The Adaption of Judicial Procedures to the Arbitral Process

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I. INTRODUCTION

The adaptation and application of judicial procedures to arbitration have long been subjects of vital concern and lively controversy. This remains particularly true with regard to the utilization of arbitration for the adjudication of labor-management disputes.\(^1\) It is asserted, generally by non-lawyers, that the introduction to labor arbitration proceedings of legal procedures such as prehearing techniques, formalized submission agreements, adoption of rules of evidence, application of precedent, reliance on transcripts, briefs and the like, prolong the proceedings, increase the costs and too often enmesh the merits of the dispute in legal technicalities which becloud the real issues. Simultaneously, it is maintained, most often by lawyers, that similar defects in arbitration proceedings are attributed to the failure of arbitrators to employ legal procedures sufficiently in the arbitral process.\(^2\)

Apart from the relative merits of the respective advocates' arguments, recent litigation and legislation point toward a greater degree of formalization and increased reliance on judicial procedures in the arbitral process.\(^3\) Judicial endorsement of arbitration as an intrinsic part of our national labor policy has been a paramount factor in this trend. Commencing with *Textileworkers v. Lincoln Mills*,\(^4\) and followed by the oft-cited *Steelworkers* trilogy\(^5\) and a series of land-

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\(^2\) R. FLEMING, supra note 1, at 57-59.


\(^4\) 353 U.S. 448 (1957).

\(^5\) United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steel-
mark decisions thereafter, the United States Supreme Court has, during the past decade, mandated the courts to enforce arbitration agreements and awards and has formulated the interrelationship of the judicial and arbitral processes with particular reference to the scope of review. In delineating the respective jurisdictions of the judge and the arbitrator, and in allocating functions and responsibilities, the Court has emphasized, in most extravagant terms, the especial expertise of the arbitrator and has restricted correspondingly the reviewing prerogatives of the judge.

While the precise line of demarcation on "substantive" matters remains hazy and indistinct, little obscurity exists in the division of jurisdiction on procedural questions. Here the Court unequivocally acknowledges the preeminence of the arbitrator. Recognition of his paramount role should free the arbitrator from any compulsion to emulate or "ape" the judges. Paradoxically, in some cases, the contrary seems to be the case. Arbitrators with a proclivity to articulate their decisions in the lexicon of the law, perhaps unconsciously with an eye on the reviewing judge and an intuitive sense that their awards will more likely be sustained if clothed in familiar legal jargon, have been encouraged in this regard. Such tendency has perhaps been further fortified by the increase in state arbitration statutes providing for enforcement and thus, limited review by state judges.


7 "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 596 (1960). See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (parties bargained for judgment of arbitrator, therefore, courts should not consider merits of award); Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (record of arbitration hearing not as complete as record of trial court's proceedings, therefore, judicial review of award more limited than judicial review of trial court's judgment); Wilko v. Swan, 346 U.S. 427, 436 (1953) (arbitration awards made without detailed report of either proceedings or reasoning, therefore, interpretations of law by arbitrators are not subject to judicial review for error in federal courts).

8 And as postulated in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 545, 557 (1964), "procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

9 There are approximately 25 states which now have arbitration statutes providing
If there is a discernible trend toward greater formalism and legalism in the arbitral process, resulting from judicial and legislative sanction of arbitration, with a disposition to emphasize the reviewing powers of the courts rather than their circumscription, this is indeed an unfortunate turn of events. Not only will the full thrust of the Supreme Court's decisions be thwarted, but the arbitral process may be irreparably damaged. This is not to suggest that arbitrators should not look to the courts for procedural rules and techniques as a guide; to the contrary, these techniques represent, in part at least, time tested devices to arrive at the truth, thereby assuring just and equitable decisions. What is stressed is the manifestly obvious and oft-reiterated fact that the arbitral process is intrinsically different from the judicial. In addition, the arbitral process must remain fluid and flexible since it is consensual in origin and because its survival is dependent upon its effectiveness in serving the needs of the parties.

II. PREHEARING PROCEDURES

Prehearing procedures and techniques afford a most fertile field for the ingenious and imaginative arbitrator interested in improving the arbitral process. For some time pretrial procedures have been employed by the federal courts,10 and a number of states, in varying degrees, have adopted some form of pretrial system.11

The principal objective of pretrial procedures is to improve the adversary system, to do away with the "sporting theory of justice—namely, surprise at the trial."12 As noted by one California court, it is designed "to relieve the members of the legal profession and the members of the judiciary from legal technicalities, trivia, detail and

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unessentials” and, as stated by another California court, the aim of this procedure is “to place the case in focus so that the defined and precise issues may be resolved as quickly as possible.” To the degree that pretrial procedures can be adapted by arbitrators to expedite the resolution of issues, with attendant reductions in costs, it accords with the underlying objectives and purposes of the arbitration process.

No uniform or inflexible rule can be postulated for prehearing procedures in arbitration proceedings. The extent to which an arbitrator may choose to advocate the utilization of prehearing procedures—whether prehearing statements or briefs, prehearing conferences or one of the other discovery devices—will necessarily depend upon a variety of factors: the type of the proceeding, the complexity of the issues, the nature of evidence to be adduced, the relationship of the parties, the professional skill of the advocates, and the time to be consumed in hearing the dispute. Since pretrial procedures depend upon the judge or hearing officer for effective application, it must always rest with the arbitrator, based on his knowledge, experience and especial expertise, to determine what forms of and to what degree prehearing procedures may be advantageous.

Certain general considerations, however, may be noted. First, the arbitrator may propose a prehearing conference to discuss preliminary matters and iron out the ground rules, and to familiarize himself more fully with the issues.

Second, it would appear that prehearing procedures are more likely to be profitably employed in grievance disputes or arbitration of rights, i.e., those involving the interpretation or application of laws, agreements, or customary practices, rather than in contract negotiation disputes or arbitration of interests, i.e., those concerning questions of the basic terms and conditions of employment. In the latter case the parties have probably been in negotiations for a substantial period of time, federal or state conciliators have frequently participated in some stages of the negotiations, and the economic or other factual justifications for the proposals will have been fully explored.

Third, even within the context of contract interpretation or grievance arbitration, it would appear that pretrial procedures have varying degrees of effectiveness, depending again upon the circumstances

14 Fitzsimmons v. Jones; 179 Cal. App. 2d 5, 8, 3 Cal. Rptr. 373, 375 (1960).
of the particular proceeding. It may be argued that the need for a prehearing is less compelling where there is a well-established, sophisticated, permanent umpire system\(^{15}\) with adequate grievance procedures and knowledgeable personnel, who are committed to explore all of the facts and who strive to settle the dispute before submitting it to arbitration. Moreover, where the umpire has a long-standing relationship with the parties and is knowledgeable as to plant practices and contractual provisions, prehearing may have even more limited value. Interestingly enough, however, at General Motors and U.S. Steel, each of which is recognized as having a superior umpire system, each side prepares and submits statements to the umpire prior to the hearing.\(^{16}\)

Fourth, it is in ad hoc grievance arbitration, where pretrial procedures are most infrequently employed, that they could well serve their most useful function.\(^{17}\) The arbitrator is often unacquainted with the parties, the plant practices and the provisions of the contract. In addition, it is more likely that the parties who resort to ad hoc arbitration as the final step will have less sophisticated grievance procedures and will be advocates neither as knowledgeable nor as experienced as those parties to a permanent umpire system.

