DUE PROCESS CONSIDERATIONS IN GRIEVANCE ARBITRATION PROCEEDINGS

*By Alan Carlson and Bruce Phillips**

In a government like ours, entirely popular, care should be taken in every part of the system, not only to do it right, but to satisfy that community that right is done.[1]

Introduction

In response to the acts of public agents which arbitrarily deprived individuals of life, liberty, or property, the common law early developed safeguards to protect those principles of liberty and justice fundamental to a free government. The requirements of due process were the devices by which self-governing communities protected "the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."[2] In circumstances involving the power of numbers it was not arbitrary power but the legitimate interests of the group as a whole that clashed with the rights of individuals. The very creation of authority involves the loss by individuals of some of their personal freedom. The survival and efficiency of the group become essential to securing and enjoying even individual interests, and necessitate surrendering some measure of individual liberty. Due process constitutes a restraint on those who exercise authority over the affairs of others so that neither institutional security, operative efficiency, nor the will of the majority are in themselves complete or sufficient excuses for disregarding anyone's individual interests. The first citizens of this country so believed in the need for such restraints that they incorporated them into the Bill of Rights as one of the fundamental limitations on the conduct of government.[3]

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* Members, second year class.

1. 5 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 163 (National Ed. 1903) (remarks made before the House of Representatives on Jan. 4, 1826 regarding a bill to amend the judiciary system).

2. Hurtado v. California, 110 U.S. 516, 536 (1884).

3. U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

One instance in which due process of law is required is at hearings where an individual has substantial interests at stake. The Supreme Court has recently held that due process requires that welfare recipients be afforded an evidentiary hearing before termination of benefits,[4] and that summary wage garnishment procedures which fail to provide a hearing are invalid.[5] In the labor relations field, however, the Court has been less direct in establishing constitutional protections. In particular, constitutional safeguards have not been expressly required at hearings that occur as part of grievance arbitrations. Yet huch hearings can have drastic effects upon the livelihood of the grievant involved.[6] He or she may lose a job[7] or important seniority rights, or establish or lengthen an adverse discipline record. Because these interests are so important to a grievant it would be manifestly unjust to allow the employee to use his or her job, wages, or other employment interests as the result of an arbitration proceeding without insuring that the hearing was a fair one. Indeed a requirement of due process safeguards could be easily met[8] and would have only slight effect upon the freedom of the employer and the labor organization to negotiate a collective bargaining agreement.

The purpose of this note, then, is 1) to determine if due process standards guaranteed by the Constitution extend to grievance arbitration situations,[9] and 2) if so, to what degree. This examination will first explore the constitutional underpinnings of a due process requirement and then delineate specific safeguards to be afforded the grievant.

The examination of the constitutional considerations involved in the arbitral process is aided by an understanding of the circumstances in which they arise. To this end the following sequence of events is assumed to have occurred. Some action has been taken against an individual, such as suspension, discharge or other disciplinary action, by his or her employer in an environment in which the employees are represented by a labor organization chosen by a majority of the employees.[10] Pursuant to the collective bargaining agreement a

4. Goldberg v. Kelly, 397 U.S. 254 (1970).

5. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

6. *See* Tobriner, *An Appellate Judge's View of the Labor Arbitration Process: Due Process and the Arbitration Process*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 37, 39 (D. Jones ed. 1967).

7. "Today membership in a union is often the *sine qua non* for obtaining employment in most skilled crafts in this country; it frequently spells the difference between lucrative employment and exclusion from the craft." NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 472 (8th Cir. 1973).

8. *See* text accompanying notes 75-137 *infra*.

9. For a discussion of "industrial" due process, *see* Comment, *Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 U.C.L.A.L. REV. 603 (1959).

10. It is further assumed that the relationship between the employer and labor or-

grievance has been filed about the action taken. The grievance has been properly advanced through all stages of the grievance procedure with timely appeals, and a solution satisfactory to the employer and the union has not been reached. Arbitration is invoked by either the employer or the labor organization, and during the hearing, some event occurs which denies the grievant due process to his or her substantial prejudice. An arbitration award is rendered and the question is raised as to the effect of the award in subsequent judicial proceedings involving the same incident.

I. Governmental Action and Constitutional Regulation

The requirement that an individual be afforded a full and fair hearing before being deprived of any employment related interests is derived from the due process clause of the Fifth and Fourteenth Amendments.[11] These amendments, however, apply only to governmental action.[12] Thus the threshold question to the application of a due process analysis is whether or not there is governmental action. Although grievance arbitrations appear to involve only private agreements and private action, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the [government] in private conduct he attributed its true significance."[13] Governmental action sufficient to invoke constitutional protections may be found for either of two reasons. In the first place the relationship between labor organizations, employers, and employees is regulated by federal law The labor organization represents the employees by virtue of the authority granted it by the federal government, and federal law has placed certain responsibilities upon such organizations when dealing with those it represents. Secondly, governmental action is invoked if either the labor organization or the employer seeks enforcement of an arbitration award by a federal or state court.

A. Federal Regulation of Labor Relations

The question of providing constitutional protection in certain activities, based upon governmental regulation of one or more of the

ganization is controlled by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970), and these two parties are assumed to have negotiated an agreement containing a clause providing for arbitration as the final step of the grievance process. This arbitration clause provides that arbitration may be invoked only by the labor organization or employer, and contains no language regarding the procedural aspects of the arbitration hearing. For an example of such a clause, see note 23 *infra.*

11. U.S. CONST. amends. V, XIV.

12. Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (Fifth Amendment); *see* Shelley v. Kraemer, 334 U.S. 1, 9 (1948) (Fourteenth Amendment).

13. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

participants, was recently addressed by the Supreme Court in *Jackson v. Metropolitan Edison Co.*[14] In *Jackson* the plaintiff claimed that termination of service without notice by a state regulated power company deprived her of property in violation of the Fourteenth Amendment. The Court noted that the mere fact of state regulation of a business did not by itself make the acts of the business those of the state, nor did the fact that the regulation was "extensive and detailed" do so.[15] The proper inquiry, the Court stated, was "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[16] The Court then rejected the claim that the monopoly status granted by the state to the company provided such a nexus, because of the insufficient relationship between the challenged action and the monopoly status.[17] The Court also rejected the claim that the nexus was provided by state approval of the termination procedure, finding that the state had not in fact expressly approved that procedure.[18]

Applying this analysis to the arbitral process the issue centers around the exclusive bargaining status conferred upon the labor organization by federal statute and the federal policy sanctioning the dispute settlement procedures adopted for use by the labor organization and the employer. The question raised is whether this express approval of the arbitral procedure agreed upon by the parties is a sufficient nexus to render the conduct in the arbitration proceedings governmental action.

Section 9(a) of the National Labor Relations Act[19] grants the labor organization chosen by a majority of the employees in a unit the authority to act as the exclusive bargaining representative of the employees for the purposes of collective bargaining. In this section Congress granted the bargaining representative "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[20] Under this authority a labor organization may enter into an agreement with the employer which provides for arbitration as the final stage of the grievance

14. 95 S. Ct. 449 (1974).

15. *Id.* at 453.

16. *Id.*

17. *Id.* at 454.

18. *Id.* at 455.

