern has never before stopped any of us.)

Second, and more important, deciding whether management prejudged the case or genuinely thought it had substantial and convincing evidence against the grievant detours from my role as trier of fact. I am the one deciding whether the facts warrant the discipline. That is why I am sitting at the head of the table.[55]

Third, in most cases sufficient incentives push employers to conduct fair and credible investigations (most notably, the high financial costs of guessing wrong) so that arbitral review of management's good faith adds little to the overall process.

**The Test's Essential Elements**

A test which requires an employer to give grievants an opportunity to tell their side of the story is by no means novel,[56] but it is important for the following reasons:

1. Untested factual allegations all too frequently turn out to have false proof, naively accepted or maliciously created. Hearing the employee's side of the story may clear up misunderstandings and even exonerate the employee.
2. Requiring an employer to take this intermediate step before imposing discipline can give cooler heads an opportunity to slow down impulses and arbitrary decisions. How much better that the parties discuss the dispute before positions harden and "face" needs to be saved to reverse decisions already made.

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[55]See *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988), where the court held that, although "there may be cases—perhaps this is one of them—in which the supervisory official is so biased that the *Loudermill* 'right-of-reply' process is meaningless," a posttermination adversary hearing would ferret out bias, pretext, deception, and corruption by the employer in discharging the employee.

[56]*See, e.g., UPI & Wire Serv. Guide*, 88-2 ARB ¶8421 (Witney, 1988).

Although many arbitrators agree in principle that an opportunity to respond is good, even necessary, the real challenge comes in selecting those elements essential to a meaningful opportunity to respond. In defining my own essential elements, I have been guided by two related concerns: (1) that the grievant has been given a meaningful opportunity to respond before discipline was levied, and (2) that the grievant has been given a meaningful opportunity to respond at the arbitration hearing. In the context of investigatory due process, the latter requirement also means that the employer must do nothing to impede the union's ability to prepare and present the grievant's case. Intrinsic to this meaningful opportunity to respond are the following elements:

1. *Notice of Charges.* The grievant must be given sufficient notice of the charges to meaningfully respond. The reason for this requirement was well stated in *Lucky Stores*:

> If the basis for suspension or discharge is known to the Union, the Union representative may be able to take action resulting in an employee's correction of irresponsible behavior. And it may be possible to settle the grievance prior to reaching arbitration.[57]

Thus, Arbitrator Fox modified what would otherwise have been appropriate discipline. Another reason for requiring notice is that the grievant and the union can provide an adequate defense.[58]

Note that notice does not require the employer to outline every detail of its suspicions. It is enough that the grievant is given general notice of the nature of the claims. Arbitrators are well able to determine what constitutes sufficient notice. For example, in *Roadmaster Corp.*[59] a discharge letter, stating only "picket line misconduct" as the basis for the discharge, was found insufficient for the Laborers Union to form a defense. Similarly, in *James River Corp.*[60] the company's notice was found inadequate because the basis of the charge against the grievant had not been properly shared with the Paperworkers Union. Thus, the grievance was sustained in part. In a contrasting case[61] Arbitrator Oestreich found that a letter notice of discharge citing "previous incidents" was not unreasonably vague, because

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[57]83-1 ARB ¶8253, at 4125 (Fox, 1983).
[58]*See, e.g., McKeown Transp. Co.*, 84 LA 600 (Armstrong, 1985).
[59]88-1 ARB ¶8024 (Doering, 1987).
[60]90-2 ARB ¶8451 (Clarke, 1989).
[61]*Hyatt Hotels Palo Alto*, 85 LA 11 (Oestreich, 1985).

it was clear to everyone that the reference was to charges of sexual harassment previously reported by the same complainant.

2. *Union Representation.* The employer must honor a grievant's request to have a union representative present when responding to the charges.[62] This requirement stems from the U.S. Supreme Court's decision in *Weingarten.*[63] Although this decision does not technically apply to most arbitrations,[64] many arbitrators subscribe to it. The reasoning is best illustrated by *General Dynamics,*[65] where Arbitrator Jones found that the employer, who failed to offer the grievant the opportunity to have a union representative present during the two and a half hours it constructively detained her, had violated more than technicalities. He concluded that the employer's ferreting out of wrongdoing deviated from basic due process and therefore overturned the discipline as without just cause.