**A. Submission Agreement**

Any consideration of prehearing techniques in arbitration must take note of the submission agreement, an instrument unique to the arbitral process. Unlike established legal procedure wherein pleadings designed to “join the issue” are a prerequisite to trial, pleadings are rarely employed in arbitration. Arbitrators and practitioners have developed in their stead the submission agreement which sets forth with specificity the issue to be decided.

While the submission agreement does not normally contain the elements of a technical pleading—ultimate facts, material allegations, relief requested—it frequently does provide for such matters as the scope of the arbitrator’s authority, procedural rules to govern the

\(^{15}\) Under a permanent umpire system an impartial third party is designated by the collective bargaining agreement as arbitrator for all disputes arising during the contract period. Under an ad hoc arbitration system, the contract merely provides a system for selecting an arbitrator for each grievance as it arises.

 Arbitrators and umpires possess only those powers conferred upon them by the agreement of submission; they have no power to do what the parties themselves could not do by agreement. 5 Am. Jur. 2d Arbitration and Award § 90 (1962).

\(^{16}\) R. Fleming, supra note 1, at 62.

\(^{17}\) Id. at 62.
hearing and the binding effect of the award. On occasion, the agreement may also include stipulations of fact.

In interest disputes, with the exception of the relatively few agreements which provide for arbitration where the parties cannot resolve their differences in negotiations, a submission agreement is a prerequisite to the hearing. In rights arbitrations, it is sometimes suggested that the submission agreement is an undue formality and that the written grievance or grievance minutes might suffice. The point is well taken except in those cases dealing with highly structured grievance provisions that incorporate, in substance, the elements of a submission agreement. The consequences of an improperly drafted grievance or submission agreement (e.g., possible vacation of an award by the courts for an arbitrator exceeding his authority) would opt for utilization and formulation of such agreements with care and precision. Even then, just as the courts have found that the modern and revised rules of pleading are sometimes inadequate to inform the parties of the nature of the lawsuit and to enable them to adequately prepare for trial, the submission agreement, even where expertly and skillfully drawn, at times has proved to be an inadequate substitute for other prehearing techniques.

B. Prehearing Statement or Brief

The submission by the parties of a prehearing statement or brief, in addition to a submission agreement, provides a twofold advantage: it obliges the parties more thoroughly to analyze their case in order to submit it in writing; and it acquaints the arbitrator with the matters to be considered at the hearing. The former has the beneficial effect of pointing up the strengths and weaknesses of the case and may lead to its withdrawal or settlement. The latter enables the arbitrator to sharpen the issues, to explore settlement and, in the event of a hearing, to probe more fully into every facet of the case so that all relevant evidence will be adduced to provide a full and complete record upon which he may rule. While the pretrial statement or brief lacks many of the beneficial attributes of the pretrial conference, it has the advantage of avoiding additional meetings, an economy which the parties may desire.

18 A written grievance is a statement of the claim by the aggrieved party, usually referring to the clause in the contract which the aggrieved party claims was violated.

19 Grievance minutes are written records of the meetings between union and management which constitute the preliminary steps of the grievance procedure.
C. Prehearing Conference

The prehearing conference is probably most effective if held two or three weeks prior to the hearing, and if properly employed, the conference can be a most important tool in expediting the more complex and potentially time consuming cases.

First, it affords the arbitrator the opportunity to analyze with the parties the issues in dispute and to articulate and define them with maximum precision. Thus, this part of the prehearing conference has several attendant advantages: It limits the scope of the proceedings by curtailing the introduction of irrelevant and immaterial evidence; it defines the jurisdiction of the arbitrator so that, should his award be challenged in the courts, it is more likely to be affirmed; and, like the prehearing brief, it enables the parties to evaluate the strength and weakness of their case.

Second, the prehearing conference permits the arbitrator to examine with the parties the theories of their case, their claims, their arguments and their defenses. This examination similarly has concomitant advantages. If the case is presented by laymen who possess neither extensive experience nor special expertise, it can put in focus the major arguments which they should be prepared to advance and to meet. If, however, the case is to be presented by professional advocates—lawyers, economists or, as is sometimes the case, personnel in the union or management hierarchies who may not have participated in the lower steps of the grievance procedure—this part of the prehearing conference may present them with their first opportunity to meet with their adversaries.

Third, the arbitrator is enabled to explore with the parties evidentiary matters, including the ground rules or rules of evidence to be applied in the hearing. The application of liberal rules of evidence subjects the arbitrator to criticism, and with some justification, for permitting the introduction of evidence which is neither relevant nor otherwise proper. Promulgation of the rules to be applied, and an explanation of their underlying considerations may be helpful in sharpening the presentations and in expediting the proceedings if the advocates are laymen.

Fourth, the prehearing conference, to a substantially greater degree

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20 Shafroth, Pre-Trial Techniques of Federal Judges, 4 F.R.D. 183, 185 (1946); see also, Louisell, Discovery And Pre-trial Under Minn. Rules, 56 Minn. L. Rev. 633, 655 (1952).
than the prehearing brief, enables the arbitrator to educate and familiarize himself with the issues, the arguments, the pertinent documents and the evidence intended to be introduced. Too frequently arbitrators are not sufficiently prepared in advance to assure that a full and complete record is made at the hearing. Deficiencies in the record may not become apparent to the arbitrator until he analyzes the evidence in preparation of his decision and, since arbitrators are reluctant to call meetings of the parties after the matter has been submitted, pretrial conferences may prevent an incomplete record.

Fifth, in any arbitration, the narrowing of issues, the exploration of theories and the examination of contemplated evidence at the prehearing conference enable the arbitrator to explore knowledgeably all avenues of settlement and, if the arbitration must proceed, to conduct the hearing expeditiously.

D. Discovery

There is less than complete agreement as to the usefulness in arbitration of discovery devices, e.g., depositions, interrogatories, motions for inspection or production of documents, and requests for admissions of fact and genuineness of documents. Yet there can be little question as to the soundness of the underlying objectives in enabling the parties to have access to the facts, so that they will be neither "surprised" at the hearing nor required to expend unnecessary time and money in preparation of nonessential proof.