19. 29 U.S.C. § 159(a) (1970): "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

20. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944).

process. Although the first proviso of section 9(a) gives any individual employee or group of employees the statutory right to present and adjust their own grievances with their employer,[21] there is no similar statutory right to take one's grievance to arbitration.[22] Such a right could be granted in the collective bargaining agreement but it seldom is.[23]

In addition the Court has found that the grant of authority in section 9(a) precludes bargaining by employees with their employer on an individual or group basis where such bargaining limits or conditions the terms of the prevailing collective bargaining agreement.[24] Thus a labor organization, acting under the authority of law, may enter into an agreement to arbitrate matters affecting employees, including their discharge, reserving to itself the discretion as to when arbitration will be invoked.

Furthermore, Congress has expressed approval of dispute settlement procedures such as arbitration in section 203(d) of the Labor Management Relations Act:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.[25]

The Supreme Court has interpreted this policy as placing "sanctions behind agreements to arbitrate grievance disputes,"[26] and has held that courts are not to review the merits of an arbitration award except in very limited circumstances.[27] Federal labor policy also requires that

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21. "[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . ." 29 U.S.C. § 159(a) (1970).

22. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

23. *E.g.*, Agreement Between Pacific Gas & Electric Co. and Local No. 1245, I.B.E.W. § 102.12 (effective July 1, 1970); "*Either Company or Union* may request that any grievance which is not settled by the procedure hereinabove described be submitted to arbitration." (emphasis added). The policy behind permitting only the union and employer to invoke arbitration is that "at this stage, a grievance is not an individual matter but a matter of relationships between [the employer] and the union." Massey, *Employee Grievance Procedures*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS: LEGISLATIVE, JUDICIAL, ADMINISTRATIVE 70 (K.O. Warner ed. 1965).

24. J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

25. 29 U.S.C. § 173(d) (1970).

26. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). *See also* Gateway Coal Co. v. UMW, 414 U.S. 368, 377 (1974).

27. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). For a discussion of the scope of judicial review of arbitration awards *see* Dunau, *Scope of Judicial Review of Labor Arbitration Awards*, in PROCEEDINGS OF NEW YORK UNIVERSITY 24TH ANNUAL CONFERENCE ON LABOR 175 (1971).

an employee at least attempt to use the grievance procedures provided in the collective bargaining agreement before bringing suit on the agreement.[28] In light of the exclusive authority granted the labor organization and the sanctioning of arbitration, the question arises as to whether a labor organization acts in violation of the Fifth Amendment when it participates in an arbitration proceeding in which an employee it represents is denied rights without due process of law.

The theory that a labor organization is subject to certain constitutional limitations when exercising its statutory authority as exclusive bargaining representative was recognized early by the Supreme Court in *Steele v. Louisville & Nashville Railroad Co.*[29] In *Steele* the Court dealt with a situation in which the union had intentionally negotiated a seniority agreement which discriminated against blacks in the bargaining unit. In interpreting language in the Railway Labor Act[30] comparable to that in the National Labor Relations Act[31] the Court stated that "[i]f . . . the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise."[32] The nature of these constitutional questions was more squarely addressed by Justice Murphy in his concurring opinion:

> The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union . . . the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. . . . [I]t cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.[33]

Declining to find the statute constitutionally inadequate, the majority instead reasoned that a duty of fair and equal representation

28. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

29. 323 U.S. 192 (1944).

30. 45 U.S.C. § 152, Ninth (1970): "Upon receipt of such certification [of the names of the individuals or organizations that have been designated and authorized to represent the employees] the carrier shall treat with the representative so certified as *the* representative of the craft or class for the purposes of this chapter." (emphasis added).

31. 29 U.S.C. § 159(a) (1970).

32. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 198 (1944).

33. *Id.* at 208-09 (Murphy, J., concurring).

owed by the labor organization to those it represents is implied from the act read as a whole, and was intended by Congress.[34] The Court, however, did adopt constitutional configurations in specifying the nature of this duty:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.[35]

In the same year the Supreme Court imposed a similar duty on a bargaining agent operating under the NLRA.[36] Thus when a labor organization is acting on behalf of employees, it is under an obligation defined by the Constitution, if not derived from it, to treat all those it represents fairly and equally.[37] In *Steele* this duty was held to exist when the labor organization was negotiating an agreement. The same duty has been found to exist when the labor organization is enforcing the agreement it has negotiated.[38]

In the *Steele* case the union, acting as bargaining agent under authority of federal law, negotiated an agreement which discriminated against a minority of employees because of their race. The union was held to have breached its duty to those it represented because it denied some of them equal protection under the agreement. In an arbitration situation the constitutional issue is not one of equal protection but one of procedural due process. When a union represents an individual in an arbitration proceeding, it is acting pursuant to an agreement it negotiated under federal authority and in a proceeding sanctioned by federal law.

The due process concepts of notice and fair hearing in the arbitral setting were addressed by the Court in *Humphrey v. Moore*.[39] This situation involved two employers, one of whom sold his authority to do business in an area as well as some of his terminals and equipment to the other employer. The collective bargaining relationship was determined by a multi-employer, multi-local bargaining agreement, the same union representing the employees of both employers. The question of the seniority rights of the employees of the selling company

34. *Id.* at 199-202.

35. *Id.* at 202.

36. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). *See also* Syres v. Oil Workers, Local No. 23, 350 U.S. 892 (1955) (per curium decision citing *Steele*); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

37. For a criticism of this conclusion, see Wellington, *The Constitution, the Labor Union, and 'Governmental Action,'* 70 YALE L.J. 345 (1961).

38. Humphrey v. Moore, 375 U.S. 335 (1964); *accord* Conley v. Gibson, 355 U.S. 41, 46 (1957) (under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1970)).

39. 375 U.S. 335 (1964).

was submitted to a Joint Conference Committee[40] pursuant to the agreement. The committee determined that the seniority rights of these employees should be continuous when hired by the surviving employer. Since these workers had greater seniority rights, this determination resulted in the layoff of several employees of the surviving employer. The employees who lost their jobs filed suit against the union alleging that the union had violated its duty of fair representation by deceiving the employees with respect to their job and seniority rights, conspiring to deprive them of their employment rights, and preventing them from having a fair hearing before the joint conference committee.[41]

After analyzing the situation the Court found that the union had acted in good faith and without hostility or arbitrary discrimination, and held that the union had not breached its duty of fair representation.[42] The Court then proceeded to the allegation that the employees had been denied a fair hearing. The Court noted that three shop stewards from the employees' union local not only attended the hearing but also were given every opportunity to state their position. In addition the Court found that the complaining employees were notified of the hearing, made no request to continue the hearing, and further failed to suggest what they could have added to the hearing if they had been differently represented.[43] By its analysis the Court suggests that the employees had a right to a fair hearing, at least with respect to adequate representation of their interests.[44] It thus appears that when a union is involved in a hearing which may adversely affect the jobs or seniority rights of employees it represents, the union must make sure that 1) the employee is notified of the hearing, 2) the employee's interests are represented by someone at the hearing, and 3) that these interests are adequately and fully considered.

