

PROBLEMS OF PROCEDURAL REGULARITY IN LABOR ARBITRATION*

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INTRODUCTION

Procedural irregularities have troubled arbitrators, and the parties, from the inception of the industrial arbitration process. Such irregularities may take place before, during, or after the hearing. The contract may, for instance, require that before any discharge is made effective the company must notify the union representative and discuss the case with him. Suppose X is then caught drinking on the job and is fired forthwith without any discussion with the union representative. What is the significance of the contractual requirement that there be notice before discharge? Or suppose that the contract requires that job vacancies be posted and that the senior man be given the job provided he has the qualifications. The company then fills the job without considering the senior man, though on subsequent investigation it turns out that the senior man did not have the qualifications. What then? Shortly after reporting for work X is accused by his foreman of being under the influence of alcohol. Hot words are exchanged and X is sent home for the day. The grievance is processed on the question of whether X was, or was not, drunk. At the arbitration hearing, however, the company switches its theory to insubordination. Putting aside the question of the union's preparation to meet the charge of insubordination, is this an issue which may be injected into the hearing at the arbitration level when it has not been discussed during the course of the grievance sessions? A similar question arises when one side or the other chooses, for whatever reason, to conceal and withhold either the testimony of a key witness or the existence of a key document until the arbitration hearing. Is the question which arises then simply one of surprise, in which case it can perhaps be remedied by giving the other party adequate opportunity to investigate and answer the unanticipated evidence, or does it run deeper than that and go to the very admissibility of such evidence when it has not previously been made available?

Finally, there is the post-hearing stage at which at least two procedural problems can, and often do, arise. One or both of the briefs may contain a new argument which has not previously been made,

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though based on evidence in the record. If the argument is likely to be decisive, what opportunity, if any, should the other party be given to respond to it? In the alternative, suppose the arbitrator finds a new clause in the contract which the parties have not argued, but which he deems controlling. May the arbitrator decide the case on the basis of the clause without further reference to the parties, or must he ask their views before proceeding in this fashion? Will he be accused by the parties of arbitral feather-bedding if he prolongs the case by asking for their comments on the new clause? Will he be accused of applying a clause which neither of them thought to be applicable if he does not? If he ignores the clause and sticks strictly to the arguments which the parties have made, will he have fulfilled the proper function of an arbitrator?

These are difficult questions on which arbitrators themselves hold widely varying opinions. Moreover, such questions involve problems of fair procedure, without which industrial arbitration cannot hope to achieve stature and respect, and problems of industrial relations policy. With the former all arbitrators are certainly concerned. The degree to which they should concern themselves with "good" industrial relations policy will be more debatable, both among arbitrators and the parties.

With this much of an introduction we may now turn to a more careful examination of the problems which arise, the ways in which arbitrators have chosen to deal with them, and some of the policy considerations which are involved.

I. THE PRE-HEARING STAGE

Many collective bargaining contracts contain clauses which impose upon the parties a prescribed procedure. Thus there are time limitations which apply to processing the grievance at various steps in the procedure, necessity of notice to the union with an opportunity for discussion in the event of discipline or discharge, requirements of advance notice of layoff in cases of layoff, and provisions that senior employees may be entitled to first consideration on promotion provided they have the qualifications.¹ The reason for such contractual rules and limitations is not hard to find. The very purpose of the collective bargaining contract, as the late Sumner Slichter so often pointed out,² is to introduce an orderly system of self-government within the plant. Arbitrators have sometimes referred to such rules

1. The Bureau of National Affairs, Inc., *Basic Patterns in Union Contracts* (5th ed. 1961).

2. Slichter, *Union Policies and Industrial Management* 1 (1941).

as rudimentary requirements of industrial due process.³ And while it may be true that it is often the union which seeks contractual limitations on the unbridled authority of management, it is not to be supposed that there is no value to management in some of the limitations. Advance discussion of a disciplinary penalty often discloses facts which affect the propriety of the penalty and give the parties an opportunity to discuss the underlying problem, of which the rule infraction may only have been a manifestation.⁴

For our purpose it is not necessary to run the entire gamut of contractual rules in order to understand the problems which are raised for the arbitrator by procedural violations. Three areas—discipline and discharge, layoffs, and promotions—will suffice to illustrate the point.

A. Discipline and Discharge

Contracts frequently include a provision which requires the company, before imposing disciplinary measures or discharge, to notify the union, give the employee a written statement of the charges, and /or hold a hearing at which the employee and a union representative are present. When such procedural requirements are violated and the case ends up in arbitration, the question naturally arises as to the effect of the rule violation. A review of the reported cases indicates that the following conclusions may be drawn on this question:

1. *All* arbitrators attach importance to the contractual requirement. Some arbitrators have even held that where past practice included prior notification of discharge such practice has become a part of the contract even though no express written provision is contained therein.⁵

2. *Some* arbitrators conclude that failure to follow the contractual procedure nullifies the entire action.⁶

3. *Most* arbitrators conclude that failure to comply with a contractual procedure will affect the degree of penalty which is appropriate, but not necessarily vitiate the action in its entirety.⁷

4. There are occasional cases which suggest that failure to comply with the contractual procedure will not necessarily affect the penalty at all.⁸

5. There are more reported cases of procedural defects in discipline

3. Bendix-Westinghouse Corp., 33 Lab. Arb. 466 (1959).

4. Fleming & Witte, *Grievances under the Collective Agreement, Unions and Union Leadership* 226 (Barbash ed. 1959).

5. Coca-Cola Bottling Co., 9 Lab. Arb. 197 (1947).

6. Baldwin-Lima-Hamilton Corp., 19 Lab. Arb. 177 (1952).

7. E.g., Kohler Brothers Sand & Gravel Co., 25 Lab. Arb. 903 (1956).

8. E.g., Columbian Rope Co., 7 Lab. Arb. 450, 455-56 (1947).

and discharge in the early reports than in recent years. This suggests that if such clauses still exist in contracts, and it is common knowledge that they do, past arbitration decisions have caused the parties to be more careful in complying with them.

To satisfactorily document these conclusions one needs to go into a little more detail. Even when arbitrators have said that the penalty may stand despite irregularity in following the contractual procedure, they have not discounted the importance of the procedure. Thus one arbitrator thought that it was appropriate to discharge a bus driver with a bad safety record even though the employer had failed to file written charges against the driver as required by the contract. But the result was justified on the ground that the safety factor was too significant to be overlooked despite the admitted procedural defect.⁹ It is, of course, noteworthy that in such a case there is a third interest involved—that of the riding public. In another case the arbitrator held that failure to issue a written reprimand, as required by the contract, did not affect the discharge because the union had acquiesced in the irregularity.¹⁰ In another case the arbitrator held that a discharge could stand where the company had failed to give the employee his contractual right to talk to his steward before leaving company premises. However, in this case the union apparently did not argue that violation of the contractual procedure should nullify the discharge.¹¹ And in a case where the majority reinstated a man who had been discharged without the union having an opportunity to offer evidence in accordance with the contractual requirement that no one be discharged without an investigation, the minority dissented vigorously on the ground that previous decisions had held that procedural defects were harmless where the "employee voluntarily acknowledges the commission of an offense charged and is assessed a measure of discipline which is fair in relation to the offense committed. . . ." ¹² Finally, in a railroad case in which the employee's contractual rights had been violated in that his chosen representative was not present at the interrogation of a certain witness, the arbitrator held that the testimony of this witness would have to be ignored, but that the employer's case could stand without it.¹³