The intrinsic value of disclosure between the parties, not only as to their positions but also as to the evidence, is, in some respects, far more significant in arbitration than in civil litigation. For example, the labor-management relationship is necessarily continuous, and it can be severely damaged if it is believed that any arbitration case was won by trickery, by suppressing evidence, or by introducing surprise evidence. Any suspicion on the part of either management or the union, and more particularly on the part of the employees, that the decision was based upon anything other than complete disclosure of the facts, will unquestionably result in a loss of confidence in the arbitration process, with detrimental consequences to its future utilization.

Occasionally, one of the parties may withhold information in the grievance steps for the advantage of introducing it as "surprise" evidence at the hearing. Such a strategem runs contrary to the purpose
of the grievance procedure, for the collective bargaining agreement implies an obligation to make disclosures. It should be discouraged. Presumably, discovery devices, in conjunction with prehearing conferences, would extract most if not all of the evidence, notably if the arbitrator were to exclude evidence at the hearing which had been withheld during discovery or prehearing conferences. Finally, the requirement that the parties exchange relevant information in advance of the hearing accords with our national labor policy. Both the National Labor Relations Board and the courts have recognized the employer's duty to disclose fully to union representatives information and facts so as to enable them, not merely to bargain intelligently, but to discharge properly their statutory duty of fair representation which includes the administration of the agreement and the handling of grievances.21

Clearly, not all of the discovery devices lend themselves equally well to arbitration, nor, more significantly, are any of them especially functional if employed in the formalistic manner used in judicial proceedings. Depositions, for example, appear to be neither useful nor adaptable to the arbitration process. Too often, even in judicial proceedings, they are employed to harass the adversary, to engage in "fishing expeditions" and to prolong and increase the cost of litigation. Similar evils attach when depositions are adapted to the arbitral process.

Conversely, interrogatories can be adapted to great advantage in some arbitration proceedings. Interrogatories could be addressed directly to the adverse party, and if he should choose not to respond to any or all of the questions the arbitrator could, prior to the hearing, indicate his views on the matter. In the alternative, the interrogatories could be directed to the arbitrator, who would select the proper questions and send them to the party for response. Such a procedure could be particularly helpful in discharge cases where the cause of the discharge is not readily apparent or where the evidence in support thereof has not been completely revealed. As an instance, if a company discharges an employee for dishonesty on the basis of an investigator's reports, detailed information sent to the union in advance of the hearing could result either in the union's with-

drawing the grievance or its being prepared to meet the allegations in the case.

The production of documents in advance of the hearing also would appear to be meritorious. Inordinate amounts of time are commonly consumed in hearings by the rambling of one of the parties who is unprepared to cross-examine on submitted documents that he has not previously seen. An opportunity for the parties to study and analyze such documents in advance can save time. Stipulations of fact and stipulations as to genuineness of documents, if obtained at the pre-hearing conference, also can aid the expedition of the arbitration hearing.

III. HEARING PROCEDURES

Even before the Supreme Court acknowledged his paramount position in procedural matters, the arbitrator was recognized as the key figure in the development of procedural ground rules for arbitral practice. At the same time, the past three decades have witnessed a transformation in his role.

Unlike the pre-World War II arbitrator, who practiced a mixed "mediation" and "arbitration," and whose decision frequently represented a consensus arrived at through compromise and persuasion, the contemporary arbitrator, especially in rights disputes, is looked to for adjudication of the "mutual intent" of the parties as manifested (implicitly or explicitly) by their collective bargaining agreement. The present and more circumscribed view of the arbitrator's function, though not universally endorsed, draws some support from recent expressions of the Supreme Court. As articulated by the Court in Steelworkers v. Enterprise Wheel & Car Corporation:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Conceding the axiom that the arbitrator's jurisdiction and authority

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flow from agreement by the parties and may be delimited by them as they see fit, there is an inherent danger to the arbitral process in overreading the Court's language and failing to construe it in the context of the Court's earlier admonition of the arbitrator's pre-eminence on procedural matters.

Limitations on the arbitrator's jurisdiction, unless explicitly expressed to the contrary, are not to be equated with restraints on his authority to determine procedural questions nor with inhibitions on his initiative to innovate in the procedural field. To the contrary, his is the prime responsibility for fixing ground rules for the hearing, for assuring a full and complete record, for maintaining an orderly proceeding, and for protecting the parties and witnesses from improper behavior. Above all, he must conduct the hearing in a manner calculated to balance the individual and institutional interests and designed to accommodate the oftentimes divergent precepts of due process\textsuperscript{24} and expeditious hearing.

A. Participation in the Hearing

The right of an individual or institution, having an interest in or potentially affected by the outcome of judicial proceedings, to notice of and participation in the hearings to the extent necessary to protect his or its interests is traditionally recognized. Acknowledgement of this right was probably the underlying basis for the statutory creation of the legal motions of intervention\textsuperscript{25} and interpleader.\textsuperscript{26}

No statutory equivalent exists in the field of labor arbitration.

\textsuperscript{24} Conceptual definitions of due process have historically intrigued philosophers, political theoreticians and legal scholars. So elusive is a definitive characterization of this concept, however, that the United States Supreme Court has repeatedly refused to define "due process of law" as an abstract doctrine. See Hannah v. Larche, 363 U.S. 420, 442 (1960). Chief Justice Warren writing for the majority states, "'[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." See also Rochin v. Calif., 342 U.S. 165, 169 (1952); Wolf v. Colo., 338 U.S. 25, 27 (1949); Gibbs v. Burke, 337 U.S. 773, 781 (1949); Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928).

Procedural due process, however, is somewhat less difficult of description. It denotes a "full and fair hearing," the right of an individual to his "day in court." It embraces at the very least, the rights to notice, to be present, to participate in the hearings, to confront witnesses and cross-examine them, and to refuse, under certain circumstances, to give testimony. Just as these are fundamental to the judicial process, so they are equally, albeit in modified form, basic to arbitration procedure. See W. Wirtz, supra note 22.


Nonetheless, proceedings do occur in which the arbitrator's award may substantially, and in many cases adversely, affect the rights of third parties. Three such situations shall be briefly noted: (1) participation by and representation of the grievant; (2) intervention by other employees whose job status may be affected; and (3) joinder of other unions, the contractual rights of which might be involved.

1. Employees as Grievants

Normally, the employer and the union are the formal parties to grievance or rights arbitration proceedings. The grievant usually participates in the capacity of a witness rather than as an advocate, with the presentation being made by his collective bargaining representative, i.e., the union. The union, as a party to the agreement, asserts concurrently the institutional and the individual interests. On occasion, however, the grievant is persuaded or believes that the union is antagonistic to his position or will not adequately represent him.