Subsequent cases in lower courts have recognized similar requirements with respect to arbitration or similar dispute settlement procedures.[45] In *Price v. Teamsters Union*,[46] involving conflicting em-

40. This proceeding is comparable to an arbitration proceeding for purposes here.

41. 375 U.S. at 343.

42. *Id.* at 350.

43. The Court, however, overlooked the fact that the employees did not have the right to intervene at the hearing, that they had been assured that their jobs and seniority rights were not in jeopardy, and that they were not aware of what had transpired until it was too late to object, intervene or seek a continuance of the hearing.

44. *See* Hansberry v. Lee, 311 U.S. 32 (1940) (the Supreme Court required only that the parties interests be represented and not that the party itself be represented); Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855) (nonlabor arbitration); Clark v. Hein-Werner Corp., 8 Wisc. 2d 264, 272, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

45. Price v. Teamsters Union, 457 F.2d 605 (3d Cir. 1972); Holodnak v. Avco

ployee interests and a procedure very similar to that in *Humphrey*, the court indicated that a union would breach its duty if both sets of interests were not given an opportunity in the hearing to be represented and considered by the committee.[47] In holding that the union had not breached its duty the court indicated what conduct would constitute such a breach:

> While the union must give appellants' local ofifcers an *opportunity to make their case* and then decide the question honestly and impartially . . . we believe they performed their required duties in this case. The record shows that the various committees that considered the problem gave *full and protracted consideration to the arguments of both sides.*[48]

Further examples of the requirements that the employee's interest be adequately presented in an arbitration proceeding are found in *Easley v. District 50, Allied & Technical Workers*[49] and in *Holodnak v. Avco Corp.*[50] In *Easley* the plaintiffs claimed that they had been inadequately represented in an arbitration proceeding because their attorney 1) was involved in a conflict of interests and 2) had prevented them from testifying on their own behalf about a matter they thought crucial to their case.[51] The court, sitting without a jury, found that the arbitration award was rendered on grounds other than those involved in the plaintiff's claim[52] and that the union had adequately represented them, thereby discharging its obligation of fair representation.[53]

In *Holodnak*[54] the court, in addressing the question of adequacy of representation, found that the union's representation in an arbitration proceeding was not adequate to discharge its obligation.[55] The court noted that the attorney representing the plaintiff at the hearing failed to object to testimony in the hearing which was irrelevant to the issues and which the court characterized as part of an "inquisition" into the plaintiff's beliefs.[56] In addition the court found the attorney's brief to be "at best a misguided attempt to plead for mercy from the arbitrator . . . and . . . at worst an indication of the union's bad faith."[57] The

Corp., 381 F. Supp. 191 (D. Conn. 1974); Easley v. District 50, Allied & Technical Workers, 377 F. Supp. 729 (M.D. La. 1974).

46. 457 F.2d 605 (3d Cir. 1972).
47. *Id.* at 611.
48. *Id.* (emphasis added).
49. 377 F. Supp. 729 (M.D. La. 1974).
50. 381 F. Supp. 191 (D. Conn. 1974).
51. 377 F. Supp. at 731.
52. *Id.* at 731-32.
53. *Id.* at 734.
54. 381 F. Supp. 191 (D. Conn. 1974).
55. *Id.* at 199-200.
56. *Id.* at 200.
57. *Id.*

brief also failed to make certain points which the court thought essential to adequate representation. Because of this inadequacy of representation at the hearing the court held that the union had violated its duty and gave judgment for the plaintiff.[58] Collectively these cases indicate that when a labor organization acts as the exclusive representative of an employee in an arbitration proceeding it is under an obligation to provide at least minimal due process by adequately and fully representing the employee's interests.

B. Judicial Enforcement of Arbitration Awards

In addition to federal regulation, governmental action may be found in a court's enforcement of an arbitration award in litigation arising from the underlying dispute. If a grievant was denied a fair hearing in an arbitration proceeding, the court's enforcement of the resulting award renders the court a willing participant in the abridgment of the individual's rights. The court's involvement may in fact be the decisive factor in determining whether or not the individual will be denied his or her rights. Such involvement by courts has been recognized as governmental action in several circumstances, usually involving issues of racial discrimination.[59]

A situation analagous to court enforcement of an arbitation award can be found in *Shelley v. Kraemer*.[60] There a group of homeowners had agreed by covenant among themselves not to sell their homes to blacks. One homeowner, however, subsequently sold to a black. A co-covenantor brought an action to enforce the restrictive covenant against the black and thereby divest him of title to the home. In its analysis the Supreme Court first noted that the equal protection clause[61] applied only to state action.[62] An agreement between property owners could not itself be held invalid because there was no state action which denied anyone equal protection of the laws. However there was a question as to "whether enforcement by state courts of the restrictive agreements . . . may be deemed to be the acts of those States; and, if so, whether that action has denied these [black] petitioners the equal protection of the laws . . . ."[63] The Court concluded that the enforcement was state action in that it placed the full weight of state power

58. *Id.* at 207.

59. *See* Moose Lodge No. 107 v. Irvis; 407 U.S. 163, 172 (1972); Barrows v. Jackson, 346 U.S. 249, 254 (1953); Hurd v. Hodge, 334 U.S. 24, 34-35 (1948); Shelley v. Kraemer, 334 U.S. 1, 18 (1948).

60. 334 U.S. 1 (1948).

61. U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

62. 334 U.S. at 9.

63. *Id.* at 18.

behind the agreement and that the court's enforcement was the difference between according the buyer full enjoyment of his rights and denying them.[64]

Having found state action the Supreme Court ruled that a state court violated the equal protection clause if it enforced a restrictive covenant thereby denying a willing purchaser enjoyment of property rights on the basis of his race.[65] Thus enforcement of an agreement by a state court is an act subject to constitutional restraints though the agreement itself cannot be said to be invalid as unconstitutional. Presumably a similar result would be reached if a federal court enforced an arbitration agreement thereby denying someone an opportunity for a full and fair hearing in violation of the due process clause.[66]

It is clear from *Shelley* that an agreement between a labor organization and an employer which denies or works to deny employees due process is not and cannot be declared invalid by the courts because it is purely private action that is involved.[67] So long as the agreement and resulting award are adhered to voluntarily there is no governmental action and neither the Fifth nor the Fourteenth Amendment has been violated. However, if either party refuses to comply and the other party seeks court enforcement of the award,[68] there is governmental action. In such an action the court would be bound by the Fifth Amendment if it is a federal court and the Fourteenth Amendment if it is a state court. The question of enforcement as governmental action also arises if the grievant, dissatisfied with the arbitration award, brings suit on the same transaction in court. The suit could be a section 301[69] suit against the employer for breach of the collective bargaining agreement.[70] In such a suit the enforcement of the arbitration award would be raised by virtue of the Supreme Court's pronouncement that courts are not to review an arbitration award so long as it draws its "essence"

64. *Id.* at 19.

65. *Id.* at 20.

66. *See* Railway Employes' Dept., A.F. of L. v. Hanson, 351 U.S. 225 (1956) in which the Court noted that a court's enforcement of a union shop clause would constitute state action in the *Shelley* sense. *Id.* at 232 n. 4. *See also* Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (holding that it would be contrary to the public policy of the United States to allow a federal court to enforce an agreement constitutionally unenforceable in state courts).