*Harbor Furniture Manufacturing Co.*[66] presents similar reasons why union representation can be crucial. There the members of the bargaining unit, including the grievant, were primarily Spanish-speaking. Lead workers had to be bilingual to transmit directions from supervisors to the work force. Finding that the grievant's English was "rudimentary at best," Arbitrator Richman concluded that proper notice to the union would have triggered the English-speaking business agent into predischarge rather than postdischarge action. Thus the grievance was sustained.

3. *Timeliness.* An employer must do nothing to impede the union's ability to present the grievant's best response at arbitration. The most obvious example of this impediment is the employer's unreasonable delay in alerting the employee to possible discipline, adversely affecting the union's ability to collect relevant evidence.[67] Untimeliness may be found even when an employer has delayed for charitable reasons. For example, in

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[62]Some arbitrators hold that a union representative need not be present unless the employee requests such representation. *See, e.g., Kidde, Inc.,* 86 LA 681 (Dunn, 1985). Also, it is well established that an employee may decline the offer of union representation. *See, e.g., Fry's Food Stores of Ariz.,* 83 LA 1249 (Weizenbaum, 1984).

[63]*NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 88 LRRM 2689 (1975).

[64]But note that Congress has codified federal employees' *Weingarten* rights in 5 U.S.C. §7144(a)(2)(B).

[65]91-1 ARB ¶8110, at 3529–30 (E. Jones, 1990).

[66]85 LA 359 (Richman, 1985).

[67]On the other hand, many arbitrators have found delay justified. *See, e.g., Intermountain Rural Elec. Ass'n,* 86 LA 540 (Watkins, 1985).

*McCartney's, Inc.*[68] Arbitrator Nelson found the employer's five-month delay in discharging the grievant untimely, despite the fact that the delay was for good reason. The employer had waited to avoid interfering with the grievant's medical coverage while he was undergoing treatment. Similarly, delay to protect an undercover agent's identity so that "bigger fish" in a plant can be caught may be deemed untimely under this test.[69]

An interesting approach to the timeliness question is *Virgin Islands Water & Power Authority*,[70] where the arbitrator found that the employer had improperly delayed in acting on information concerning employee misconduct, despite the fact that the grievant intentionally failed to show up for a hearing. Arbitrator Watkins concluded that the employer's flawed procedures could not be ignored, even though the grievant's behavior had been clearly unacceptable. The arbitrator adopted an unusual remedy, permitting the employer to choose between paying eight months' wages and allowing the discharge to stand, or reinstating the employee.

*Opportunity to Respond Not Required*

It is difficult to think of many situations where the employer would be excused from the duty to provide the grievant with a predetermination opportunity to respond. However, one example is *Anderson-Bolling Manufacturing*,[71] where Arbitrator Daniel did not penalize the employer for failure to provide an opportunity to respond because the grievant was not present for such discussion through his own fault; he was in jail. Even here, however, I believe that the employer could have obtained the grievant's response through a phone call or letter.

## Applying the Test

With this test comes the question of what to do when the employer has failed to meet even these minimal requirements of fair procedure. The answer appears easiest when the employer not only has failed this modest test but also lacks adequate evidence to support issuance of discipline. In our introductory

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[68]84 LA 799 (Nelson, 1985).
[69]*See, e.g., Inland Tool & Mfg. Co.*, 65 LA 1203 (Lipson, 1975).
[70]87-2 ARB ¶8472 (Watkins, 1987).
[71]91-1 ARB ¶8052, at 3241 (Daniel, 1990).

hypothetical, what if Joe proves that he did not steal the employer's property? In this case I would award only the conventional make-whole remedy. Although this remedy fails to address the employer's disturbing failure to get the grievant's side of the story at a time when it would be meaningful, I am persuaded by the great weight of arbitral thought, holding that the arbitrator has no authority to penalize management beyond make-whole; not every wrong has a remedy.