Despite the importance which arbitrators have assigned to compliance with contractual procedures, not many of them have held that

9. Hudson County Bus Owners Ass'n, 3 Lab. Arb. 786 (1946).

10. Schwayder Bros., Inc., 7 Lab. Arb. 552 (1947).

11. Douglas Aircraft Corp., 19 Lab. Arb. 716 (1952).

12. Railway Express Agency, Inc., 29 Lab. Arb. 409, 411 (1957).

13. Brotherhood of Railway Trainmen and N.Y. Central R.R. Co. (Eastern District, Boston and Albany Division), Special Board of Adjustment No. 289, Award No. 8, Claim No. 2 (1959).

irregularities of this type will completely negate the action which has been taken. There are a few decisions of this kind,¹⁴ but sometimes the language of the contract is very precise, as in the case in which the contract provided that no discharge should be effective prior to the ruling of the Impartial Chairman and the company then discharged the individual in advance of such a ruling.¹⁵ In the overwhelming number of the cases arbitrators have taken the rule violation into consideration with respect to the penalty, but have not declared the entire action a nullity. Doubtless the exact nature of the award in these cases is affected by the facts of the particular case, and it is difficult to generalize. There are discharge cases in which the employer failed to consult the union in advance;¹⁶ the employer failed to give the employee a statement of the reason for his termination;¹⁷ the warning procedure was ignored;¹⁸ and the employer fired a man in violation of the provision that no discharge could be effected without approval of the arbitrator except in case of theft.¹⁹ The employee was reinstated but denied part or all of his back pay because the arbitrator concluded that the offense had, in fact, been committed, but the procedure had been violated. Conversely, there are cases in which the company failed to give the union prompt notification of the dismissal;²⁰ the discharged employee was refused permission to call a foreman to the grievance hearing despite the contractual guarantee that the employee could call anyone who could shed light on the grievance;²¹ the employer failed to file the required written complaint;²² employees were summarily discharged without the requisite hearing in the presence of union representatives;²³ and the discharge was sustained but the employees given back pay from the date of the discharge to the date of the award or some other appropriate date. In other cases the discharge of an employee for insubordination was commuted to a five day layoff because, among other reasons, the employer had failed to follow the contractual requirement that he notify the union of the discharge;²⁴ and discharged employees were given an additional two weeks pay because the employer violated the contractual requirement that two weeks prior notice be given of a

14. See, e.g., Baldwin-Lima-Hamilton Corp., 19 Lab. Arb. 177 (1952).

15. Modernage Furniture Corp., 4 Lab. Arb. 220 (1946).

16. Hayes Mfg. Corp., 17 Lab. Arb. 412 (1951).

17. Die Tool & Eng'r Co., 3 Lab. Arb. 156 (1946).

18. Cedartown Textiles, Inc., 8 Lab. Arb. 360 (1947).

19. Lou Seidman & Co., 9 Lab. Arb. 653 (1948).

20. National Lead Co., 13 Lab. Arb. 28 (1949).

21. Pittsburgh Plate Glass Co., 8 Lab. Arb. 317 (1947).

22. Schreider Trucking Co., 5 Lab. Arb. 430 (1946).

23. Torrington Co., 1 Lab. Arb. 35 (1945).

24. Ranney Refrigerator Co., 5 Lab. Arb. 621 (1946).

contemplated discharge even though the employees were given two weeks pay at the time of discharge.²⁵

Viewed from a purely theoretical standpoint one would suppose arbitrators could take at least three positions in discipline and discharge cases in which there are procedural defects: (1) that unless there is strict compliance with the procedural requirements the whole action will be nullified; (2) that the requirements are of significance only where the employee can show that he has been prejudiced by failure to comply therewith; or (3) that the requirements are important, and that any failure to comply will be penalized, but that the action taken is not thereby rendered null and void. The first of these positions would seem to be generally undesirable for a number of reasons. The procedural irregularity may not have been prejudicial in any sense of the word, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process, and the end result could on many occasions be quite ludicrous. If, for instance, an employee gets drunk on the job and starts smashing valuable machinery with a sledge hammer, it would hardly seem appropriate to nullify his discharge on the sole ground that it was in violation of a contractual requirement that the union be given advance notice. The second position has considerable merit in that it focuses on what is, after all, the significant point. Granted there has been a failure to comply with the procedure required by the contract, has this dereliction in any way prejudiced the employee? If he can show that it has, he has then obviously been deprived of a fair opportunity to present his side of the grievance and the past action should be set aside. There is, nevertheless, a defect in this approach. It tends to minimize the importance of a regularized procedure in a matter of considerable importance to both the company and the union, and to place a premium on value judgments as to when action will result in prejudice to the individual and when it will not. In the clear case this may make no difference, but in the marginal situation it may change the whole result. It is a recognized fact in all human negotiations that it is easier to modify a proposed action before it is taken than afterwards. Thus where a reason for requiring by contract that the company discuss a discharge with the union before effectuating it is to give the union an opportunity to forestall the action and persuade the company that some lesser penalty might better serve the purpose, it may be hard to prove that the employee has been prejudiced by failure to comply with the procedure, but certainly his situation is psychologically quite different. The third approach, which is the one most arbitrators have

25. New York Tribune, Inc., 8 Lab. Arb. 410 (1947).

taken, has the virtue of penalizing failure to comply with the contractual procedure, thereby encouraging compliance with it, but not necessarily obviating all that has been done. The decision may, on occasion, quite outrage one of the parties. When a company has discharged an employee for an offense which everyone can concede is worthy of discharge, it may be shocked to be told that it must nevertheless pay the culprit his wages between the time of the discharge and the date of the arbitration award because it failed to follow the procedural requirements of the contract. This sense of outrage will hardly prevent the company from making sure the next time that the contract is followed. Is this a bad result? The steady decline in reported cases involving procedural defects suggests that such arbitration decisions may have been influential in persuading the parties that rules, once made, are to be complied with.

B. Layoff Problems

The provision found in so many collective bargaining contracts requiring advance notice of a layoff serves a somewhat different purpose than the similar provision related to disciplinary action. The employee who is about to be laid off wants to know about it not so much in order to talk the company out of it, for so long as his seniority is respected he has little possibility of this. Rather, he wants to know as much in advance of a layoff as possible so that he may adjust his private plans to his change in status. Thus the notice of layoff becomes a part of the substance of the transaction. Moreover, in the normal layoff the company is able to plan ahead and it does not resist the idea of advance notice. The tensions which are invoked in disciplinary and discharge cases are not involved. The exception to this, of course, is the layoff which is occasioned by an emergency beyond the control of the company.

In light of the above, it is not surprising that the cases almost universally hold that where the company has violated the notice provisions of the layoff procedure liability is incurred. The difficult cases have been those in which the sudden layoff is beyond the control of the company and it seeks relief from the notice provisions of the contract. Even in such situations if the notice provision of the contract is unqualified, arbitrators have usually held that it is binding despite the company's inability to do anything about the cause of the shutdown.²⁶ Sometimes a modified result is attained by applying principles of contract law under the doctrine of impossibility.²⁷ Thus the company is excused from performance to the extent to which

26. E.g., Greer Hydraulics, Inc., 29 Lab. Arb. 706 (1957).

27. 6 Williston, Contracts, § 1956 (Rev. ed. 1938).

performance is genuinely impossible, but not thereafter. Part of the period of notice may then be excused without waiving the entire requirement. Some contracts recognize the problem and take care of it in that fashion.