The recent decision of the United States Supreme Court in *Vaca v. Sipes*\(^27\) definitively determines the absence of obligation on the part of the union to pursue a grievance to arbitration on behalf of an employee which the union "in good faith" concludes is without merit. But, the decision left unsettled the extent to which the individual is entitled, where the grievance is prosecuted, to full and separate participation in the arbitration hearing including representation by counsel of his own choosing. Dialogue by arbitrators on this subject has been substantial;\(^28\) adjudication has been sparse.

In general, there appears a discernible disposition on the part of arbitrators to permit the grievant full participation in the hearing, but somewhat less enthusiastic response to that of allowing separate counsel. Owing to the fact that constitutional due process does not embrace the right to counsel before private tribunals, such bodies may establish their own procedural rules.\(^29\) Notwithstanding the above,

\(^{27}\) 386 U.S. 171, 190, 194 (1967) (breach of union's statutory duty of fair representation occurs only when union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith; union, as employee's statutory agent, must make good faith, nonarbitrary decisions as to merits of particular grievances).


fair procedures, at least as viewed by the Nation Labor Relations Board for purposes of effectuating its policy of deference to arbitration awards, may under certain circumstances entail the prerogative of one's own lawyer at the hearing.  

Separate representation of the grievant in arbitration hearings represents a further instance of harmonizing institutional and individual interests. Whether separate representation is to be allowed may turn on the reasonable belief in or the evidence supporting an allegation that the grievant will not receive full and fair representation by his collective bargaining agent. Thus, in a recent case, the arbitrator denied the grievant's request for separate counsel, finding that there was no showing that the union would not fairly or adequately represent him. On this ground the arbitrator distinguished the ruling of a New Jersey court which held that an employee was entitled to intervene with his own counsel upon showing that the union was acting adversely to his interests. Since neither Section 9 (a) of the Labor Management Relations Act, which permits the individual to process his own grievance under certain conditions, nor constitutional due process requires that the grievant be afforded separate counsel, the arbitrator has little in the way of objective criteria to aid him in this determination.

2. Intervention by Other Employees

A related although factually distinguishable situation, posing substantially the same question to the arbitrator, arises where an employee or group of employees who are not grievants, may nevertheless be adversely affected by a decision of the arbitrator. Such a situation most commonly occurs in connection with seniority cases.

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33 LABOR-MANAGEMENT RELATIONS ACT OF 1947 (TAFT-HARTLEY ACT) § 9(a), 29 U.S.C. § 159(a) (1965) provides:
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: Provided, That any 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 representatives, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.
but may arise in arbitrations involving work assignments, filling of temporary vacancies, vacation scheduling, or distribution of overtime work.

For the first time, the Supreme Court in Humphrey v. Moore\textsuperscript{34} postulated its view in the context of a group of employees who were disadvantaged by the "dovetailing" of seniority lists. Factually, Company A had taken over the operations of Company B and had proceeded to lay off the latter company's employees, some of whom filed grievances under a multi-employer multi-union Teamster contract that covered both employers. The grievants contended that the seniority lists of the two companies should be merged or dovetailed. At the final step of the grievance procedure, a joint committee made up of an equal number of union and employer representatives ruled that it had the authority to interpret the contract on this question and that the merging of seniority lists was appropriate. The joint ruling accorded with the position taken by the union at the committee hearing. Thereafter, employees of Company A, who were laid off as a result of the dovetailing, filed an action in the state court and were granted an injunction to prevent the joint ruling from being given effect. The Supreme Court unanimously reversed.

Several far reaching issues were involved, and four separate opinions were filed by the Justices. Of present significance is the view of the majority that the union did not breach its duty of fair representation where: (1) in good faith, it espoused the interests of one of the two competing groups of employees that it represented; and (2) the complaining employees—who were not grievants in the original dispute since under the company's interpretation they had initially retained their positions—were notified and present at the hearing and "were given every opportunity to state their position."

The majority noted further that these employees:

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made no request to continue the hearing until they could secure further representation and have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented.\textsuperscript{36}
\end{quote}

Participation in the hearings was, perhaps, not essential to the Court's determination. Fundamental to future arbitration procedure, nonetheless, is the supposition implicit in the majority's language

\textsuperscript{34} 375 U.S. 335 (1964).
\textsuperscript{35} Id. at 350.
\textsuperscript{36} Id. at 350-51.
that failure to notify and afford the complaining parties the opportunity to participate might have led the Court to a different result.

It does not follow from the *Humphrey* case that an employee must be permitted to intervene in the hearing each time he may be disadvantaged by an arbitrator's decision. Always allowing an employee to intervene is shown to be impractical when it is recognized that the affirmance of his rights may adversely affect the rights of others. Furthermore, it does not follow from *Humphrey* that a group of employees whose interests are antagonistic to the position of their collective bargaining representative must always be joined. In denying a group of dissident employees the right to participate in arbitration proceedings, Professor Jones, the arbitrator, stated:

> Procedures are evolving which equip arbitrators to enable joinder of those whose interests might otherwise be impaired unless they can participate in some form in the arbitration. But joinder techniques do not operate inexorably nor without heed to their appropriateness in the specific circumstances. Quite the contrary. Arbitral joinder techniques are only appropriate in those circumstances where the failure to effectuate joinder would cause *patent injustice*, given the reality either of a bilateral decision in a multilateral dispute which might be significantly dispositive of third-party rights, or the prospect of an undue extension of indecision by the postponement of the resolution of a multilateral dispute.37

Decisions based on the foregoing types of situations present the dual problem to the arbitrator of harmonizing individual and institutional interests and of balancing the philosophical concepts of due process with pragmatic considerations of orderly and expeditious grievance arbitration proceedings. To achieve harmony and balance functionally rather than conceptually, it is suggested that only in those limited situations, where it is evident to the arbitrator that a full and fair hearing cannot ensue without separate representation by the grievant or intervention by adversely affected employees, should such requests to participate be granted. To do otherwise is to intrude on the institutional interest and statutory obligation of the union to represent its members, thereby hampering unduly the arbitral process. So long as the grievant or disadvantaged employees have other avenues by which to pursue the remedies of "fair representations," they should be left to such forums.38

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38 Vaca v. Sipes, 386 U.S. 171 (1967); Independent Metal Wkrs. Local 1, 147
3. Unions as Grievants

The decision of the Supreme Court in *Carey v. Westinghouse Electric Corporation* poses to the arbitrator yet another procedural dilemma. In the *Carey* case, a majority of the Court held that the jurisdiction of the NLRB to resolve work assignment disputes and to determine appropriate bargaining units of employees does not preclude the use of the arbitration procedure to resolve one union's grievance that the work covered by its bargaining unit, incorporated in its agreement with the employer, was being performed by employees represented by another union.