A more difficult question arises when the employer fails the test but the evidence clearly demonstrates there was good reason for the discipline. For example, assume that there is overwhelming evidence that Joe took the employer's property. Certainly he deserves discipline. But what about the employer's high-handedness in kicking him off the premises without a chance to respond, or at least without notice of the proof against him? I believe that such unfair process carries costs which cannot be ignored, even in the case of the "guilty" grievant.

Unlike many arbitrators, I do not weigh whether the procedural flaws constituted "prejudicial error" because I believe that the opportunity to respond is so basic to fairness that it is not harmless under any circumstances.[72] The parties owe minimal fairness not only to each other but to the collective bargaining process. Whether we call it arbitral common law or fundamental due process, if we can agree on any one essential element of "fairness," it is that an employer must at least listen even to a "guilty" grievant's version of events before issuing discipline. It is appropriate to consider unfair process even in those cases where a different procedure would not affect the outcome. I weigh the employer's shortcomings in the remedy portion of the decision. While bad procedure does not necessarily invalidate or alter discipline in every case, it counts in the same way as other factors which traditionally go into assessing whether "the penalty fits the crime" (e.g., an employee's longevity and work record, and discipline issued to other employees). Thus, flawed process can in appropriate cases provide the basis for reducing what would otherwise be appropriate discipline.

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[72] I agree with the arbitrator's statement in *State Paper & Metal Co.*, 88-1 ARB ¶8112, at 3544 (Klein, 1987), that "the correct interpretation is whether the grievant was permanently deprived of his job without the opportunity to present his side of the issue, in the presence, and with the assistance, of a union representative."

## Conclusion

In this paper I have sought to highlight and illustrate the issues surrounding the difficult subject of investigatory due process. In response to the question of whether there is a common trend in the arbitral community, my answer is that I can discern none. However, I conclude that, as an absolute minimum before an employer may exercise the right to discharge or discipline, it must afford employees a meaningful opportunity to tell their side of the story. The minimum requirements of a "meaningful opportunity" include timeliness, notice, and union representation. I am not sure that arbitrators should demand more.

## MANAGEMENT PERSPECTIVE

ALEXANDER E. WILSON III*

I appreciate being invited to be with you today, and particularly to have the opportunity to give the management response to Christine Ver Ploeg's presentation. The issue of investigatory due process is one of the most significant in the field of arbitration law, and Ver Ploeg has provided a very illuminating review of the ranges of arbitral thought on the subject. She has also attempted in a very meaningful way to provide a generally applicable principle which could be uniformly followed on this subject.

Since our speaker has used the well-known seven tests of the late Carroll Daugherty as the launching point of her presentation, I would like to comment just briefly on how I view the Daugherty tests. For many years, I have used those seven tests in essentially verbatim form in client management training programs, advising management representatives that they should be able to affirmatively answer each of the seven questions in order to go forward with a particular disciplinary decision. With the increase in litigation in the fields of employment discrimination and wrongful discharge, the ability to defend a disciplinary decision has become essential, whether or not employees are represented by a union. If a disciplinary decision can satisfy the

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strenuous Daugherty tests, that decision is virtually unassailable. Aside from litigation prevention, I believe that the Daugherty tests are firmly rooted in basic principles of sound employee relations. The conduct of an impartial investigation into the facts, including hearing the grievant's side of the case, is an essential component of fair and consistent decisionmaking.

Ver Ploeg has thoroughly reviewed arbitration decisions on disciplinary due process, and in this response I will not dwell on whether there is a trend in this area. In fact, most arbitrators do require a minimal level of procedural due process. I will focus my remarks on the specific issue of whether arbitrators should impose on the employer the arbitrator's views as to procedural due process.

My most able adversary, Harris Jacobs, in giving the union response to our speaker's presentation, places the Daugherty test somewhere between the U.S. Constitution's Bill of Rights and the Ten Commandments on the scale of arbitral justice. I sometimes have to remind Harris that the Bill of Rights is inapplicable to the private sector or arbitration. If the parties to a union contract intended to apply the Ten Commandments, they certainly would have at least incorporated them into the contract by reference.