C. Promotions

Promotion cases often involve a different kind of problem in procedural regularity. The discipline and layoff cases tend to involve specific contractual requirements which have, for one reason or another, not been met. Promotion cases, on the other hand, often involve only a general standard with the question then being one of whether the procedure which the company utilized in complying with that standard was "fair." Obviously this gives the arbitrator much greater latitude for the application of his own views, for he is then faced not only with assessing the importance of compliance with a given standard, but deciding what the standard is in the first place.

Illustrative cases in this area are frequently found in the telephone industry. A typical contract clause will provide that in selecting employees for promotion the company "shall adhere to the principle that seniority shall govern if all other qualifications of the individuals being considered are determined by the company to be substantially equal." The decision of the company is then final unless it is shown to have acted "arbitrarily or in bad faith."

Under one such clause an arbitrator held, in 1951, that the clause had been violated because company supervisors, in evaluating applicants, read "substantially equal" to mean "exactly equal."²⁸ Following this decision the company installed an elaborate system for evaluating applicants so that the same error could not happen again. But in a subsequent case an arbitrator held that the company had not followed its own system with the end result that its action had been "arbitrary."²⁹ In another telephone company case almost exactly the same sequence of events took place.³⁰ A similar situation, outside the telephone industry, involved a contract which provided that in cases of transfers, promotions and increases or decreases of the working force, length of service, ability, skill and efficiency and physical fitness should be considered. Seniority would then govern if employees had the "necessary" ability, skill, efficiency and physical fitness. In choosing employees for certain vacancies the company utilized a battery of tests developed at its request by a university

28. Southern Bell Telephone and Telegraph Co., 16 Lab. Arb. 1 (1951).

29. Southern Bell Telephone and Telegraph Co., 8 Am. Lab. Arb. Awards # 70,335 (1957).

30. American Telephone and Telegraph Co., 25 Lab. Arb. 256 (1955).

research agency. The arbitrator thought it was improper for the company to rely on these tests to the exclusion of all other factors because: "Those attributes are in point only to the extent of establishing a standard of satisfactory capacity for such employees as can achieve it, and from there seniority prevails."³¹ Thus any attempt to follow the test to the exclusion of seniority was improper. And in a situation in which the company agreed to promote men in accordance with their seniority, provided the employee had the aptitude, ability and efficiency to handle the job, the arbitrator held that it could not automatically eliminate from consideration an applicant who did not have a high school education, though it could consider this insofar as such a factor could be shown to be relevant.³²

In short, where the parties have agreed to a general standard, arbitrators have not been reluctant to inquire into the procedures by which such general standards are effectuated. And insofar as such procedures are capricious, or may lead to unfair results, they have been rejected. Such a conclusion, incidentally, often leads the arbitrator into an even more difficult question—that of the proper remedy—which is beyond the scope of the present inquiry. The arbitrator may get into the case in the first place because a rejected applicant, usually having greater seniority than the successful bidder, grieves. At the hearing the evidence may show that the procedure used in choosing the employee for the vacancy was defective, but it may furnish no basis whatsoever for deciding whether the grievant would be qualified if a proper procedure had been utilized. The hearing may, on the other hand, disclose that the grievant is not qualified. To simply declare the job open, as is sometimes done,³³ may be less than satisfactory because commitments have been made which will lead to the suspicion that the same result will ultimately be reached after a new and ostensibly fair proceeding. To promote an unqualified man will be to ignore the contract, and also to expose to possible discharge a man who is not competent to do the work. In situations of this kind arbitrators have sometimes sought a compromise under which the party which has failed to comply with the proper procedure is penalized without upsetting the substantive action which has been taken.³⁴

D. Conclusions

If there is any basis for the claim that arbitrators have violated the fundamental rules of fairness by failing to respect procedural

31. Ball Brothers Co., Inc., 27 Lab. Arb. 353, 356 (1956).

32. Union Oil Co., 17 Lab. Arb. 62 (1951).

33. Sandvik Steel, Inc., 29 Lab. Arb. 747 (1957).

34. A. O. Smith Corp., 9 Am. Lab. Arb. Awards # 70,970 (1959).

requirements of the contract, it is not apparent from the reported cases. As a matter of fact, quite the contrary seems to be the case. Arbitrators often go considerably beyond the requirements of fair play. Exactly why they do so is not always clear. Sometimes non-compliance may be simply a convenient peg on which to hang a decision which may otherwise appeal to the arbitrator but which he is having difficulty rationalizing. At other times the decision may represent a value judgment on the part of the arbitrator that it will be "good" for the parties to adhere strictly to their agreement. To the extent that it represents the latter the arbitrator has gone beyond his immediate function of umpiring the dispute and imposed something of his own philosophy on the parties. In any event, there is a higher degree of uniformity in the way arbitrators treat procedural irregularities which occur before the hearing than there is those which occur either at or after the hearing, as we shall now see.

II. THE HEARING STAGE

Every experienced arbitrator has faced a puzzling series of questions arising out of the presentation of alleged new issues, new arguments and new evidence at the hearing stage. These issues, arguments and evidence are characterized as "new," of course, because they have not been presented at the previous stages in the grievance procedure. Examples of this situation are readily available. B is discharged for the violation of a safety rule, but at the hearing the company wants to show "unsatisfactory work performance," though it has not previously argued this.³⁵ C is discharged for excessive absenteeism, and the company now wants to show, for the first time, that there are other valid grounds for the discharge.³⁶ D is discharged for starting a civil action against the company, but the latter now wants to show that he has committed a theft.³⁷ E is discharged for insubordination, but the company now wants to show that he once punched out for two other employees, contrary to company rules.³⁸ In a rate dispute in which the union has contended for a given classification, it now wants the arbitrator, if he finds the requested classification inappropriate, to choose a classification which has not been previously discussed.³⁹ In a union jurisdictional dispute one party attempts for the first time to show that the other is engaged in a boycott, though this

35. West Virginia Pulp and Paper Co., 10 Lab. Arb. 117 (1947).

36. International Shoe Co., 7 Lab. Arb. 941 (1947).

37. Dow Chemical Co., 32 Lab. Arb. 71 (1958).

38. Forest Hill Foundry Co., 1 Lab. Arb. 153 (1946).

39. Chrysler Corp. and United Auto Workers, 1 Am. Lab. Arb. Awards # 67,258 (1944).

is not a part of the charge which has brought the matter before the umpire.⁴⁰

Whenever a situation like those cited above arises two basic, but quite separate, questions arise. The first is one of procedure, the second one of policy. This difference in the nature of the two questions gives rise, in turn, to a subsidiary question, namely, should arbitrators confine themselves to procedural questions and avoid those which involve industrial relations policy? None of these questions can be satisfactorily answered without exploring, by case example, the nature of the terms "procedure" and "policy," and then the institutional framework within which labor arbitration takes place.