67. Ignore for purposes here that the labor organization is acting under the authority of federal law, discussed in text accompanying notes 19-31 *supra.*

68. *E.g.,* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

69. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C. § 185(a) (1970). "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . . ."

70. Smith v. Evening News Assoc., 371 U.S. 195, 200-01 (1962).

from the collective bargaining agreement.[71] Thus the enforceability of the arbitration award is directly in issue.

In determining whether the *Shelley* doctrine is applicable to a proceeding involving the enforcement of an arbitration award, one further question arises. In *Shelley* the court was asked to enforce the very agreement which denied the buyer equal protection of the laws. In an arbitration award context it is the award which a party seeks to enforce, but it is the agreement to arbitrate which permits the denial of due process to a grievant. However, in enforcing the award the court is condoning, if not sanctioning, the arbitration proceeding in which the grievant's rights were abridged. This is true whether the arbitration involves the interpretation of the collective bargaining agreement or the application of that agreement. In either case the court's act of enforcement will determine whether or not the grievant's rights will be protected or denied.

The Court subsequently expanded the *Shelley* concept in *Barrows v. Jackson,*[72] holding that a state court would violate the Fourteenth Amendment if the effect of the enforcement of a private agreement was to encourage discrimination and denial of enjoyment of property rights based on race. In *Barrows* the suit was by one co-covenantor against another for damages for breach of the covenant. The Court refused to enforce the covenant because to do so would encourage the use of restrictive covenants and coerce property owners subject to such covenants to continue to use their property in a discriminatory manner.[73] The analogous action involving the enforcement of an arbitration award would be an action by a labor organization or an employer to force the other to comply with the award rendered in a proceeding unfair to the grievant. The number of cases to which this theory would apply would be reduced by the limitation that the enforcement would have to be shown to encourage labor organizations and/or employers to conduct proceedings in a manner which denies grievants due process, or to coerce unions or employers into continued use of proceedings which deny due process to grievants.[74] The severity of this requirement may in fact reduce the set of cases meeting the requirement to the null set.

In summary, *Shelley* and *Barrows* suggest three types of cases in which a court's enforcement of an arbitration award would violate the Fifth or Fourteenth Amendment if an individual was denied due process of the law in an arbitration proceeding. The first is where the

71. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960).

72. 346 U.S. 249 (1953).

73. *Id.* at 254.

74. *Id.*

bargaining agent or employer seeks to enforce an award against the non-complying party. The second is where enforcement is sought by the employer or labor organization in an action by a grievant against it based on the same facts. The third would be an action seeking enforcement of an award by a labor organization or employer against the other where the enforcement encourages or coerces a party to deny a grievant due process of law at the arbitration hearing.

II. Specific Procedural Safeguards

Having identified the sources of the constitutional requirement of due process in arbitrations in the preceding section, this note will now proceed to explore those elements which satisfy this requirement.[75] This section will itemize some of the procedural safeguards that should become a permanent part of grievance arbitrations. The focus is on the specific due process protections of notice, right to counsel and intervention, and the right of confrontation and cross-examination. Additional areas discussed include self-incrimination, search and seizure, use of past conduct, standards of evidence, and burden of proof. Examples of the inequities resulting from denial of these important procedural rights will be given, followed by a discussion of how the arbitral process can best be adapted to provide these procedural rights.

A. Notice

If the individual employee is to be afforded any due process rights at all in the arbitral process, it is self-evident that the right of notice, both of the hearing itself, and of the charge, if it is a disciplinary hearing, is the most fundamental right. Obviously, if the employee is unaware of the arbitral hearing, questions about the right against self-incrimination, the right to counsel, and the right to confrontation of witnesses will never arise.

In proper judicial proceedings it is axiomatic that parties to the controversy are afforded notice. Notice, or at least the opportunity to appear, is fundamental to our legal system. In recent years, the courts have begun to expand this concept to less formal proceedings, such as parole revocation hearings.[76]

In disciplinary hearings particularly, the employee should not only be given notice, but the notice should inform her of the true charge

75. For background on the requirements of due process *see*, Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Symposium, *Due Process*, 25 HASTINGS L.J. 785 (1974).

76. Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972); *accord*, Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare due process).

against her, so that she can adequately prepare a defense.[77] The arbitrator should pay particular attention to this requirement when it appears that defending the individual employee's interest is not necessarily in the best interest of the union.[78] The arbitrator should remember that, for the individual employee, the stakes may be high, his or her job, and reputation, might be seriously damaged as a result of the proceeding.

> But in justice and fairness every person who may be adversly affected by an order entered by the Board should be given reasonable notice of the hearing. . . . No man should be deprived of his means of livelihood, without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."[79]

Arbitration cases generally, indicate that in serious disciplinary cases, notice of the true charge is a fundamental requirement.[80]

Any difficulties in making sure all concerned parties are given notice does not appear to be an insurmountable problem. As arbitration proceedings are not formalized procedures, a requirement to use a reasonable method under the circumstances of each case would be sufficient. The method used need only inform the proper parties of the action that is to take place.[81]

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77. *See* American Enka Corp., 68-2 CCH LAB. ARB. AWARDS ¶ 8558 at 4917 (1967) (Pigors, Arbitrator).

78. "We do not believe that the requiring of the giving of notice, and an opportunity to intervene, to those employees not being fairly represented in the arbitration by the union, as a condition to the award being binding on such employees, will prove disruptive of the arbitration process." Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 275, 99 N.W.2d 132, 138 (1959), *cert. denied*, 362 U.S. 762 (1960).

79. Estes v. Union Terminal Co., 89 F.2d 768, 770 (5th Cir. 1937) (involved the Railway Labor Act); *accord*, Primakow v. Railway Express Agency, 56 F. Supp. 413, 416 (E.D. Wis. 1943); *see also* O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 143 (1973) [hereinafter cited as FAIRWEATHER].

80. *See* Comment, *Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 U.C.L.A.L. REV. 603, 631-33 (1959) [hereinafter referred to as *Industrial Due Process*] *citing* the following: "[T]he discharge . . . must stand or fall on the reason given at the time of the discharge." West Virginia Pulp & Paper Co., 10 Lab. Arb. 117, 118 (1947) (Guthrie, Arbitrator); "The company may not properly be permitted to state only *some* of the charges against the employee and then later defend its discharge action upon the basis of *additional* charges to which the employee . . . had not an opportunity to reply." Bethlehem Steel Co., 29 Lab. Arb. 635 (1957) (Steward, Arbitrator).

81. *See*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 408 (1962) [hereinafter cited as Summers]. Prof. Summers indicates

The giving of notice to persons concerned in the arbitration is encouraged by the American Arbitration Association in their Voluntary Labor Arbitration Rules,[82] and in some state codes.[83]

It is manifestly clear that the public policy in arbitration as regards notice should be the same as in other proceedings where enforceable awards can be made. As Mr. Justice Sutherland, writing for the Court in *Powell v. Alabama*[84] stated: "It has never been doubted by this court . . . that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they . . . constitute basic elements of the constitutional requirement of due process of law."[85]

B. Right to Counsel/Intervention

Concurrent with the right to notice and appearance is the right to counsel. Logic dictates that basic to the right to be heard is the right to be heard effectively. Denial of effective representation would make the right to appearance meaningless. Normally, of course, the union represents the employee in his or her grievance arbitration hearing, and usually does an effective job. In those cases, undoubtedly the majority of arbitration cases, the need giving rise to the employee's right to counsel is fully satisfied by the union representation he or she receives. A problem arises, however, when successful representation of the employee would be adverse to the union's interest. It is in this area that gross abuse of justice and fairness may arise.