On the particular question discussed by Ver Ploeg, my view as a management advocate in the arbitration process is that notions of what are good employee relations and sound labor practices are separate and distinct from the issue of what procedural requirements an arbitrator may require of an employer before upholding a disciplinary decision. Simply stated, I believe that, if a specific procedural requirement is found neither in the collective bargaining agreement nor in the applicable legal principles, it should not be automatically imposed by an arbitrator.

The first inquiry is: What does the contract require? Many union contracts contain specific requirements for procedures, such as advance notice of discipline to a union, an investigatory suspension prior to discharge, stating specific grounds for the disciplinary action, and the presence of a union steward during the investigation. These are proper subjects of negotiation. If they are not included in the collective bargaining agreement, they should not be added to the agreement by an arbitrator. In large part, the presentation of Ver Ploeg seems to agree with this view. I believe that the integrity of the bargaining process depends on the collective bargaining agreement being inter-

preted as the parties have negotiated it. If the employer and union have not agreed to a particular procedure, that procedure should not be imposed on them unless it is clearly and logically implied by other specific contract language. So I believe that the first inquiry of the arbitrator on issues of investigatory due process should be: What does the contract require?

I also believe that the responsibility of an employer for investigatory due process should be found either in the contract or in the law. If the contract does not require a specific procedure, the second inquiry is to the law. This is a troublesome area, because the National Labor Relations Act has essentially no procedural rules governing the administration of a union contract. We are left to the "law of the shop" or "industrial common law." As a lawyer representing management, I have a great deal of trouble advising clients on the specific provisions of the unwritten industrial common law. When we look at the diverse backgrounds of arbitrators—lawyers, professors, economists, businesspeople, union representatives—and the lack of any true adherence to precedent by many arbitrators, we risk losing any degree of predictability in contract interpretation when unwritten rules and requirements are superimposed on the express contract language.

The purpose of Ver Ploeg's presentation is to articulate what the minimal procedural requirements are in employer disciplinary decisionmaking. The basic issue, as I see it and as recognized by our speaker, is this: If the evidence demonstrates to the arbitrator's satisfaction that the employee is guilty of the offense charged and that the discipline is appropriate to the offense, why should not the arbitrator simply affirm the decision of the employer? Stated another way, if procedural deficiencies have not affected the employer's decision on the merits, why should that decision be overturned?

I do not argue with the proposition that management should give an employee the opportunity to respond, afford the opportunity for union representation, and conduct a careful investigation before making a decision. The employer has that responsibility. But we lawyers do not always have the facts we want in our cases. Our clients sometimes fail to give careful attention to procedural matters, but still wind up making the right decisions. And when that happens, management decisions should be upheld in arbitration.

A case in point is one which I handled several years ago. A supervisor gave an employee a work assignment, to which the employee responded by grabbing the supervisor's shoulders, shaking him in a rough fashion, and directly threatening him with bodily harm. The supervisor told the employee: "You're fired; get out." At arbitration, there was no conflict in the evidence. The argument of the union was that management should have investigated the facts before making the decision. The arbitrator put the employee back to work, stating that the decision was flawed because it was made in reaction to an emotional event. The testimony clearly showed that management would have made the same decision even if a different official of the company had reviewed the case prior to the discharge decision.

Under our speaker's test, which requires an opportunity to be heard, the discharge in that case would have been flawed. But the "opportunity to be heard" requirement effectively reinstates one of the seven Daugherty tests, which our speaker rejects, that is, the requirement of an impartial investigation. What does the "opportunity to be heard" mean in this context? Heard by whom? The supervisor? Higher management? If the facts are clearly known at the time the decision is made, and if an opportunity to be heard would make no difference in the decision, why should that hearing procedure be imposed on the employer? One arbitrator, quoted by Ver Ploeg in her paper, says in his decision that he reduced a discharge to a suspension in order "to impress upon the company the importance of that minimum due process requirement." Is that the role of an arbitrator? I do not believe so.