When a company discharges X for violating a safety rule, and then wants to show at the hearing that he has an unsatisfactorily work record, a number of procedural questions will immediately occur to the arbitrator. Is the union prepared to meet this new charge, or may it legitimately claim "surprise?" If the union is surprised should the hearing be adjourned in order that it may adequately prepare its case? Has the employee been prejudiced in any way by the company's delay in bringing forth this new charge? In view of the seriousness of the discharge penalty is there an analogy to the law of criminal pleading in which there ". . . is a rule that on an indictment charging only a single offence the issue must be confined to that offence, and no election is allowed to lay before the jury a number of such offences from which they are to select the one best proved?"⁴¹

Quite obviously the arbitrator is competent to, and indeed must, answer the above questions if the arbitration hearing is to be fair. But there are other questions which he may, or may not, answer which more nearly relate to "policy" than to "procedure." If the parties are allowed to introduce "new" material at the arbitration stage (even assuming this can be done under conditions which will fully protect the procedural rights of the other party) will this tend to undermine the whole grievance procedure of which arbitration is but the final step? And if it will tend to do this, should the arbitrator rule that no "new" material may be presented because this will be "bad" for the system of industrial jurisprudence which the parties are supposed to be developing in the plant? Or should the arbitrator take the position that the nature of the relationship between the parties is none of his business, and that the only questions which he need answer with respect to any alleged new material relate to whether either party will be prejudiced in terms of a fair hearing?

If the institution known as labor arbitration could be made to fit

40. *IUE v. Sheet Metal Workers*, 33 Lab. Arb. 512 (1959).

41. 1 Wigmore, *Evidence*, § 194, at 651 (3d ed. 1940).

within a single mold, the question of the appropriate role of the arbitrator in deciding questions of "procedure" or "policy" could at least be wisely debated. But because labor arbitration does not fit a single model the debate is immeasurably more complicated. One can easily tick-off several varieties of arbitration situations:

1. The well-established, sophisticated umpire system in which the grievance steps are well handled, and the parties firmly believe that every effort should be made to settle the matter before it is referred to arbitration.⁴²

2. The well-established umpire system in which the parties nevertheless believe in giving their umpire wide latitude to proceed on his own.⁴³

3. The ad hoc case in which the parties are sophisticated but where, for one reason or another, one party has chosen to withhold a key portion of its evidence.⁴⁴

4. The ad hoc situation in which one or both parties procures counsel at the arbitration level, and where for the first time a systematic investigation and organization of the evidence is provided.

5. The ad hoc situation in which the parties have not procured counsel and where one or both are rank neophytes at arbitration, so that they have made little or no effort to organize the evidence prior to the hearing, and where the arbitrator must himself take over much of the examination.

6. The case in which the relationship between the parties is so bad or so suspicious that they make no real effort to resolve grievances prior to arbitration, and much of the time at the arbitration hearing may be spent in trying to ascertain the issues which are to be tried.

These are, of course, not the only situations which can arise, but they are familiar ones and they illustrate the point that there is no common denominator in the labor arbitration field. Moreover, the contract itself may control the introduction of new issues, or new evidence at the hearing stage. Thus any meaningful analysis of decisions handed down by arbitrators becomes difficult. Nevertheless an analysis may shed some further light on what arbitrators are doing in these kinds of cases and why.

Starting at the far end of the spectrum, it is common practice to deny to either party the right to present and argue an entirely new

42. Alexander, *Impartial Umpireships: The General Motors—UAW Experience, Arbitration and the Law*, in *Proceedings, 12th Annual Meeting, Nat'l Academy of Arbitrators* 108 (1959).

43. E.g., *The agreement between the Ford Motor Co. and the UAW-AFL-CIO states in Article VII, Sec. 13 (b), that: "The Umpire may make such investigation as he may deem proper. . . ."*

44. *Texas Co., 7 Lab. Arb. 735 (1947)*.

grievance, even though the grievance has some episodic relationship with the issue before the arbitrator. Thus where the original grievance complained about the employer's method of reducing his work force, the union was not permitted to argue claims related to recall or alleged denial of free transportation rights since no separate grievances had ever been filed on those subjects.⁴⁵ Even in this kind of situation, however, the new claim would probably be heard in the absence of any objection from the company. As was pointed out earlier, there are situations in which the parties literally make it a practice to define the issues at the arbitration hearing, and in which they then proceed upon the basis of the issues as defined. This may very well mean that such differences have never been discussed in any meaningful fashion in the grievance procedure. Under an umpire system new claims of this kind would be quite unlikely to end up before the umpire without any previous discussion between the parties. But in the ad hoc type of case the arbitrator has almost no opportunity to influence the development of a sound grievance procedure.

A much more frequent situation involves the kind of case in which the basic issue remains the same—"Was X discharged for just cause?"—but the rationale or the evidence changes. There are many decisions, particularly in discipline and discharge cases, in which it has been held that the company is bound by whatever reasons were given for the discharge at the time it was invoked, and may not thereafter rely upon other grounds. This is so even though the additional grounds which are now stated can be proved and if proved would probably have justified an otherwise unjustifiable action.⁴⁶ There is, however, at least one decision in which the arbitrator held that the evidence was insufficient to support a discharge on grounds of excessive absenteeism and that other reasons subsequently given could not be considered, but nevertheless denied back pay because of the additional reasons for the discharge which were advanced at the hearing.⁴⁷ Some of the cases in which the company is limited to the reasons originally given for the discharge can be traced directly to contract language. It may require that the company notify the union of *all* reasons for the discharge at the time the action is taken.⁴⁸ Or it may simply require that before discharge an employee be given a written statement of the reasons for the discharge.⁴⁹ In either case the arbitrator need only rely upon the contract for his

45. American Airlines, Inc., 27 Lab. Arb. 448 (1956).

46. Chrysler and United Auto Workers, 1 Am. Lab. Arb. Awards # 67,021 (1945).

47. International Shoe Co., 7 Lab. Arb. 941 (1947).

48. Forest Hill Foundry Co., 1 Lab. Arb. 153 (1946).

49. Bethlehem Steel Co., 29 Lab. Arb. 635 (1957).

ruling that additional reasons for the discharge are not admissible at the arbitration hearing. There are other cases in which a similar result is reached but in which less reliance is placed upon the strict language of the contract. In such cases it is often frankly stated that to permit new grounds for past action to be stated at the arbitration hearing will undermine the grievance procedure,⁵⁰ and "void the good results which may be expected in the preliminary steps of a well functioning grievance system."⁵¹

It appears correct to conclude from the above cases, and others like them, that arbitrators believe it is unwise to permit new charges not previously advanced in the course of the grievance procedure, to be advanced at the hearing. But one must not assume from this that any such universal rule is invoked. As has been pointed out, the official rationale for such a holding often is that the contract does not permit it. Thus the arbitrator is not imposing his views of what is "wise" upon the parties, he is simply applying a contractual agreement. Many of the cases in which the contract does not require such a restriction involve umpire situations in which the umpire, usually with the full approval of the parties, is attempting to develop a system of grievance handling which will maximize the responsibility of the parties.⁵² There are, on the other hand, countless ad hoc situations in which the issues are never defined with any care prior to the arbitration hearing, and in which the arbitrator's sole concern is likely to be one of conducting a fair hearing in the sense that both parties are aware of the issue to be tried and have had an opportunity to prepare for it. In this kind of a proceeding there is usually little question of outlawing a given charge, but only of giving the other side adequate opportunity to prepare to meet it.

A somewhat different question is raised when the problem is not one of a new charge, but rather of new evidence relating to the same old charge. Such evidence will ordinarily fall into one of two categories: (1) newly discovered evidence; or (2) deliberately withheld evidence. In either case the hybrid nature of the arbitration tribunal is exposed. It is, in part, an appellate body—a court of last resort—for it ordinarily considers an issue only after the parties have tried but failed to resolve it. It is, on the other hand, akin to a trial tribunal, for seldom do the parties make an all-out effort to marshal their resources unless the case must be referred to arbitration.