An example of this problem may be found in *In re Soto*.[86] In that case dissatisfied employees who had left their original union (National Jewelry Workers) joined a rival union and went out on a wildcat strike. After the strike was enjoined and the employees had gone back to work, the employer charged them with slowdown tactics and notified the Jewelry Workers union that the employees would be discharged from work. The union requested arbitration. The employees were notified of the arbitration hearing and came to the hearing with their own attorney, pointing out that the attorney for the Jewelry

approval of a right to notice, and notes that the instituting of the right need not be too formalized. If the grievance affects an individual, some form of direct communications is desirable, and actual notice might be required. If the grievance affects a group, notice by posting might be sufficient.

82. Rule 22 "Attendance at Hearings—Persons having a direct interest in the arbitration are entitled to attend hearings." AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES 4 (1970) [hereinafter cited as ARBITRATION RULES].

83. *See, e.g.*, N.Y. CIV. PRAC. LAW & RULES § 7506(b) (McKinney 1963); CAL. CODE CIV. PROC. § 1282.2(d) (West 1972).

84. 287 U.S. 45 (1932).

85. *Id.* at 68-69.

86. 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960).

Workers union had also appeared as counsel for the employer in enjoining the wildcat strike and in proceedings against the rival union; they contended that he would not adequately represent them. The arbitrator, however, held that the employees had no right to independent counsel, because the union was the sole bargaining agent under the collective bargaining agreement. The hearing proceeded, the employer made his case, the union put forth no defense, and, on the record established, the arbitrator upheld the discharges.

The lower court vacated the arbitration award on the grounds that the individual employees should have been allowed to intervene since the element of lack of fair representation was present.[87] The court of appeals reversed, stating that only a "party" to the arbitration could move to vacate the award, and that the employees were not parties.[88]

The manifest injustice inherent in situations such as that outlined above indicate that public policy considerations require that employees who are not being represented fairly, or are likely to be inadequately represented due to some conflict of interest, should be allowed their own representation. There is no logical reason, under these circumstances, to deny the real party in interest (the individual employee whose future may be at stake) rights as a party to the proceeding.[89]

The right of employees to intervene in grievance discharge arbitration is, however, beginning to be recognized. Professor Summers of Yale University has suggested how some of the purposes of collective bargaining are actually diminished by withholding the rights of intervention and counsel in appropriate cases:

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87. Soto v. Lenscraft Optical Corp., 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (App. Div. 1958).

88. 7 N.Y.2d 397, 399, 165 N.E.2d 855, 856, 198 N.Y.S.2d 282, 283 (1960); *accord*, Bailor v. Teamsters Local 470, 400 Pa. 188, 161 A.2d 343, 347 (1960). *See* Hildreth v. Union News Co., 315 F.2d 548 (6th Cir. 1963), *cert. denied*, 375 U.S. 826 (1963). Ms. Hildreth was discharged for "just cause" even though there was not even an assertion that she had committed any act or acts constituting such "just cause" or that she was a "poor employee." The union refused to file a grievance, per an agreement worked out between the union and the employer. The court held that Ms. Hildreth could not file the grievance herself, since the union was exclusive representative of all employees and as such the union and the employer could conclude that her firing was for just cause so long as no fraud, bad faith, or collusion with the employer was found. *Id.* at 550. (It is hard to imagine just what had to be shown to satisfy the bad faith or collusion requirement). *Accord*, Simmons v. Union News Co., 341 F.2d 531 (6th Cir. 1965), *cert. denied*, 382 U.S. 884 (1965) involved the same facts as *Hildreth*. Justice Black, somewhat outraged by these cases, dissented: "The plain fact is that petitioner has lost her job, not because of any guilt on her part, but because there is a suspicion that someone of the group which was discharged was guilty of misconduct." *Id.* at 887-88.

89. *See* Estes v. Union Terminal, 89 F.2d 768 (5th Cir. 1937).

> The needs of collective bargaining look also to the interests of the employees and their individual rights. In simple economic terms, the individual's interest is often of first magnitude. . . . The individual's very livelihood is at stake. In personal terms, loss of seniority undermines his sense of security and discharge darkens his good name. Making the union the exclusive representative for processing grievances subordinates those interests of individual employees and endangers interests which collective bargaining purposes (*sic*) to protect.[90]

Professor Summers lists three types of cases where the individual should be allowed to intervene.[91] First, where the individual fears that the union will not present his or her best possible case. Second, where the individual (or group) interest is opposed by the union, and third, where the decision being requested substantially involves the interest of a third party.[92] In judicial proceedings, representation by counsel who has a conflict of interest constitutes denial of due process of the law.[93] "There seems little doubt that counsel who *does not wish to* represent his client effectively, would also deny the accused due process of law."[94] The rules of the American Arbitration Association also support representation by counsel.[95]

The arguments that allowing individual employees to intervene with their own counsel in these types of arbitral proceedings will be too disruptive of the process and would seriously undermine its usefulness is not of great weight.[96]

> Such reasons lose persuasiveness when confronted with the realities of modern procedural rules allowing liberal intervention and

90. Summers, *supra* note 81, at 392.

91. *Id.* at 406-07.

92. *Id.* Prof. Summers' ideas have been supported by other authorities. *See generally* Wirtz, *Due Process of Arbitration*, PROCEEDINGS OF THE 11TH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 1, 26 (1958) [hereinafter cited as Wirtz]. Wirtz suggests that if the arbitrators do not acquiesce to this idea, he suspects that the courts will demand it.

93. *See Industrial Due Process, supra* note 80 at 640 citing *Glasser v. United States*, 315 U.S. 60 (1942).

94. *Id.* (emphasis in original).

95. *See* ARBITRATION RULES, *supra* note 82, Rule 20 "Representation by Counsel—any party may be represented at the hearing by counsel or by other authorized representative." *E.g.*, CAL. CODE CIV. PROC. § 1282.4 (West 1972): "A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title."

96. "Were each aggrieved employee permitted to be represented at an arbitration by private counsel who has the right to question witnesses and otherwise participate fully in the proceedings, the Local, as a trustee representative, would be effectively unable to perform its duty. Union officials and private counsel might well be at complete loggerheads over what witnesses to present, in what order to present them, the efficacy of cross-examination of a particular witness, or over any one of the myriad decisions that enter into the conduct of a trial proceeding." Bailor v. Teamsters Local 470, 400 Pa. 188, 193, 161 A.2d 343, 347 (1960).

> joinder of parties. . . . It is a strange lack of confidence in the adaptability of informal arbitration procedure to argue that it cannot cope with such problems when the way has been shown by the courts and administrative agencies.[97]

In short "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[98] Logically that right extends to the entire proceeding.[99] The alleged procedural difficulties are not of sufficient magnitude to justify restriction of that right.