One point made by our speaker is that, if arbitrators are to oversee the decisionmaking process as well as its results, there should be a clearer articulation of what is expected in that process. I agree, but I am not sure that, given the diversity of arbitrators and arbitral thought on this subject, this clarification can happen. For this reason I favor a test of procedural due process which Ver Ploeg rejects—the prejudicial error (or "harmless error") test. I do not agree with the speaker that this is a nebulous test incapable of being applied, nor do I agree with her statement that some procedural deficiencies are so egregious that they should be presumed prejudicial in all cases. I believe that the prejudicial error test can be applied and that the basic inquiry in each case should be: Does the procedural deficiency relied on by the grievant (or the union) flaw the employer's

decision? The following are examples of how this test could be applied:

1. If intensive questioning by an employer without offering union representation shows that the information the employer obtained in that questioning is faulty, the decision is reversible. (Obviously, if the employee requests and is denied representation, the employer's conduct will be reversed either in arbitration or by the NLRB.)
2. If the failure to interview the grievant demonstrates that the employer did not obtain evidence which would have affected the decision, that decision is reversible.

This is a fact-intensive inquiry, but I believe that it is consistent with the arbitrator's basic role as the trier of fact.

Since I believe that the procedural requirements in the decisionmaking process are limited to those defined either by the contract or by law, I disagree with the proposition in several cases cited by our speaker that the meaningful opportunity to be heard includes a requirement that the employer affirmatively offer union representation. This approach goes significantly beyond the *Weingarten* rights, which require only that union representation be afforded if requested by the employee. If in a particular case an employer forgets to offer union representation to the employee, that failure should not flaw an otherwise valid discharge or disciplinary decision.

Essentially, I agree with Ver Ploeg that the primary role of the arbitrator is as trier of fact. If the evidence supports the disciplinary action, and if the decision is not flawed by procedural deficiencies to the detriment of the grievant, the inquiry of the arbitrator is over. It is the duty of the arbitrator to determine whether the evidence of the employee's conduct and employment record support disciplinary action and, if so, whether the disciplinary action imposed fits the offense.

I would also attach the prejudicial error requirement to the second prong of the test espoused by our speaker, which is that the employer do nothing to inhibit the union from adequately representing the grievant. I agree with this proposition. If an employer conceals the true reason for discharge, delays unduly in making or implementing the decision, or conceals relevant evidence, and if the union by that conduct is precluded from adequately preparing for arbitration, the decision is reversible. Again, prejudicial error should be the basis for that reversal. If

management's omission did not affect the result, its disciplinary decision should not be disturbed.

In conclusion, I believe that whatever contractual requirements have been agreed to must be followed in disciplinary decisionmaking. If the employer has violated the procedural rules contained in the contract, the discharge should be set aside. If the union has violated those rules, such as time limits in grievance filing, the management decision should be affirmed. If the contract is silent as to a particular procedure, and if a procedure is not specifically imposed by law, it is my belief that the prejudicial error test should be applied to the minimal due process requirements discussed by Ver Ploeg.

The ultimate purpose of arbitration of disciplinary cases is to determine whether the discipline administered is appropriate to the offense. The application of the prejudicial error test ensures this result. It is a test which can be argued by advocates and applied by arbitrators in the interests of consistent and predictable arbitral decisionmaking.

## LABOR PERSPECTIVE

HARRIS JACOBS*

Is there a trend in the treatment of due process issues when they arise in the context of disciplinary proceedings in arbitration cases? Our considered answer to that question is "yes, maybe." It is advisable, when dealing with any issue in the field of arbitration, to qualify all responses to such questions, since we must pay tribute to the caveat that in arbitration there are no absolutes.

Procedural due process, as an ideal to be recognized in discipline cases, had its inception in arbitration of industrial disputes before the Daughterty decisions of the 60s.[1] In earlier times arbitrators had already suggested that considerations of fairness (including notice and an opportunity to be heard), before the decision to discipline had been made, were a necessity in a collective bargaining milieu.[2] The concept of fairness under the

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[1]*Grief Bros. Cooperage Corp., Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966); 42 LA 555 (Daugherty, 1964); *Combustion Eng'g*, 42 LA 806 (Daugherty, 1964).