Factually, the IUE filed a grievance asserting that certain employees in the engineering laboratory at the Westinghouse plant, who were represented by another union which had been certified as the exclusive bargaining representative for a unit of "all salaried, technical employees," were performing production and maintenance work. IUE was the certified collective bargaining representative for all "production and maintenance employees" and had incorporated its unit certification into the collective bargaining agreement. Upon Westinghouse's refusal to arbitrate, on the ground that the controversy presented a representation matter for the NLRB, the IUE petitioned the state court for an order directing arbitration. The petition was refused and the intermediate appellate courts affirmed; the Supreme Court reversed.

The *Carey* decision compels arbitration between an employer and a grieving union on jurisdictional matters, despite the absence of a second union's participation in the hearing and even though the second union's institutional interest of representation along with the scope of its collective bargaining agreement may be placed in jeopardy. Additionally, the decision propounds the question of what measures the arbitrator might invoke to persuade or compel all parties to join in the arbitration so that the ultimate decision will be binding on the employer as well as on each of the unions, and that the adjudication will be finally determinative of the jurisdictional issue involved.

A series of law review articles has already explored this subject.
in depth. Suffice it, therefore, to direct the reader to the provocative dialogue between two scholars in the field, Professor Jones of UCLA and Professor Bernstein of Ohio State University. Professor Jones advances an imaginative and comprehensive proposal designed to bring about through "consent and compulsion" the inclusion of a non-participating union in the proceeding. Professor Bernstein's opposition proceeds primarily on the incompatibility of a coercive force with the consensual nature of the arbitral process.

Thus far, arbitrators have displayed little inclination to adopt procedures designed to compel the second union to participate. Unions' declinations to transform bilateral arbitration into trilateral proceedings have generally been followed by the arbitrator's going forward with only the two primary parties to the grievance. The arbitrators' acquiescence may be due to a disinclination to resort to compulsion or a reasoned conclusion that they are without the requisite authority. As noted by Arbitrator Block in a recent ruling, where, after an analysis of the applicable California statutory law and the Supreme Court's decisions in Carey and Wiley and a review of the major

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44 Berstein, Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel, 78 Hary. L. Rev. 784, 786 (1965).


46 Berstein-Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel, 78 Hary. L. Rev. 784, 786 (1965).

47 John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) as cited in Lockheed-California Co., 46 Lab. Arb. 865, 869-70 (1966). In Lockheed the Company argued that the question of joinder was a procedural matter which should be left to the discretion of the arbitrator, basing its assertion on the following quotation from Wiley: "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of dispute and bear on the final disposition should be left to the arbitrator [376 U.S. at 557]. However, the arbitrator, after careful consideration of Wiley and Carey, ruled "they do not open the door to joinder by him."
literature on the subject, he rejected a company's motion to join the second union:

Here, as in Carey, bilateral arbitration is being sought by one union (the I.A.M.) in a jurisdictional work dispute situation. While the ensuing arbitration on the merits may or may not end the controversy, the Arbitrator is unable to construe the above U.S. Supreme Court decisions as sanctioning joinder by him of the Welders Union in this case.

In conclusion, it is the Arbitrator's opinion that there is neither case law, statutory nor contractual authority for granting the Company's motion.49

While students of the subject imbued with Professor Bernstein's voluntary or consensual nature of the arbitral process50 may find Professor Jones' proposed solution unpalatable, the dilemma posed by the Carey decision clamors for solution. The practicalities of the labor-management relationship, as well as due process considerations, will require further experimentation and innovation on the part of arbitrators to evolve procedures by which such jurisdictional questions may be adjudicated with finality and with all parties afforded the opportunity to participate.

B. Due Process Considerations

1. Right to Confront and Cross-Examine Witnesses

The right of the grievant and his representative to confront and cross-examine adverse witnesses presents still another area of accommodation for the arbitrator, that of balancing this concept with the procedural principle of relaxed rules of evidence for arbitration. Employers' requests, that grievants be excluded from the arbitration hearing on the ground that appearances of witnesses should be limited to the time when they testify, have met with no success. The rationale is that exclusion of grievants is "tantamount to a denial of due process . . . akin to excluding a defendant in a criminal proceeding from his own trial."51

50 Bernstein, Jurisdictional Dispute Arbitration: The Jostling Professors, 14 U.C.L.A. L. Rev. 347, 351 (1966). Professor Bernstein defines the voluntary or consensual nature of the arbitral process as:

- the freedom of the parties to shape their procedures and decisional criteria to meet their needs, the freedom to prescribe the method of selecting arbitrators, and the finality of awards free from court review (except for blatant departures from procedural decencies) . . . .

However, far less unanimity exists among arbitrators with respect to the employer's obligation to produce as witnesses for cross-examination such individuals as spotters, shoppers and private detectives upon whose reports disciplinary or discharge action is based. Here the arbitrator must weigh the traditional right to face one's accuser, which affords the opportunity for cross-examination for credibility and impeachment purposes, against the employer's institutional interests in maintaining his investigators' anonymity.

As might be anticipated, arbitrators' views on this question are multifarious; some exclude the testimony as hearsay, others admit it with the customary admonition that "it will receive its proper weight," and still others strive for a middle ground where they interview the investigator without any of the parties being present to determine the reliability of the report. There appears to be little basis for reconciling these divergent views other than the personal predilections of the arbitrators. What is discernible in this area, however, is the increasing concern on the part of the arbitration profession for more procedural protection to the individual involved. Court review will undoubtedly bring to bear more pressure in this regard.

A related form of "absentee" evidence stems from the custom and practice in a number of industries of not calling witnesses from the other side, viz., the employer does not call bargaining unit employees, the union does not call foremen or others in the managerial hierarchy. This practice stems from an assumption that if unfavorable or adverse testimony is given by such witnesses then some form of retribution will ensue.

The dilemma of the arbitrator in such cases centers about developing a full and complete record, since in many instances such testimony would prove helpful, if not determinative, to a resolution of factual conflicts. Many arbitrators are of the opinion that there is little legitimate justification for this practice. As a result, there has been a disposition to circumvent it either by interviewing witnesses in private, which has the undesired effect of making the arbitrator an independent investigator rather than a trier of fact, or by the arbitrator's calling the witnesses himself. While the arbitrator has the legal power to compel attendance only by subpoena, which is now provided

62 See F. Elkouri & E. Elkouri, supra note 1, at 183-84.
63 See W. Wirtz, supra note 22, at 25.
64 See Problems of Proof in Arbitration, supra note 1, at 258.
for in some twenty-six states, there are other practical measures he can employ to accomplish this objective. As the decision maker, reasonable requests by him for the production of witnesses are likely to be honored.

2. Search and Seizure

Other due process considerations relate to the manner in which the evidence is obtained, e.g., confidential records of the company are invaded, memoranda are taken from wastebaskets, items are "found" in employees' lockers and, increasingly, evidence is acquired through the use of movie, television or recording equipment. While the courts have steadfastly refused to admit evidence tainted by a questionable search and seizure, the question whether identical exclusionary principles should prevail in the arbitral process remains undecided.