C. Confrontation and Cross-examination

The principle of confrontation, that is the right of an accused to confront his or her accusers and cross-examine them, is a right that is given constitutional protection in criminal cases everywhere in the United States.[100] The principle has not been confined exclusively to criminal cases, but has been extended to civil actions as well.[101]

In contrast arbitrators have been reluctant to allow confrontation of witnesses in several situations. Typical among such situations are those 1) where a customer complaint is the cause of the disciplinary proceeding, 2) where a fellow employee witnesses the dispute between the grievant and another, usually a foreman, upon which the disciplinary action was based, and 3) where the witness is someone retained by the employer to observe and report on employee behavior.[102] The reasons for this reluctance are understandable in each situation. When the complaint is from a customer, the employer naturally does not want

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97. Summers, *supra* note 81, at 406 (citations omitted); *See* Clark v. Hein-Werner Corp., 8 Wisc. 2d 264, 99 N.W.2d 132 (1959); *accord*, Donnelly, v. United Fruit Co., 40 N.J. 61, 190 A.2d 825, 835 (1963); FAIRWEATHER, supra note 79, at 143: "Where the individual employee's interest does not coincide with those of his union, thus giving rise to a question of the adequacy of the union's representation of the employee, the Board will not defer to the arbitration award unless the employee not only had notice of the time and place of the hearing but had the right to be represented by his own counsel."

98. Powell v. Alabama, 287 U.S. 45, 68-69 (1932); *see also* Morrissey v. Brewer, 408 U.S. 471, 491 (Brennan, J., concurring) (*semble*).

99. FAIRWEATHER, *supra* note 79, at 144.

100. R. FLEMING, THE LABOR ARBITRATION PROCESS 177 (1965) [hereinafter cited as FLEMING].

101. *Id.; see also* Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (right to confront and cross-examine witnesses in parole revocation case); Greene v. McElroy, 360 U.S. 474, 508 (1958); *accord*, Dick v. United States, 339 F. Supp. 1231, 1233 (D.D.C. 1972) (administrative denial of security clearance case): "The Supreme Court in *Greene* . . . concluded that in the absence of express executive or legislative authority, a hearing which did not provide the safeguards of confrontation and cross-examination did not comport with our traditional ideas of fair procedure."

102. Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235, 245-47 (1961).

to put a customer to any trouble for fear of losing him or her. In the case of the employee witness, many employers feel that calling the witness may result in strife among the employees. This would be potentially damaging to the employer's business, particularly if the accused employee is reinstated. In the case of spotters, (persons who roam around public carriers posing as customers, and watching for employee misconduct), the employer may not want to risk the spotter's effectiveness by revealing his or her identity.[103] In large part, arbitrators have accepted the employer's arguments against production of witnesses. For example "[h]earsay is almost universally accepted in preference to calling one production employee against another."[104]

Arbitration experts appear in general agreement that these problems can be overcome. It is suggested that arbitrators, with a little inventiveness, could handle most of these situations, given the flexibility of the arbitral process.[105] In the customer complaint category, for example, a simple solution would allow a private talk between the arbitrator and the customer with the admission of the conversation into evidence at the subsequent hearing. Another possible solution, adopted by one grocery store chain and a union, authorized the umpire to receive identified customer complaints in the absence of the witness. Then the union, or the grievant's own attorney, is given an opportunity to check privately with the customer, and if there are any discrepancies, the arbitrator will call in the customer.[106] These alternatives are equally applicable to the second category of situations involving fellow employee witnesses.[107]

While it appears that arbitrators generally require the appearance of a complaining employee witness,[108] the same is not true of spotters.[109] Yet the argument to protect the spotters is no more compelling than that made in the other two categories. Clearly, with a little inventiveness, arbitrators could protect the spotter's identity and at the same time have the spotter testify. The customer complaint procedures could be used, the spotter could testify behind a screen, or other "blind," but reliable methods could be devised. "Where the nature of the business requires that witnesses remain anonymous, arrangements

103. *Id.*, at 247.

104. FLEMING, *supra* note 100, at 179; *See*, WIRTZ, *supra* note 92, at 18. Wirtz says that the custom of not calling bargaining-unit witnesses is the greatest single element preventing reliable fact determination in this type of case.

105. WIRTZ, *supra* note 92, at 18.

106. Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235, 245, 247-48 (1961).

107. *Id. Cf.* FLEMING, *supra* note 100, at 181.

108. R. SMITH, L. MERRIFIELD & D. ROTHSCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION 219 (1970) [hereinafter cited as SMITH].

109. *Id.*

should nevertheless be made to permit counsel for the parties to confront and examine them in the presence of the arbitrator."[110]

D. Miscellaneous Problem Areas

There are a host of other arbitration problems that could be dealt with at some length; however, for the most part they do not have the constitutional dimensions that were reached in the preceding discussions. This subsection covers (with limited discussion) some of the more prominent ones. While not within the category of due process, these problem areas are closely related, and their inclusion serves to round out the reader's understanding of the major problem areas in the grievance arbitration setting.

1. *Self-Incrimination*

The Fifth Amendment privilege against self-incrimination[111] has been well established in the criminal justice system, applicable to states as well as the federal system.[112] A problem arises, however, as to how and whether this privilege should apply in an arbitral setting.

The reaction to and utilization of the Fifth Amendment by arbitrators has been amazingly mixed. Many arbitrators have ruled that the privilege against self-incrimination has no place in arbitration, that arbitration in a disciplinary situation should not be viewed as a penalty for misconduct but rather as a judgment on the satisfactoriness of the employee.[113]

Professor Fleming of Stanford University has laid out a set of rules for use in dealing with Fifth Amendment problems:

> 1. Since the privilege against self-incrimination owes much of its existence to historical developments which have no relevancy to the field of arbitration, the privilege should have only a very limited application to arbitration.
>
> 2. When the grievant claims the privilege against self-incrimination for purposes of the arbitration proceeding, either without reference to another forum or on the ground that a criminal proceeding elsewhere is pending against him for the same offense, he should be advised that a failure or refusal to testify may give rise to an inference against him.

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110. FLEMING, *supra* at 181. *See*, CAL. CODE CIV. PROC. § 1282.2(d) (West 1972), American Enka Corp., *supra*.

111. U.S. CONST. Amend. V, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

112. Malloy v. Hogan, 378 U.S. 1 (1964).

113. SMITH, *supra* note 108, at 221-22. "Many arbitrators feel that the privilege against self-incrimination has no place in the arbitration proceeding." FLEMING, *supra* note 100, at 185.