[2]*United States Steel Corp.*, 29 LA 272 (Babb, 1957); *American Iron & Mach. Works*, 19 LA 417 (Merrill, 1952); *Cone Finishing Co.*, 16 LA 829 (Maggs, 1951).

system of criminal law protecting the public was readily transported to the arbitral area to afford similar protection to the organized employee. As Arbitrator Maggs stated in 1951:

> It would, I believe, violate our Anglo-American traditions that innocence must be presumed notwithstanding accusations by officials to view the Sheriff's actions alone as constituting reasonable ground for the Company's belief that Chatman was guilty.[3]

Court approval of the principle that due process was required to validate the discipline of employees in an industrial context eventually provided the legal support. This added comfort to the minds of arbitrators who had rendered decisions reversing the discipline meted out to employees, despite grounds otherwise supporting good cause.[4] In the latest update to the Elkouri treatise, the authors opine that "it is becoming widely accepted by arbitrators."[5] While arbitrators generally demanded strict compliance with the procedural requirements of the bargaining agreement, and either refused to sustain the punishment assessed by the employer or ameliorated the penalty to some extent,[6] they are now found more frequently to sustain grievances without the presence of procedural strictures in the contract.[7]

Of course, this view is not without its detractors.[8] Some arbitrators reject due process defenses when presented with cases of serious wrongdoing, particularly when the procedural violation is minor and no prejudice to the grievant is ascertainable,[9] demanding that the grievant assume the burden to establish that prejudice has resulted. Others, who recognize the danger of ignoring a lapse in the duty to observe procedural

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[3]*Cone Finishing Co., supra* note 2, at 834.

[4]*See Johnston Boiler Co. v. Boilermakers Local 893*, 753 F.2d 40, 118 LRRM 2348 (6th Cir. 1985); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 103 LRRM 2380 (8th Cir. 1980). An example of a case denying enforcement of the award that overturned disciplinary discharges on grounds of lack of procedural fairness is *Auto Workers Local 342 v. TRW, Inc.*, 402 F.2d 727, 69 LRRM 2524 (6th Cir. 1968).

[5]Elkouri & Elkouri, How Arbitration Works, 4th ed., 1985-89 Supplement (BNA Books, 1985), at 178.

[6]*Warehouse Distribution Centers*, 90 LA 979 (Weiss, 1987) (employee refused to take drug test which arbitrator found was reasonably ordered; discharge reversed because of failure to provide notice required by agreement); *Gold Kist, Inc.*, 89 LA 66 (Byars, 1987) (company failed to undertake complete review of employee's record prior to discharge).

[7]*McCartneys, Inc.*, 84 LA 799 (Nelson, 1985) (arbitrator set aside discharge after employer failed to allow grievant opportunity to be heard before discharge).

[8]Dunsford, *Arbitral Discretion: The Tests of Just Cause*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 23.

[9]*Intermountain Rural Elec. Ass'n*, 86 LA 540 (Watkins, 1985).

requirements, deal with these due process violations in the remedy, compromising the grievant's claim because of the perceived seriousness of misconduct.[10] Then there are those who refuse to acknowledge the principle that the contractual stricture of just cause has a due process concomitant, and (particularly in cases of egregious conduct) either ignore or give short shrift to the complaint that the employer's actions were lacking in procedural fairness.[11]

Needless to say, labor unions invariably advance the arguments sponsored by Daugherty in his decisions noted earlier,[12] wherein he set out the seven questions defining just cause, to be answered in the affirmative in order to sustain the employee's punishment.[13] Included therein in questions 3, 4, and 5[14] are those characterized as due process issues. And subsumed within the three classes of due process questions are (1) the right to give an explanation of the grievant's actions (to defend oneself), (2) the right to representation (a union presence to assist the grievant), and (3) meaningful rather than perfunctory consideration of the employee's and union's efforts. As with the other four questions posed by Daugherty, a "no" answer to any of these questions constitutes grounds to nullify the employer's punitive action.