The argument can be made that when an individual becomes employed, he does so subject to management prerogatives and plant rules, which implicitly include the right to examine his locker or his automobile without consent or search warrant, or to observe his activities through picture or electronic devices without his knowledge or consent. Contrariwise, it can be asserted that the circumstance of employment should not deprive him of his constitutional rights and subject him to invasions of his right of privacy and intrusions on his daily working life. Assuming neither a constitutional right nor an explicit prohibition in the contract, the question presented to the arbitrator is whether such methods of obtaining evidence should be encouraged by admitting it in the hearing. Again divergent views exist. Some arbitrators hold that so long as its authenticity and materiality are not questioned, such evidence should be admitted. Others adhere to the view that "[k]nowledge, even though incriminating, if acquired through such illegitimate procedures, is of questionable validity in bringing action against the individual."

Probably the most far reaching and significant questions in this area will revolve about the admissibility of evidence obtained through the use of closed circuit television and electronic instruments. Where the employee is aware of the utilization of such devices little argument can be advanced for the inadmissibility of such evidence despite

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55 See, e.g., ILL. ANN. STATS. ch. 10, § 21 (Smith-Hurd 1966); MINN. STATS. ANN. § 572.14 (Supp. 1966); TEX. CIV. STATS. art. 230(c) (Vernon's Supp. 1967).
56 See PROBLEMS OF PROOF IN ARBITRATION, supra note 1, at 105, 204.
the fact that it may "put the employees under constant strain . . . ."58
But, where the espionage is conducted under surreptitious conditions, with the employee unaware that he is being spied upon, it presents the arbitrator with one facet of the broader social question—the degree to which invasion of "rights of privacy" will be countenanced in our contemporary society. There is no rationale for a more restrictive interpretation of this guarantee by arbitrators in the industrial arena than by the judges in our social and political life.

C. Failure or Refusal of a Grievant to Testify

The failure or refusal of the grievant to testify in an arbitration proceeding may be due to: (1) personality traits, including his demeanor, emotional instability or inarticulateness, which would make him a "poor" witness; or (2) his intention to invoke the "privilege against self-incrimination." In the main, the decisions indicate a clear consensus that the failure of the grievant to testify at the hearing is a prime factor which leads to the conclusion that the grievance is without merit.59

A somewhat different view is suggested where the case involves a discharge or disciplinary matter. Many arbitrators require a higher standard of proof in such cases because of the serious consequences, particularly where the alleged acts entail moral turpitude or criminal intent. Here, it may well be contended that the refusal to testify should be equated with the legal rule barring comment on the failure of a defendant to testify in a criminal proceeding,60 and that the grievant's abstention should not be weighed adversely by the arbitrator.

The privilege against self-incrimination established in the criminal law is not, in the opinion of most arbitrators, applicable to the field of labor arbitration. This proceeds from the assumption that, unlike

58 W. Wirtz, supra note 22, at 17.
59 F. Elkouri & E. Elkouri, supra note 1, at 182 & n.46.
60 See Griffin v. California, 380 U.S. 609, 615 (1965), where the Court stated:
We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt (footnote omitted).
See also Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).
[A] limited immunity from the common duty to testify was written into the Federal Bill of Rights, and . . . as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions.
a criminal case, a disciplinary grievance is "'a matter not to be
viewed primarily as a question of penalty for misconduct, but as a
problem of whether or not, all things considered, the individual has
proved an unsatisfactory employee.'"61

The increased emphasis by the judiciary on the protection against
self-incrimination may, however, augur a modulation in the arbitrators' predilections in this regard. The statutory trend to vest the
arbitrator with the subpoena power supports the recognition of this
right. The federal courts, in fashioning a body of law under Section
301,62 may well conceive of the protection of this privilege as a con-
dition precedent to enforcement of an arbitration award.

D. Rules of Evidence

Consideration of the effective utilization of specific evidentiary
rules in arbitration must proceed from the premise that strict ad-
herence to judicial rules is incompatible with the arbitral process.
Several factors contribute to this conclusion. First, rules of evidence
evolved as an integral part of the jury system and were designed to
aid laymen in evaluating evidence, but the rules are not always
applied, strictly construed or observed by administrative bodies or in
non-jury trials. Second, rules of evidence are in large measure ex-
clusionary in nature. Yet evidence which is not strictly relevant, or
otherwise proper, may nevertheless be helpful to the arbitrator, par-
ticularly the ad hoc arbitrator, for background and as an aid in de-
termining the mutual intent of the parties. Third, the professional
arbitrator's especial expertise should qualify him to analyze and
weigh the evidence produced within the proper context. Fourth,
reviewing courts are more likely to sustain awards where there has
been liberal admission rather than a rejection of competent, although
technically inadmissible evidence. Fifth, arbitration has a therapeutic
value in the labor-management relationship by enabling the parties to
"get things off their chest" and "have their day in court" which
frequently can be accomplished only by liberal admission of evidence.
Finally, the success of arbitration and its continued acceptance by the
parties are dependent upon its remaining efficient, speedy, inexpen-
sive, and informal.

Consideration of the preceding factors is not to suggest that limita-

61 W.Wirtz, supra note 22, at 19.
§ 185 1965).
tions on the admissibility of evidence be abandoned or that advocates should refrain from pressing their objections vigorously. The former has the beneficial value of expediting hearings by precluding the introduction of irrelevant, immaterial and repetitive evidence, the latter of directing the arbitrator's attention to deficiencies in the evidence.

1. Burden of Proof and Burden of Producing Evidence

The term "burden of proof" is often loosely used in arbitration parlance to refer to: (1) burden of pleading; (2) burden of producing evidence; (3) burden of persuasion; and (4) standard or quantum of proof. With two notable exceptions, viz., discharge or disciplinary and seniority grievances, the burden of proof concept has little significance in arbitration proceedings. As already noted, technical pleadings are rarely employed in arbitration and any "burden" in this regard is meaningless. The burden of producing or going forward with the evidence, similarly, has little applicability to the arbitral process. The grieving party normally presents his case first, but no inference is to be drawn that he is obligated to establish a prima facie case before the adverse party is obliged to respond. The order of presentation should be based on how the facts may best be developed to provide an expeditious and orderly hearing, rather than on any analogy to established judicial procedure.

In discharge or disciplinary cases, the above pragmatic considera-

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63 Three types of evidence of limited value to arbitration might be briefly noted: compromise offers, admissions, and surprise evidence. Considerations of sound labor-management relations, rather than the law of evidence, govern the admissibility of such evidence in arbitration hearings.

As in judicial proceedings, compromise offers are not usually permitted. Interests other than the merits of the dispute obviously motivate parties to settle cases. In the field of labor arbitration, disclosure of compromise offers would frustrate settlement of future grievances and seriously injure the labor-management relationship.