> 3. An adverse inference arising out of failure or refusal to testify, whether before the arbitrator or elsewhere, will rarely, if ever, be sufficient by itself to sustain the penalty which has been imposed.
>
> 4. An adverse inference arising out of failure or refusal to testify before the arbitrator or elsewhere may, when coupled with unrefuted evidence against the grievant, be used to sustain the penalty.
>
> 5. Insofar as the privilege against self-incrimination has any standing before an arbitration tribunal it should not apply to other than testimonial compulsion.[114]

Fleming's first rule suggests "limiting" the privilege in arbitration proceedings. While it is not quite clear just where the limitation should lie, it appears that most arbitrators follow the familiar "whatever is appropriate to the facts of the case" approach.[115] Arbitrators should pay careful attention to the circumstances, however, since the pressures that can be placed on an employee to incriminate himself or herself (at least as far as his or her job goes) can be very effective, particularly in an interrogation setting. As stated in *Miranda v. Arizona*, "[t]he circumstances surrounding incustody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[116]

In cases involving interrogation of employees by the employer, arbitrators have consistently adhered to the principle that they are not bound by the strict rules applied in criminal proceedings.[117] Instead they have treated the problem as a question of credibility rather than one involving rights of the grievant. Despite this shift in analysis, arbitrators have reached conclusions similar to those reached by the *Miranda* Court.[118]

The Supreme Court, however, has indicated that the Fifth

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114. FLEMING, note 100, at 185-86.

115. *See* Thrifty Drug Stores Co. Inc., 50 Lab. Arb. 1253, 1262 (1968) (E. Jones, Jr., Arbitrator).

116. Miranda v. Arizona, 384 U.S. 436, 469 (1966).

117. "I do not consider that the strict rules or vigorous practices under which the State or Federal constitution is applied to criminal investigations necessarily apply with equal force to private investigations by an employer into the conduct of an employee." Weirton Steel Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8249, at 3862 (1968) (Kates, Arbitrator).

118. "The evidence of how the Company's interrogations were conducted must be assessed, but it is important to bear in mind that the inquiry has nothing to do with whether they are compatible with community standards of fairness and propriety. The sole focus is on the extent to which they affected the credibility of the responses of the employees being interrogated. If their fact-finding procedures were significantly flawed, then the "facts" which they produced must be discounted as unreliable for the purpose at hand." Thrift Drug Stores Co., Inc., 50 Lab. Arb. at 1258.

Amendment privilege extends beyond criminal proceedings,[119] particularly when denial of the privilege might cost the employee his or her means of livelihood,[120] or is just "costly."[121] It seems apparent then that even if the general principle of looking to the facts of each case in order to determine the applicability of Fifth Amendment safeguards is followed, arbitrators should inquire into all of the circumstances involved in the making of the statement in judging the weight to be given confessions and admissions of guilt.[122] Additionally, arbitrators should be on the lookout for the real fact situation when the employee is discharged for refusal to cooperate in the company's investigation, where such "refusal to cooperate" might in reality be a refusal of the employee to incriminate himself or herself.[123]

Professor Fleming's next three points may be considered together. Informing the employee that his or her refusal to testify will create an adverse inference unless the grounds for refusal involve the possible use of the employee's statement in later criminal proceedings is reasonable so long as the employee's right of refusal is liberally construed. As pointed out above, no employee should be compelled to incriminate himself or herself if it might result in loss or his or her job.

It is also beyond argument that the employer should have to substantiate the charge.[124] Clearly, even if an adverse inference against the grievant is created, it should not be enough by itself to justify imposition of penalties. Conversely, if the inference is coupled with sub-

119. "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

120. Garrity v. New Jersey, 385 U.S. 493, 497 (1967); *compare* Exact Weight Scale Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8128 at 3449 (1967) (McCoy, Arbitrator), "I know of no principle, or decided case, upholding a company's right to compel an employee, under pain of discharge, to admit or deny a rule violation or other offense. Such a principle would contradict all our Anglo-American principles . . . ." *with* Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. 141, 147 (1970), "Thus, it has been held that an employee's admission of guilt in a theft investigation was not invalidated by his having been placed in fear of punishment by Company investigators . . . ." *Accord*, Weirton Steel Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8249 (1968) (Kates, Arbitrator).

121. Spevack v. Klein, 385 U.S. 511, 512-15, (1967).

122. *See* the excellent discussion of the problem in Thrifty Drug Store Co. Inc., 50 Lab. Arb. at 1261-63.

123. *See* Colgate-Palmolive Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8357 (1968) (Koven, Arbitrator). *But cf.* Scott Paper Co., 52 Lab. Arb. 57 (1969) (Williams, Arbitrator).

124. FLEMING, *supra* note 100, at 183: "[a]rbitrators now quite uniformly hold that the employee must be reinstated where the sole cause for the discharge is the individuals unwillingness to testify."

stantial unrefuted testimony against the grievant, an arbitrator might well, and properly so, uphold the employers action.

Why the privilege against self-incrimination should be limited only to "testimonial compulsion" is not clear. Utilizing the above principles, the privilege should extend to any situation where the employee's right has been infringed.[125] Certainly under the "whatever is appropriate under the facts of the case" approach the arbitrator should be able to make a judgment on the application of the privilege.

2. *Search and Seizure*

The area of private search and seizure, wherein the company searches the employee, or his or her locker, for evidence of misconduct relating to her employment, is poorly defined. The basic rule of thumb seems to be that rules relating to company search and seizure should be strictly construed. More simply, if the company has a stated policy requiring searching of employees entering or leaving the company premises, then that will be allowed, but no other company searches should be sustained.[126] "In the absence of a clear plant rule requiring it, an employee may not be forced . . . to submit to a search of his person, or to disclose the contents of his pockets to the company or its representatives."[127]

Clearly, while employers may claim the right to search their employees on company grounds for valid reasons such as theft, this right, as indicated above, should be carefully limited to situations where such searching involves a reasonable cause (*e.g.*, to stop theft) and is conducted according to a stated, well defined policy so that every employee can be aware of the situation and understand it.[128] The fact

125. *But see* Colgate-Palmolive Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8357, at 4226 (1968) (Williams, Arbitrator) (privilege against self-incrimination does not include freedom from fingerprinting).

126. "Mill Rule No. 12 allows the Company to examine the contents of any and all packages and bundles being taken in to or out of the plant by any employee. This rule allows the Company to search an employee suspected of theft of Company property, or for any other reason, as the employee enters or leaves the Company premises.

But Rule 12 does not give the Company the right to search an employee, other than when he enters or leaves the plant. Therefore, the order given to the Grievant in the Company office that he empty his pockets, was an improper order and the Grievant was within his rights in refusing to comply with it." Scott Paper Co., 52 Lab. Arb. 57, 58-59 (1969) (Williams, Arbitrator).

127. *Id.* at 59.

128. *See* International Nickel Co., 68-1 CCH LAB. ARB. AWARDS ¶ 8229 (1967) (Shister, Arbitrator), where the arbitrator held that the company did not violate employees' rights when it conducted a locker search. Although the contract was silent on the subject, the arbitrator found that the search was not arbitrary, but done pursuant to the company's longstanding practices of locker searches. Interestingly, the arbitrator refused to consider any constitutional aspects of the search since he considered the mat-

that a person is an employee should not make her submit to every passing whim of the employer, and searches not conducted according to these criteria should be disallowed by the arbitrator.[129]

3. *Past Misconduct*

It appears that the general tendency of arbitrators is to admit evidence of prior misconduct as evidence against the grievant, even if the past misconduct has no material bearing on the present charge. Apparently this evidence is considered admissible on the idea that this helps the arbitrator receive the maximum amount of information, the "whole picture."[130]

Professor Fleming lists four problems that may occur when such evidence is admitted:

1. A tendency to find the grievant guilty of the offense because he or she is a likely person to have done it.

2. A tendency to punish the grievant for past unpunished offenses even though he or she may not be guilty of the present charge.