To the unions these are more than mere procedural matters. They represent real protection against capital punishment, the ultimate industrial penalty, discharge. From the union perspective, failure to protect any of the rights, whether guaranteed by contract or not, is always prejudicial if disciplinary action has resulted. Some arbitrators have indulged in the speculation that, absent the defective employer practice, another result might have occurred. Here are typical examples:

> There is a *possibility* (less than a reasonable doubt) that B may not have believed that he was not guilty of theft . . . he may have justified this action . . . and charged Jones only for his labor.[15]

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[10]*Union Oil Co. of Cal.*, 91 LA 1206, 1208 (Klein, 1988).
[11]*Johnson Controls, Inc.*, 85 LA 594 (Garnholz, 1985).
[12]*Supra* note 1.
[13]*Grief Bros. Cooperage Corp., supra* note 1.
[14](3) Before administering discipline, did the employer make effort to discover whether employee did, in fact, violate or disobey rule or order? (4) Was employer's investigation conducted fairly and objectively? (5) In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
[15]*Arkansas Power & Light Co.*, 92 LA 144, 150 (Weisbrod, 1989) (employer had, among other things, by deceit denied grievant his *Weingarten* rights).

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> The grievant was terminated without being apprised of the charge which had been brought against him, without being informed that he would be disciplined for his infraction, and without even being allowed the opportunity to present his version of the incident. Admittedly, it is quite possible, maybe even probable, that even if the Company had followed such a procedure, the ultimate decision would not have been any different. Be that as it may . . . and in the truest sense of the phrase, he was considered by the Company as "guilty until proven innocent."[16]

A clear statement of the principle is found in *Gold Kist, Inc.*:

> However, if there is a possibility, regardless of how remote, that the grievant was prejudiced by the employer's omission, the employer's action should be set aside.[17]

Others have taken an absolutist view of this employer duty. Without ever discussing the merits of the grievance, upon noting that these protections were lacking from the proceedings in the case, Arbitrator Fish summarily granted relief to the grievant, stating:

> There is no need to discuss the substantive issue in this case since the Company defaulted on its contractual obligation to notify the Chief Shop Steward prior to disciplining the grievant.[18]

Professor Ver Ploeg cautions the arbitral community to recognize that, by applying a due process standard, they are "imposing their own notions of fairness on parties who have remained silent on the matter." There are at least two rejoinders to that position. By remaining silent, the parties have authorized the trier of the cases to impose current community or national standards in defining just cause. That concept has been utilized in bargaining agreements for many years, and the parties are or should be aware that arbitrators will bring their own peculiarly individual or unique interpretations of that term to the arbitration hearing. Pursuing that response further, arbitrators have adopted due process considerations in determining what is fair and appropriate in the pre-arbitral activities. They have embraced interpretations originating in the U.S. Constitution,

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[16]*Great Midwest Mining Corp.*, 82 LA 52, 56 (Mikrut, 1984).
[17]*Supra* note 6, at 70.
[18]*Harry Davies Molding Co.*, 82 LA 1024, 1026 (Fish, 1984).

which is as fine a legal or community standard as any we can single out.

The other argument is that, while it is a subjective evaluation of fairness, is not that what all decisionmaking or judicial processes devolve into ultimately? To criticize or abolish the requirement of due process prior to employee discipline in an industrial context because it has a subjective component is to subjugate the entire arbitration tradition to banishment for similar reasons. It is almost axiomatic to state that we can find an arbitrator's decision supporting any proposition, similar to the argument that the devil can quote the Bible for evil ends. What other explanation for the variety and breadth of decisions if not that they are all products of the unique individual, the arbitrator writing from a subjective point of view.