Basically, new evidence (in either of the above categories) will present the arbitrator with the same questions of procedure and policy

50. Dow Chemical Co., 32 Lab. Arb. 71 (1958).

51. Chrysler Corp. and United Auto Workers, 1 Am. Lab. Arb. Awards # 67,258 (1944).

52. Alexander, *supra* note 42, at 146.

which have already been discussed. He will be concerned with whether the new evidence so surprises the other party that a fair hearing cannot be held without an adjournment with opportunity for investigation and further preparation. And in the case of deliberately withheld evidence he will have additional misgivings about the "wisdom" or the "ethics" of permitting the evidence to be introduced. These misgivings will be accompanied by doubts as to the function of the arbitrator in relation to such policy matters.

If the only problem is that in the course of preparing its case for arbitration one side or the other has developed some new arguments, not previously used in the prior steps of the grievance procedure, few arbitrators are likely to find any serious question as to the receipt of the argument. As one arbitrator said:

At the hearing the Union departed somewhat from these [past] arguments and added some additional arguments. The Chairman does not believe that the new contentions raised by the Union at the hearing should be barred for the reason that they were not presented during the preliminary discussions in the grievance procedure, although the Company contends otherwise. When cases reach the last step in the grievance machinery, consisting of arbitration, it is common practice for them to be reviewed and more thoroughly prepared than they had been prior to that time. Contentions which do not change the facts or the issue, it appears to the Chairman, should always be available to the parties. A different situation is presented where important facts, as distinguished from arguments, may have been withheld during the earlier steps of the grievance machinery or where, as often occurs, an attempt is made to broaden the scope of the grievance for the first time in arbitration. Such, however, is not the case here.⁵³

The fact that new evidence, not previously presented in the grievance procedure, is being presented does not cause its disbarment by all arbitrators. In one such case the contract provided that in discharge cases the parties should have a meeting at which "the facts concerning the case shall be made available to both parties." Subsequently, in arbitration, the union contended that the arbitration board was limited in its consideration to those items of fact presented by the company at the original meeting. The board rejected this view, saying:

The only reasonable interpretation that can be made of this sentence is that each party on the request of the other party must make available what facts it has on the case at the time. . . . There is obviously nothing in the given sentence . . . that

53. Mergenthaler Linotype Co., 15 Lab. Arb. 707, 708 (1950).

precludes either party from introducing subsequently in the grievance steps or in the arbitration facts other than those presented in the suspension hearing. . . . Certainly the union, on behalf of a disciplined employee who believes that he has been unfairly dealt with, should not have foreclosed to it the right to present additional evidence that might be used to sustain the innocence of the employee. Similarly, the company must be recognized as not being deprived of the right to introduce additional evidence prior to final adjudication to sustain its charges against the employee. These respective rights of the parties are commonly recognized in judicial proceedings. The labor agreement of the parties does not set aside these rights.⁵⁴

While the above decision did not limit the evidence at the arbitration hearing to that which was presented at the original grievance hearing, it did imply that the parties were under a mutual obligation to disclose to each other facts then in their possession. Another arbitrator appeared to open the door even wider for the receipt of new evidence. When the employee was discharged for incompetence, the union argued that the company did not, at the preliminary hearing between the parties, present the evidence which it later submitted to the arbitrator to prove unsatisfactory work performance, and that this evidence should therefore not be considered. The arbitrator simply replied that "the contract . . . does not restrict the Umpire to consideration of only factual evidence submitted at the first stage, or any earlier stage. . . ."⁵⁵

Perhaps the most difficult question is whether evidence which is deliberately withheld at the earlier stages of the grievance procedure may be barred on that ground when the arbitration is held. On this arbitrators appear to hold quite different views. The case for barring such evidence is set forth in the following extract:

Arbitration is merely a method for determining a pre-existing dispute which the parties have been unable to settle in the prior steps of the grievance machinery. The arbitration hearing is not the place for presentation of new claims, although the more thorough investigation which precedes arbitration often results in the discovery of evidence not theretofore known and of arguments not theretofore conceived. The essential facts supporting the claim of the Union should be revealed in the earlier steps of the grievance machinery if such facts are known to the Union. In the absence of such revelation, the entire purpose of the grievance machinery remains unfulfilled, and the possibilities of settlement are lost. The same, of course, is true with regard to the company's claims and existing evidence in its favor. If such

54. American Steel & Wire Co., 5 Lab. Arb. 193, 206 (1946).

55. Carbon Fuel Co., 1 Am. Lab. Arb. Awards # 67,327 (1946).

evidence is not made known by one side to the other it may not be accepted for the first time in arbitration.⁵⁶

The opposite view, namely, that the only serious question when such evidence is presented is one of "surprise," is set forth in another case:

The Union has complained that the Company did not furnish it "all information in its possession necessary to a full understanding of the subject matter of the complaint," as required by Article XIV of the contract. However, all such information was presented at the hearing, and the Union was allowed ten days, the time it asked, to consider it. That the information must be furnished at an earlier stage of grievance proceedings is not evident from the language of the contract, which only states that the Company will furnish the information "to the representative of the employee and/or Board of Review." The purpose appears to be to make sure that the representative and the Board shall have the information in time for full consideration of it; and this was so in the present instance.⁵⁷

Something of a compromise between the above positions was struck by a third arbitrator who justified the admission of deliberately withheld evidence at the arbitration hearing on the ground that the union had contributed to the "adversary" atmosphere in which the parties conducted their affairs, and could not therefore complain about the end results.⁵⁸

Conclusions

Both the reported cases and discussions with arbitrators indicate a wide disparity in the way they handle problems of new issues, new evidence and new arguments presented for the first time at the arbitration hearing. However, an important caveat must be entered immediately. Differences among arbitrators on these questions may be more theoretical than real. The lack of a single model for the arbitration process confuses the question. If one prefaces his question as to the handling of new material by stating the context within which the question arises, e.g., a large corporation with a well established umpire system, the answers are much more likely to be uniform than if the question is put in the abstract. Moreover, it is clear that in any context there is no significant difference among arbitrators as to the necessity for insisting upon procedural safe-

56. Bethlehem Steel Co., 18 Lab. Arb. 366, 367 (1951).

57. Texas Co., 7 Lab. Arb. 735, 739 (1947).

58. Bethlehem Steel Co., 6 Lab. Arb. 617 (1947).

guards in the way of adjournment, further investigation, etc., which will insure the integrity and fairness of the hearing.

The one area in which there appears to be a genuine split among arbitrators relates to the matter of referring the controversy back to the parties when any new material appears upon the scene. Some arbitrators feel strongly that the arbitration process must never become in any way a substitute for the grievance machinery and collective bargaining in general. Thus in their view the proper ruling when new issues, evidence or arguments are presented is to refer the matter back to the parties on the theory that since they have not considered the new materials, they have not exhausted the possibilities of agreement and arbitration should not proceed until they have. To do otherwise, they point out, is to undermine the collective bargaining potential between the parties and make a mockery of the grievance machinery. Other arbitrators would say that this approach is probably desirable within the context of an established umpire system, but that it is wholly unrealistic in the typical ad hoc situation. It is true that the two cases are not quite comparable. In the umpire situation the arbitrator has a continuing stake in the whole grievance pattern. His long run success, as well as his tenure, may depend in large part on his success in persuading the parties to resolve most of their own difficulties. This point of view is likely to be buttressed by the more careful thought which the parties have given to their umpire system and to the ultimate objectives which they hope to achieve through it. One of those objectives will almost certainly be to resolve their own grievances insofar as this is possible. The likely result is a high degree of co-operation between the umpire and the parties toward the ultimate end of exhausting the possibilities of settlement before cases are referred to the umpire for decision. The institutional factors which are operative in the ad hoc case tend to exert a pressure in exactly the opposite direction. Even if he has previously arbitrated for the parties, the ad hoc arbitrator may know less about the relationship than does the umpire, and certainly has less control over it. He comes into the case with very little information. If material is presented at the hearing which one party contends is entirely new, the arbitrator's concern is much more likely to be with the procedural problem of giving the other side a fair opportunity to meet the new material than it is with the impact which proceeding further will have on the collective bargaining relationship between the parties. Moreover, the parties themselves are likely to resent "meddling" with their affairs in terms of any advice he may render on the development of "sound" labor relations. They may suggest that they have hired him to render a decision, not to give them gratuitous advice.