Under certain circumstances, admissions—statements made prior to the hearing in order to dispute or discredit a claim or defense advanced by the other party—are vulnerable to similar criticism. It has been suggested that a distinction be drawn between an admission made by the grievant, in contrast to one made by his representative. It would appear, however, that the context in which the purported admission occurred, rather than who made it, is a more valid criterion for determining admissibility. Thus, an admission made as a part of, or in conjunction with, a compromise offer might not be permitted as it would tend to discourage future open discussions, whereas admissions made under other circumstances may be allowed.

Surprise evidence, that is, evidence withheld until the final arbitration step of the grievance procedure, could be avoided by the use of prehearing procedures. Absent prehearing, arbitrators vary as to their rulings. A few will exclude surprise evidence, although most appear to admit it. Generally, arbitrators either give less weight to such evidence or afford the adverse party a continuance to meet the "surprise."

64 R. Fleming, supra note 1, at 68-69, 72-73, 77.
tions usually require the employer to proceed first with a presentation of the evidence. Often, this may be the only way in which the facts can be systematically developed in the record. Unfortunately in many instances, the evidence serving as the basis of the proceeding is unavailable to the grievant or his representatives. This lack of information may be the result of an inadequate grievance procedure in which the parties fail to investigate and consider matters at the pre-arbitration stages. The result may stem from the strategy of the employer to allege vague or multiple grounds for his action with the intent of choosing the one he considers most persuasive as the hearing develops, or from an arbitrary refusal on his part to reveal the grounds. To require the union under such circumstances to proceed first could result in burdening the record and prolonging the hearing with unnecessary and irrelevant evidence. The same problem presents itself in seniority cases wherein a senior employee, without being informed of the specific facts or reasons, may be bypassed on the ground that he is not qualified to perform a higher job or, as provided in some seniority clauses, that he does not possess qualifications "substantially equal" to that of a junior employee.

The legal concepts of burden of persuasion and quantum of proof have little practical consequence for most arbitration cases. While some arbitrators clothe their decisions in the legal jargonisms of "preponderance of the evidence" or evidence "beyond a reasonable doubt" or "sufficient to convince a reasonable mind of guilt," the admonition of the late Dean Shulman that notions of burden of proof are "hardly applicable to issues of interpretation," or Professor Aaron's more emphatic observation that the evidentiary concept of most arbitration cases is "manifestly absurd," more nearly accords with the realities of the arbitration process.

One particular form of discharge case requires further comment. Where the discharge involves allegations of moral turpitude or criminal intent, arbitrators frequently observe the more stringent standard of proof of criminal proceedings, i.e., "proof beyond all reasonable doubt." Those who argue against this standard emphasize that the grievant is not being tried "criminally," that even within the law there are different standards of proof in the civil and criminal courts for the same offense, and that in any event an arbitration determination is

66 *Aaron, supra* note 1, at 742.
neither binding upon nor properly admissible in a court of law. Nevertheless, arbitrators must be sensitive to the social stigma and the consequential impact of future job jeopardy; hence they are justified in observing the "same exacting standards of proof that prevail in criminal proceedings." With the exception of cases involving alleged moral turpitude or criminal intent, it would seem that the arbitration process is likely to be little enhanced by the adoption of the judicial concept of "burden of proof."

2. *Parol Evidence Rule*

Of the numerous exclusionary rules of evidence, probably the single, most significant and controversial one in arbitration is not a rule of evidence at all but one of substantive law, *i.e.*, the parol evidence rule. As formulated by the courts the rule, with certain exceptions, provides that a complete and integrated contract supersedes all prior and contemporaneous negotiations and prohibits the introduction of any extrinsic evidence, oral or written, to alter or vary the terms of the written instrument. As articulated and applied by arbitrators to collective bargaining agreements, the rule is frequently liberalized to allow the admission of extrinsic evidence in the nature of statements or conduct of the parties proposed to reform the agreement, to establish a collateral agreement, or to clarify the meaning of the agreement.

This rule has little relevancy to interest arbitrations which, by definition, arise from disagreement between the parties over the inclusion of new terms in a collective bargaining contract, and which are different from grievance or rights arbitrations where the dispute originates under the existing provisions in a contract. The assertion that the rule should be applicable to arbitration proceedings is invariably advanced by management representatives, who contend that: (1) The arbitrator is without authority to alter, vary, add to, or subtract from the terms of the collective bargaining agreement; and (2) parol evidence may not be admitted or relied upon where the language is plain and unambiguous. They also assert that even if the language is ambiguous, the ambiguity must be latent rather than patent. However, such assertions misconstrue the essence of grievance or rights arbitration and misconceive the nature of the collective bargaining process. Except for those cases which involve a factual

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67 Id. at 745.
68 *See Problems of Proof in Arbitration, supra* note 1, at 95-98.
conflict only, the focal point of the arbitrator’s decision-making process revolves about an interpretation of the contested meaning of provisions in the collective bargaining agreement. Only if it is presumed that one of the parties is proceeding frivolously or fraudulently can it be concluded that the express language is sufficiently without “ambiguity” to express “plainly” the mutual intent of the parties. By its very nature, the core of a grievance or rights dispute, after resolution of any factual conflict, emanates from equivocacy, duplicity, or obscurity in the meaning of the words of the agreement. Thus, grievance or rights arbitration insofar as one of the parties in good faith advances the contention of ambiguity, intrinsically inhibits the strict application of the parol evidence rule.

Indeed, the courts have been troubled by the fact that the parties’ good faith contentions as to the meaning of the language of the contract simultaneously furnish the ambiguity and give rise to the application of the rule. The result has been that judges have resorted to various stratagems to avoid the impact of the rule. Chief Justice Traynor of the California Supreme Court in discussing the parol evidence rule observed that:

Its fatuity is demonstrated by holdings [of the courts] that the conflicting contentions of the parties as to the meaning of a written instrument alone supply the ambiguity necessary to take the rule out of play. . . . Litigation as to the meaning of language arises only from disputes as to meaning; a rule applicable only when no dispute exists is of no assistance in resolving a dispute that does exist.69

And in the same light, Professor Jones in his scholarly dissertation on this subject commented:

[T]he appellate courts have had little difficulty in verbally giving obeisance to the rule while still condoning admission in trials of parol evidence considered to be reliable in reflecting the actual rather than the recorded agreement of the parties to a contract.70

Whatever reasons exist for temporizing the rule as an exclusionary device in judicial proceedings are pluralized in arbitration hearings. Not uncommonly in the collective bargaining process the provisions of the contract are agreed upon and drafted under the most un-

toward circumstances—at the culmination of marathon bargaining sessions, or under the stress of a strike deadline—which are definitely not conducive to meticulous and precise draftsmanship. Moreover, while there has been an increased disposition in recent years to employ skilled professionals for drafting purposes, large numbers of collective bargaining agreements are still drawn by laymen without the requisite expertise in this field. Finally, collective bargaining agreements intrinsically must cover a great variety of industrial situations, not all of which are foreseeable or existent at the time the parties execute the agreement. Consequently, the preciseness of contracts in other fields is sometimes lacking.