Ver Ploeg would limit the utilization of due process considerations to those instances where employees were denied "a meaningful opportunity to tell their side of the story." While she is to be applauded for making this one of her dispositive criteria, other aspects of due process are equally important. Without their observance comes a heightened probability of inequity. Upon reflection, it is apparent that all criteria of due process are related and bound to each other as one package of rights. If an employer will not undertake a reasonable investigation of the surrounding facts and circumstances, it is doubtful that substantial weight will be given to the grievant's explanation. These abuses frequently occur in tandem, appearing in the same case.[19]

Similarly, if an employer refuses to permit representation for the employee who is then and there at risk, ignoring *Weingarten*[20] rights, how fair can the opportunity to respond be? Why should we conclude that a meaningful investigation and evaluation of the facts and circumstances surrounding the violation was conducted before the decision to impose discipline was made?[21]

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[19]*Adrian College*, 89 LA 857 (Ellmann, 1987) (no opportunity to respond, no notice that an incident might give rise to discipline, no fair investigation, no written notice of charges, refusal to divulge information requested in preparation for arbitration). The arbitrator characterized the employer's conduct as "the quintessence of the very unfairness which the parties sought to prevent. . . ." *Id.* at 861. *Cf. Wine Cellar*, 81 LA 158 (Ray, 1983) (no written warning, no opportunity to defend, no investigatory hearing with representative of union).

[20]*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975).

[21]*Southern Cal. Gas Co.*, 89 LA 393 (Alleyne, 1987).

It is not surprising that organized labor, striving to ensure job security for its wards, embraces due process as a necessary ingredient of just cause, for it is not always the merits of a dispute that determine the final outcome. Frequently, it is the process undertaken to review the controversy which influences the action an employer will take. Those arbitrators, who have great respect for the principle that due process is mandated in disciplinary cases, have recognized this phenomenon.[22] The discussion by Arbitrator Smith is noteworthy:

> Yet, I must consider the question of proper discipline . . . in a case where serious employee misconduct collides with serious violations of industrial due process.
>
> One can only speculate on what would have been the outcome here had:
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> * * *
>
> (2) The grievant been promptly informed of the precise grounds for his suspension and discharge.
> (3) The grievant been given a pre-suspension opportunity to be heard in his own behalf.
>
> * * *
>
> Among the possibilities are a settlement satisfactory to both parties. . . . In arbitration law the requirement of due process is founded on fairness, . . . and, before positions are frozen, the good faith attempt to work out a fair settlement.[23]

There is always a real possibility that an appeal to the employer's sense of compassion, to sympathy, will result in a solution less than termination. Together with union representation (e.g., the steward or business agent may be aware of similar cases, which may present a favorable paradigm or in which the employer was cajoled or otherwise induced to grant mercy), the employee may seek clemency from the ultimate punishment—discharge, the equivalent of capital punishment in the industrial context. But if no predisciplinary meeting between the employee and the employer is permitted, how can the employee ameliorate the punishment by vowing never to transgress again? If no union representation at a predisciplinary meeting is authorized, how can the union request a last chance arrangement and

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[22]*See, e.g.,* Gold Kist, Inc., *supra* note 6, at 70.
[23]*Associated Grocers of Colo.,* 82 LA 414, 419 (J. Smith, 1984).

document the agreement in writing, memorializing the pact so that both parties are fully aware no further violations will be tolerated? Some employers are persuaded in these circumstances, and the sinning worker should not be denied this opportunity, as slim as it may be.[24]

One final observation—the course followed by arbitrators on this issue may well provide a litmus test, foretelling the direction of future decisions. Just as a liberal Supreme Court has protected and enforced due process rights at the same time it was extremely sensitive to employee rights under new and developing legislation, so an arbitrator who feels strongly about due process in industrial relations may also be sensitive and tolerant to employee problems, particularly in these difficult times.

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[24]*Harbor Furniture Mfg. Co.*, 85 LA 359 (L. Richman, 1985) (the arbitrator opined that notice would have triggered predischarge action by union rather than force postdischarge action which is more difficult). *Cf. Margolis, McTernan, Scope, Sacks & Epstein*, 81 LA 740 (F. Richman, 1983) (arbitrator found substantial due process violation in denial of presence of steward, but sustained discharge and ordered a cease and desist and posting of a notice).