Rigid insistence upon a given pattern to be followed in the event new material is offered at the arbitration hearing would seem to be a mistake. The flexibility which has been a principal virtue of the arbitration system would be thereby diminished. Whether the issue should be referred back to the parties when something new emerges is essentially a policy question. The answer depends so much on the context within which the question arises that no uniform answer is either possible or desirable. However, if one views the question of new material solely from the vantage point of the fair process and procedure, it would seem that three questions should then be asked:

1. Is the issue, the evidence, or the argument which is now being raised genuinely new in the sense that the parties have not previously been aware of it?

2. If it is new, will its admission in any way prejudice the position of the other party, or is it purely incidental to the basic issue in the case?

3. If it is new, and if it will be prejudicial to the interest of the other party, what procedural steps should be taken to protect the interest of the surprised party?

There are some issues which arise on the arbitration hearing which evoke the response of "surprise," which hardly qualify for that label. Assuming there is genuine surprise injected at the hearing, it may nevertheless not prejudice the case. New corroborative witnesses, for example, may add nothing to the principal case, and the other party may be fully protected through his right to cross examination.

If there is real surprise, and if prejudice will result, some way must be found to give the other party an opportunity to meet the new situation. Many arbitrators apparently accept the evidence, but then give the opposing party an opportunity to investigate and request a further hearing.

There are no reported cases which have come to our attention, nor have discussions with arbitrators revealed any complaint by the parties that they have been denied a fair hearing because of surprise evidence. They may differ as to its admissibility, they may strenuously argue the effect of such a procedure on the grievance machinery, and they may deplore the ethics of the party which has deliberately withheld evidence, but there is no evidence that they feel that the procedural steps which arbitrators have taken to protect their rights to respond to surprise materials have been less than satisfactory.

III. THE POST-HEARING STAGE

Logically, the problem of new evidence after the record has been closed should not give rise to any particular difficulty and, in fact,

it rarely does. No evidence contained in a post-hearing brief will be considered if it was not presented at the hearing. If, on the other hand, one of the parties advances a legitimate reason for re-opening the hearing in order to introduce new evidence not available at the time of the hearing, the request will usually be granted. The circumstances of the individual case will control the ruling, but if one assumes that the request is in good faith and not for the purpose of unduly lengthening the hearing, most arbitrators will doubtless agree to reconvene for the purpose of receiving the evidence.⁵⁹

The difficulty at the post-hearing stage is not with evidence but with argument. The arbitrator may sit down to consider a case only to find that one of the briefs contains an argument which was not advanced in the hearing or at any of the steps of the grievance procedure. Or, in the course of studying the record, the arbitrator may find that he is himself gradually evolving a new theory which neatly resolves the dispute but which is new to both of the parties. What then? If the arguments are based upon the evidence which is in the record is there any reason why the parties or the arbitrator should be restricted in any fashion in arguing any theory that occurs to them for purposes of reaching a decision? Perhaps this is a question which ought not to be answered without first testing it against some of the case problems which arise.

In an industrial plant making packaging products one department handled the necessary printing. Apprentices regularly worked with the journeymen so that a supply of trained men would be available if and when expanded operations became necessary. At the outset of the training program the apprentices had simply worked along with the journeymen during their regular hours. Then the company decided that it would be more efficient to permit the apprentices to continue to operate the machines during the half-hour lunch periods of the regular operators, and to take their own lunch periods after the operators were back on the job. When this change was ordered the union promptly grieved, claiming in the alternative that the apprentices were either entitled to journeymen's pay for the half-hour period, or that the journeymen were entitled to an additional half-hour's pay since they "owned" the machines to which the apprentices were assigned. The dispute between the parties over this issue was referred to arbitration after they were unable to agree and the hearing followed along the lines indicated. In its brief the union, for the first time, advanced an argument which, while related to its original contention and based upon the evidence in the record, had not pre-

59. See Voluntary Labor Arbitration Rules, American Arbitration Ass'n, Rule 32.

viously been made. It asserted that the journeymen were entitled to the extra half-hour's pay because, though they did not work during this period, they were held responsible for the work of the apprentice, and if it was in any way defective, the blame was placed upon the journeymen. There was, indeed, evidence in the record that the journeymen were held responsible for the work of their apprentices during the lunch hour in that the mark of the journeyman appeared upon each piece of work done on his machine so that defects could be traced back to their point of origin.

What should the arbitrator do about the "new" argument in the above case? Since the brief was in the hands of the company and it had made no comment upon the union's shift in tactics, should the arbitrator be concerned? Is there any obligation on the part of the arbitrator to *ask* for comment by the company? Is there anything unfair about considering a new argument, particularly when the other party is made aware through receiving a copy of the brief that it is being advanced?

If the above case seems easy, take another one of somewhat different dimensions. The issue is a discharge, and the contract contains a clause which states, "In support of any suspension or discharge the company shall not rely on past disciplinary actions occurring prior to the preceding twelve-month period. . . ."

The issue involves the alleged insubordination of the grievant and the testimony is flatly contradictory. Barred from introducing the grievant's past disciplinary record by the clause in the contract, the company nevertheless includes in its brief a photostatic copy of his personnel record, stating that it does so not to support the discharge but only to aid the arbitrator in weighing the reliability of the various witnesses. Is it possible to conclude that the disciplinary record contained in the brief is only "argument" and not evidence? Can the union claim that the company has not only inserted evidence in its brief, but that the evidence is barred by the contract? Can the arbitrator divest himself of any prejudice he may have acquired by looking at the employee's personnel record?

Finally, can one reach any firm conclusions about how to handle a new argument advanced in the brief by one of the parties without considering the thorny problem of the case which is decided upon a theory developed by the arbitrator but unknown to the parties? There are not many reported cases which discuss these problems, therefore one must rely more on discussions among arbitrators as to their views.

The safest generalization about arbitrators' views on new arguments advanced by the parties in their briefs is simply that the problem arises with sufficient frequency so that some arbitrators have

developed procedures which pretty well protect them from it. Thus a leading Detroit arbitrator asks the parties at the end of the hearing to state the grounds on which they will rely in their briefs so that there can be no surprise. And one of the most experienced New York arbitrators even suggests to the parties that they indicate before the conclusion of the hearing what reported cases they will rely upon in their briefs so that the other side may respond to this in the course of its brief.