3. The injustice of forcing the grievant to defend against unexpected evidence, or evidence difficult to refute.

4. The possible confusion of the real issues.[131]

The professor supplies us with his own guidelines:

> 1. Unless the grievant has already put in evidence of his good character, evidence of his past offenses should not be received until the record contains more than a *pro forma* showing with respect to the offenses charged.
>
> 2. When evidence of past misconduct is offered for the purpose of inferring that the grievant committed the present offense it should be admitted, provided it is of record and known to the grievant. Such evidence should, however, be given weight only insofar as there is a clear relationship between the kinds of offenses involved, and insofar as the events have taken place within a reasonable span of time.
>
> 3. When evidence of past misconduct is offered for the purpose of impeaching the credibility of the grievant it should be received, provided it does not appear to be offered simply to prejudice the arbitrator.

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ter to be governed solely by the contract. *Accord*, Fruehauf Corp., 49 Lab. Arb. 89 (1967) (Daugherty, Arbitrator).

129. *Compare* United States v. Kahan, 350 F. Supp. 784, 793 (S.D.N.Y. 1972) *and* Congoleum-Nairn, Inc., 63-2 CCH LAB. ARB. AWARDS ¶ 8843 (1963), (Short, Arbitrator) *with* Weirton Steel Co., 68-1 ¶ 8249 (1968) (Kates, Arbitrator).

130. Stone, *Due Process in Labor Arbitration*, 24 N.Y.U. CONF. LAB. 11, 19-20 (1971). *See also* BEATTY, LABOR-MANAGEMENT ARBITRATION MANUAL 65-66 (1960) [hereinafter cited as BEATTY]; Yale Transport, Inc., 41 Lab. Arb. 736, 737 (1963), (Kerrison, Arbitrator); *Smith, supra* note 108, at 216.

131. FLEMING, *supra* note 100, at 169.

4. When evidence of past misconduct is offered in order to justify the severity of the present penalty it should normally be received. The weight to be given such evidence will then depend on (a) the relationship between the kinds of offenses, and (b) the period of time involved. This rule should apply to past conduct both within and without the company although in general the latter evidence will carry less weight.

5. A contractual limitation on the use of the past record shall be broadly construed to exclude such evidence.[132]

A few desirable changes to be made in utilizing the above rules include:

1. In Rule 1, substantially more than a *pro forma* showing should be made before such evidence is admitted. There should be sufficient showing to obviate the need for such evidence except as limited by the first clause in the rule.

2. Pertaining to Rules 3 and 4, only past misconduct that is "of record" should be utilized.

4. *Standards of Evidence*

Generally, arbitrators do not apply the rules of evidence as used in the courts.[133] However, it has been suggested that in instances involving serious crimes, moral turpitude, subversion, etc., where an adverse decision may brand the grievant for life, a very strict standard (similar to criminal standard, i.e.: proof beyond a reasonable doubt) should be followed.[134]

132. *Id.* at 169-70.

133. *See* FAIRWEATHER, *supra* note 79, at 210; BEATTY, *supra* note 130, at 57; SMITH, *supra* note 108, at 213. *See also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

134. Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 741-42 (1957); *see also* discussion of the different standards of evidence used by arbitrators in Cannon Electric Co., 28 Lab. Arb. 879, 882-83 (1957) (Jones, Arbitrator) "It is often said, sometimes uncritically, that discharge is the economic equivalent of capitol punishment. Yet it is clear that in an area where there is a shortage of the particular skills possessed by the discharged employee competitive labor conditions may well largely (aside from seniority) redress the injustice of a mistaken or unjust discharge. Perhaps in such a case the application by an arbitrator of either the 'clear and convincing' or the 'reasonable apprehension' standards of proof would protect the rights of the grievant. But where the local labor situation means an employee is not readily employable elsewhere, or where, as here, discharge is based upon an allegation involving moral turpitude which, if upheld, will blackball the discharged employee elsewhere, a rigorous standard of proof seems applicable. . . . In the context of a moral turpitude discharge, therefore, protection of an innocent employee against the injustice of industrial blackballing and social ostracism demands the most careful and exacting scrutiny to assure that the facts alleged as the basis for the discharge actually exist. That kind of scrutiny is embodied by the community in its criminal law under a standard which is phrased to require that guilt be demonstrated beyond any reasonable doubt in the mind of the trier of facts by facts and their necessary inferences." (Cannon, at 883). *Accord*, Thrifty Drug Stores, Inc., 50 Lab. Arb. at 1258. *Cf.* Braniff Airways, Inc., 44 Lab. Arb. 417, 421 (1965) (Rohman, Arbitrator).

The American Arbitration Association and some of the state codes indicate that the arbitrator has wide discretion in this area.[135]

5. *Burden of Proof*

The general rule regarding the burden of proof is that in nondisciplinary proceedings the grieving party bears the initial burden,[136] and in disciplinary proceedings, particularly in discharge cases, management has the burden of proving its case.[137]

Conclusion

The use of arbitration proceedings has become an integral part of the contemporary collective bargaining relationship between employers and their employees. Arbitration provides a peaceful means of settling employer-employee disputes. There is, however, a potential for abuse in that procedural rights of employees in arbitration hearings are generally not guaranteed by the arbitral agreement. Constitutional due process guarantees could be introduced if the action in the arbitration hearing could be attributed to the state or federal government. The link between the government and the arbitral process is provided by the statutory authority granted the union to represent the employee in the hearing and by the finality attached to the proceeding by federal law. Additional governmental action is found in a court's enforcement of an arbitration award at the request of either party. Whether procedural safeguards are in fact afforded depends as much upon the ease with which they can be incorporated into the arbitral process as upon the finding of governmental action. It has been shown here that due process requirements are sufficiently flexible to permit their introduction without undue disturbance of the arbitral process or emasculation of the protection sought to be achieved. Among those areas of due process which could be incorporated readily are the right to notice and appearance, the right to counsel, and the right of confrontation and cross-examination of witnesses. Another procedural safeguard that

135. Rule 28 ARBITRATION RULES, *supra* note 82, at 5; CAL. CODE CIV. PROC. § 1282.2(d) (West 1972): Note that a refusal by the arbitrator to hear evidence pertinent to the inquiry may be misbehavior on her part. *Industrial Due Process, supra* note 80, at 619.

136. FAIRWEATHER, *supra* note 79, at 196.

137. *Id.* at 198; *cf.* BEATTY, *supra* note 130, at 60: "Perhaps it is more appropriate to say that both parties run the risk of nonpersuasion." SMITH, *supra* note 108, at 229: "The 'rule' generally recognized by arbitrators seems to be, as in court cases, that the party holding the affirmative of an issue must produce evidence sufficient to prove the facts essential to his claim; therefore the burden of proof is held to rest on the party against whom the arbitrator would hold if no evidence were given on either side."

should be included is the privilege against self-incrimination. In light of the serious consequences which may result from denial of these protections to a grievant, the ease with which they may be afforded, and the comparatively insubstantial effects on the union-employer relationship, the balance weighs in favor of a fair and just hearing for the individual.