Two types of parol evidence are usually proffered in the arbitration hearing to resolve ambiguities in the language: (1) that going to the history of collective bargaining between the parties, including prior or contemporaneous negotiations; and (2) that relating to the parties' past conduct or "past practice" either in interpretation or application of the agreement. As to the former, the evidence submitted usually takes the form of prior collective bargaining agreements, written proposals and counter-proposals, minutes of negotiation meetings, and testimony as to oral discussions in such meetings. The prior written documents, both agreements and formal proposals, are liberally admitted, since they may be of the greatest assistance to the arbitrator as background material as well as for elucidation of the parties' intentions. A rejected or adopted proposal viewed in the context of prior practices, grievance disputes or rights arbitration may be highly persuasive if not determinative of the issues involved. Minutes of negotiation meetings jointly executed or impartially transcribed may also be helpful, but minutes by one of the parties or testimony as to what transpired or what was said at negotiation sessions are generally of little value, as they often suffer from deficiencies in recollection and the usual interspersion of opinion and self-serving declarations. In every case, the probative value of the evidence and the pragmatic weighing of its quality against the expedition of the proceedings should govern the arbitrator in his determination as to admissibility.

Past conduct or past practices also represents one of the major sources of evidence in arbitration for resolving ambiguities in the contractual language. Where, for example, a contract provision has been construed by the parties in a particular manner over the years
and is included in subsequent agreements, "the language will be presumed to have the meaning given it by past practice." The weight to be accorded such evidence is, of course, distinct from the question of its admissibility and has been a subject of substantial dialogue by arbitrators. Suffice it to note here, that the significance to be ascribed to past conduct or past practice is contingent on several factors including: whether it was mutual or unilateral, general or isolated, uniform or varied, active or passive, prolonged or recent, and whether it was known or reasonably should have been known to each of the parties.

Parol evidence is generally admitted where there has been a mutual mistake in the preparation of the agreement. A more complex situation arises, however, from the allegation advanced by one of the parties that there is a common understanding evidenced by past conduct or past practice which amends, modifies or amplifies the parties' written agreement. Except where the agreement explicitly provides that all prior agreements are incorporated in the contract or that all collateral understandings or amendments must be in writing, arbitrators usually permit the introduction of parol evidence for such purposes. Nonetheless, they typically require a showing equivalent to mutual agreement upon the alleged amendment or modification.

3. Hearsay

Hearsay evidence may be defined as evidence of a statement that was made other than by the witness testifying at the hearing and that is offered to prove the truth of the matter stated. Its value derives not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person.

The underlying considerations for the exclusion of hearsay evi-

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72 Problems of Proof in Arbitration, supra note 1, at 96, 125, 184-86, 256-57, 291, 293-94.
73 See, e.g., CAL. EVID. CODE § 1200(a) (West 1966) which provides:
"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
74 Hopt v. Utah, 110 U.S. 574, 581 (1884); Dennis v. U.S., 302 F.2d 5, 10 (10th Cir. 1962). See generally Donnelly v. United States, 228 U.S. 243, 273 (1913); Smith v. Whittier, 95 Cal. 279, 293, 30 P. 529, 532 (1892); Wilcox v. Salomone, 118 Cal. App. 2d 704, 711, 258 F.2d 845, 850 (1953).
dence in judicial proceedings are: (1) there is no opportunity to cross-examine the individual alleged to have made the original statement; (2) there is a great risk of inaccuracy in the repetition of the story; (3) it does not permit a person to face his accusers; and (4) it affords no occasion to the trier of fact to observe the demeanor or manner of the witness in weighing credibility. While experience has demonstrated the unreliability of such evidence, the courts have nevertheless recognized that its exclusion, particularly where a witness is unable to testify, has often frustrated rather than facilitated justice. In attempting to balance the multifarious considerations, occasionally the exceptions have been so expanded and the rule so relaxed, notably in non-jury trials, as to almost engulf the rule itself.

In arbitration proceedings, the practicalities of the labor-management relationship compel an even more flexible rule than that sometimes applied in judicial proceedings. Great reliance must be placed on the discretion and wisdom of the arbitrator. While he may choose to admit varying forms of hearsay evidence, he should be sensitive to its deficiencies and plainly articulate his reservations to the parties. Not infrequently, indication from the arbitrator that "little weight" will be accorded the hearsay evidence results in the introduction of primary, probative evidence.

Clearly, due process considerations may counter the acceptance of hearsay evidence. In any event, however, the arbitrator should not rely on hearsay alone, and where it is admitted he should require corroborative evidence to support his decision.

4. Relevance and Materiality

Evidence is relevant if it reasonably tends to prove or disprove any disputed fact. Additionally, it must bear on a question that is material to the case.

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78 See, e.g., CAL. EVID. CODE § 210 (West 1966) which provides: "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

79 Bird v. United States, 180 U.S. 356 (1901); Roberts v. Permante Corp., 188 Cal.
The trend of modern court decisions is to admit any evidence that may have a tendency to throw light on or have any weight in determination of the issue, while leaving the strength of such tendency or the amount of such weight to be determined by the trier of fact.

The same considerations are equally apt to the admission of such evidence in arbitration proceedings. After the arbitrator has the issues well in hand, he should discourage evidence which is not pertinent to the resolution of the issues. This must be done, however, in the context of affording the parties a full and fair hearing, while appreciating the cathartic effect of permitting the parties to air their ire, and while recognizing that at the time of decision-making he will fare better to have erred on the side of admitting too much rather than too little.

IV. CONCLUSION

It is manifest from even this brief review that perplexing procedural questions emanate from the arbitrator’s responsibility to accommodate individual and institutional interests, while harmonizing the sometimes divergent precepts of due process and orderly and expeditious hearings. The judicial sanction of arbitration as an integral part of our national labor policy and the review by state and federal courts, albeit limited in nature, will inevitably raise further issues.

The acknowledgment by the United States Supreme Court of the preeminence of the arbitrator in the procedural sphere affords unique opportunities to the arbitration profession. Unlike the judge who is constrained by legislatively enacted or judicially promulgated proce-
dural rules, and the National Labor Relations Board which is inhibited by administrative regulations, the arbitrator is virtually free to experiment and to improvise in this area. It is to be anticipated that the arbitrator, with his especial expertise, will adopt and adapt judicial procedures in a manner calculated to improve and perfect the arbitral process.