Absent any agreement about the use of new arguments in the brief, there is little uniformity in the views of arbitrators as to how the matter should be treated. One suspects that this diversity is more apparent than real, for when faced with a given set of facts the rulings might be quite consistent. Some arbitrators take the view that there is nothing wrong with a new argument advanced in the brief, and that as long as the other side receives a copy the arbitrator is not even under any obligation to ask the second party to comment. Other arbitrators feel that any time a substantial new argument is advanced in the brief, comment from the other party should be requested even if it has previously received a copy of the brief and made no comment. Some arbitrators qualify either view by saying that it "depends on the kind of case and the kind of argument which is made." In every discussion of the issue the point is soon raised as to whether there is any difference between a new argument raised by one of the parties, and a new argument advanced by the arbitrator in his decision. This, in turn, raises a question which needs to be explored further.

"Surprise" at the hands of the arbitrator—in the sense that his decision is based upon grounds not argued by the parties—is largely a phenomena of the ad hoc cases and the increased tendency towards judicialization of the arbitration process. It could hardly have happened in the clothing industry when William Leiserson was umpiring, in the hosiery industry under George Taylor, or in the Ford Motor Co. under Harry Shulman's tenure, because none of these parties viewed the umpire as a circuit-riding judge who came into the lives of the litigants simply to hear a given dispute and then depart to render a decision. He was, on the contrary, an integral part of the company-union relationship, he was free to go anywhere and talk to anyone, and his decisions were expected to be based on much more than just the information that might be given to him in connection with the point at hand. In a substantial number of instances, the decision was, in fact, a mediated result even if it did not show this on its face. Under such a system there was little opportunity for the arbitrator to shock the parties with an unexpected analysis because his analysis had already been discussed with them. For different

reasons, much the same thing is true today of the umpire system in General Motors and the United Auto Workers. There the parties carefully screen their cases, present them to the umpire stripped of a mediation context, bar new evidence or arguments not presented earlier in the grievance procedure, and expect a decision based upon their presentations. In other umpire situations, like United States Steel, there is a board on which management and labor are both represented. This insures a full discussion of the neutral chairman's line of thought with the result, once again, that there is little chance of surprising the parties.

If the umpire system offers little opportunity for surprise from the arbitrator, the exact opposite is true of the ad hoc system. Usually the arbitrator works alone, often finds himself confronted with a woefully inadequate presentation of the case, and even in the well-presented case has little opportunity to think it out and ask questions which a later study of the record may convince him should have been asked. In the process of writing his decision the arbitrator faces a real dilemma. If he finds an unexpected contract clause which he deems decisive, but which the parties have not argued, what should he do? Reconvene the hearing? Ignore the clause? Write to the parties and ask them if it is relevant? Assume that it is relevant and base the decision thereon? Or suppose it isn't a new clause in the contract, it is simply a new line of argument neglected by the parties but amply justified by the evidence. Should it make any difference that one side was less well represented than the other? Is it a proper function of the arbitrator to come to the aid of one side if he believes there is a decisive argument which has not been made?

Some case illustrations will highlight the above problems even more sharply. In a steel mill a railroad dumper crew hauls raw material within the company yards. The company finds that it is necessary to weigh the cars of raw materials and installs a scale for this purpose. Arguing that the duties so involved are of a minor nature it assigns them to the conductor, and offers only to negotiate a new wage for him. The union insists that the company is without the unilateral right to assign duties, and requests that both the wage and the assignment of the duties be negotiated. Both parties come to arbitration agreeing that there is no controlling clause in the contract, and simply disputing the company's right to exercise its managerial prerogative. In deciding the case the arbitrator comes to the conclusion that the evidence supports a finding that the company knew of its manning problems during the past negotiation, but did not discuss them when the conductor's wage was being negotiated. Because of this the arbitrator concludes that the company is now bound by the previous job content unless and until the parties can agree upon a

change. This is not an argument which the union made, but it is based upon evidence in the record. Is it legitimate in that kind of a case for the arbitrator to issue a decision based upon his own argument?

In a somewhat different type of case the company owned a warehouse situated a few miles from the main plant. The warehouse was leased from another owner who was responsible for its care and maintenance. When painting was required the owner hired a non-union contractor, thereby causing the painter's union to picket the warehouse. Foreseeing the dilemma which this would pose for its industrial union employees, the principal company gave part of its employees the option of coming into the main plant to work until the painters' dispute was resolved. At the same time it left a few of the industrial employees at the warehouse. When they refused to cross the picket line they were disciplined. Following their discipline the employees grieved, claiming that the record of violence in the community was such that they did not dare cross the picket line. The arbitrator held with them, but not for the reason they gave. He thought the company had violated a well known principle of industrial jurisprudence to the effect that employees cannot be discriminatorily treated. Thus when the company chose to remove some of the employees from the scene of the picketing so that they would not be faced with the problem of crossing the picket line, it could not expose others to the same problem and then discipline them for refusing to cross. This brought the following friendly, but tart, response from the company:

We do not expect to receive an award on a position or argument we have not made; nor do we anticipate that the arbitrator will slide around the table and make the Union representatives' case for them. We do believe the case decided by the arbitrator should be the same case argued by the parties at the final local level prior to arbitration—and not a new one conceived by him.⁶⁰

Would it have been better if the arbitrator had stuck strictly to the arguments presented by the parties in the above case? Is there any difference between applying what the arbitrator might allege to be a well-known rule against discrimination which has become a part of the common-law of industrial jurisprudence, and applying a wholly new clause in the contract which the parties have not argued?

Perhaps the most troublesome case of all is the situation in which the arbitrator comes across a clause in the contract which has not been argued or even mentioned during the hearing, but which seems to be decisive. Since the contract is invariably introduced as an

60. Letter from a company vice-president to the author, Feb. 1, 1960.

exhibit there will be no problem of having a basis in the record for the decision. Sometimes, of course, the problem can be avoided if the arbitrator has time to scan the contract for relevant sections about which he may then diplomatically inquire during the hearing.

An airline case, in which the company members of the board dissented, furnishes a typical example of this type of case. A group of pilots had been suspended for falsification of expense accounts, and they grieved over the penalty assessed. Though finding the pilots guilty of the offense charged, the chairman and the union board members felt that the penalty was not binding on them because the company had failed to conduct the disciplinary proceedings in accordance with the negotiated rules of the agreement. To this the company members gave the following spirited reply:

The undersigned specifically disagree with and dissent from the findings and conclusions of the neutral members of the Board with respect to the so-called faulty procedures followed by the company. The undersigned further state that by those findings the neutral member of the Board has given to portions of the collective bargaining agreement . . . a new meaning which in fact does not appear in said agreement and which was never intended. . . .

Furthermore, the undersigned also state that the matter of procedure raised by the neutral member was not an issue in this case and not subject to decision by the Board, and therefore for that reason also outside of the jurisdiction of the Board. We believe the record shows that none of the grieving pilots nor their counsel ever raised the procedural issue discussed at length by the neutral member, that this issue was only raised by the neutral member himself, and was improperly made a part of the case.⁶¹

Some of the sharpest criticism of arbitrators who develop their own theories or rely upon new clauses in deciding cases comes from people who advocate a much more "judicial" approach to arbitration. Unaware of the furious debate which has raged down through the years as to the proper function of a judge, they somehow assume that "judicial" means that the arbitrator will hear the arguments of the parties, retire to his quarters, strip his mind of all matters not discussed however relevant they may appear to be, and then decide the case. Perhaps this is the way it should be—both among arbitrators and judges. In fact, courts, like arbitrators, often resort to their own theories for resolving controversies. This is illustrated by the controversial decision handed down by the Wisconsin Supreme Court within the past year involving labor arbitration. In that case a

61. Unpublished award furnished the author in confidence.

dispute arose between the company and the union as to whether certain production employees who had been promoted to supervision and then returned to the production force continued to accrue seniority.⁶² An arbitrator held that they did not, in response to a grievance filed by the employees who were bumped by the action of the company in returning the supervisors to the bargaining unit. The supervisors, who had neither been present at the hearing nor given any direct notice of it (except insofar as they were now once again members of the union) brought suit to enjoin enforcement of the award on the sole ground that the arbitrator had exceeded his jurisdiction. Ignoring the basis of the complaint, the trial court nevertheless granted an injunction on the ground that the complainants had been divested of property rights without due process of law. The union appealed this judgment to the Supreme Court, and the plaintiff moved for review of the action of the trial court in failing to make a finding that the arbitrator had exceeded his jurisdiction although such issue was raised by the complainant. The Supreme Court modified the trial court's opinion somewhat, but stuck to the position that the plaintiffs were not bound by the award because of not having been given proper notice of the arbitration hearing. It then brushed off the original ground of the complaint, that the arbitrator had exceeded his jurisdiction, by saying that it was unnecessary to decide in view of the earlier conclusions. The end result was that the only issue which the plaintiffs had ever themselves raised was left unanswered, though they "won" the decision.

No lawyer will suppose that the *Hein-Werner* case is in any sense atypical. Judges have from time immemorial departed from the arguments of counsel to decide cases, despite Mr. Justice Cardozo's classic admonition that the judge is not ". . . a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."⁶³ Some judges, like Charles Wyzanski, Jr., have freely discussed the role of the trial judge in various types of cases. Speaking of antitrust cases in which the question was what has been the custom of the market and what would be the consequences of a judicial decree altering those practices, he notes that the judge "is faced with the problem of determining either the appropriate standard of fair competition in trademarks or the appropriate standard for fiduciaries."⁶⁴ Counsel sometimes fail to offer relevant material and the judge then reaches his result partly on the basis of general information and partly on the

62. *Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959), cert. denied, 362 U.S. 962 (1960).

63. Cardozo, *The Nature of The Judicial Process*, 141 (1928).

64. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1295 (1952).

basis of his studies in a library. Judge Wyzanski then goes on to observe:

This tendency of a court to inform itself has increased in recent years following the lead of the Supreme Court of the United States. Not merely in constitutional controversies and in statutory interpretation, but also in formulation of judge-made rules of law, the justices have resorted, in footnotes and elsewhere, to references drawn from legislative hearings, studies by executive departments, and scholarly monographs. Such resort is sometimes defended as an extension of Mr. Brandeis' technique as counsel for the state in *Muller v. Oregon*. In Muller's case, however, Mr. Brandeis' object was to demonstrate that there was a body of informed public opinion which supported the reasonableness of the *legislative* rule of law. But in cases of which I am speaking these extra-judicial studies are drawn upon to determine what would be a reasonable *judicial* rule of law. Thus the focus of the inquiry becomes not what judgment is permissible, but what judgment is sound. And here it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism.

How this criticism should be offered is itself a problem not free from difficulty. In some situations, the better course may be to submit the material for examination, cross-examination and rebuttal evidence. In others, where expert criticism has primarily an argumentative character, it can be received better from the counsel table and from briefs than from the witness box. The important point is that before a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent an egregious error.⁶⁵

Insofar as one pursues the analogy between judges and arbitrator it should be noted that there are at least three important points of difference. The judge is clearly a public official, and his judicial responsibilities extend beyond the problem of the parties. The arbitrator is a private umpire whose responsibilities relate much more sharply to the parties who employ him. The judge is frankly bound by precedent, while the arbitrator says he is not. Insofar as a judge decides a case in line with a clear precedent he can hardly be said to have surprised the parties, even if they neglect to point out the precedent to him. Finally, judicial rules provide for a rehearing even before courts of last resort, while the arbitrator's decision becomes final once he signs it. Courts have been known to change their minds on rehearing but this possibility does not ordinarily even exist for the arbitrator. In this sense the arbitrator who departs

65. *Ibid.*

on a path of his own runs the risk of doing greater damage to the parties than does that judge, for the parties can ask for an opportunity to show the judge that he was wrong. This advantage in the judicial system may be in part offset by the fact that private parties can, on receipt of a privately issued arbitration award, themselves agree to discard it and arrive at another solution which is more to their liking.

Conclusions

Post-hearing procedural problems are, as we have seen, largely confined to the ad hoc arbitration cases. And insofar as one party surprises the other—that is, catches him unprepared—the problem is invariably resolved by an appropriate procedure which gives the other party time to prepare. There are, however, two difficult and unresolved policy problems in such cases. One is the extent to which arbitrators should insist that nothing new be brought to the arbitration table that has not been presented before, on the ground that to do so undermines the collective bargaining process. The other is the attitude which arbitrators should take towards deliberately withheld evidence. The ambivalence of arbitrators about these questions is probably attributable to the lack of an agreed theory as to the role which the arbitrator is expected to play. If he is the mere agent of the parties, hired simply to give his expert judgment as to the merits of a dispute as it is presented to him, he need have no concern for the wisdom of the practices which the parties are pursuing. His sole objective will then be to see that the surprised party is given a fair opportunity to answer something which may be new to him. If, on the other hand, the arbitrator is something more than a mere agent of the parties, he may have a legitimate concern with the development of the bargaining relationship.

Some of this same ambivalence shows up when one approaches the question of the use by arbitrators of their own undiscussed theories to resolve cases before them, or the application of unargued contract clauses. Few, if any, arbitrators would probably be willing to give up the "arbitrator's prerogative" of using his best judgment as to how to resolve the case provided only that he stays within the limits of his jurisdiction. It is doubtless true that in taking this position most experienced arbitrators have been burned, and thus grown cautious, about the practice. It is reasonable to suppose that with the passage of time, and the growing sophistication of the parties in the field of arbitration, arbitrators will, and should, resort less and less to their own unargued theories or to new contract clauses for resolving cases without first discussing them with the parties. There is, at least from

the point of view of the parties, a basic question of fairness involved and some of their resentment toward arbitrators on this score is no doubt justified.

Until we evolve an accepted theory as to the role of the arbitrator we will not resolve questions as to how he should deal with policy matters, or the exercise of his own unreserved judgment. In this connection we would do well to reflect on the relative recency of industrial arbitration. It is essentially a post-World War II phenomenon. A large percentage of the active arbitrators got their basic training working in the mediation context of the War Labor Board. Many of them, and other non-War Labor Board arbitrators, are college professors who teach in the field of industrial relations. Given these facts it is not surprising that few arbitrators have been willing to accept a completely passive role in which they do nothing but resolve disputes on the terms presented without ever inserting their own ideas. It should also be noted that the development of a "rule of law" within the plant is in substantial part due to the decisions of arbitrators through which the parties have come to lay down and accept regularized procedures governing their conduct. It may be seriously doubted whether such a development could have taken place had arbitrators not to a certain extent imposed their ideas of constructive labor relations on the parties.

In short, the mold within which the arbitrator is cast should not yet be confined to a single production model. The context within which cases come to arbitration is still too varied to make this a desirable development. Standards of fairness are, with rare exceptions, being met. The gray areas, which touch on the policy role of the arbitrator, are not in such urgent need of clarification that they cannot be allowed to continue to develop free of rigid rules.