

## **A PRACTICAL GUIDE TO GRIEVANCE ARBITRATION**

Long before Alternative Dispute Resolution was commonplace, work place disputes were being determined by Arbitrators. The labor arbitration process continues to be important to the fabric of labor relations. Even today it is the primary method utilized by public and private employers and unions to solve disputes that arise in the workplace under labor agreements. Many attorneys who have not had wide experience with arbitration criticize it and try to avoid it by trying to have their disputes determined by the judicial process. They argue that Arbitrators try to “split the baby” too frequently and that the process is not sufficiently constrained because of its failure to follow the rules of procedure and evidence. Most, we suggest, who have wide experience in arbitration think otherwise, and that arbitration works well in the resolution of workplace disputes. What we attempt to do in this paper is to provide the practitioner with a working knowledge of the process, how it works and areas where practitioners should be particularly careful.

### **DISPUTE ARBITRATION VERSUS INTEREST ARBITRATION**

The most common use of the arbitration process is in the resolution of disputes which arise under an existing labor agreement which provides for arbitration as the final step in the grievance process. In labor agreements, various types of grievance procedures are utilized and most are usually crafted and designed to meet the needs of a particular employer or union. In large operations these procedures may have as many as four or five steps before the grievance is submitted to arbitration - while in small units there may be but only one or two steps before arbitration is demanded. Most have time limits which specify the time the employer and employee have to process the grievance in a particular step - and procedures indicating what occurs if those time limits are not met. The matters submitted to arbitration under this type of grievance processing usually involve the interpretation, application or enforcement of an existing

labor agreement between an employer and a union. This is the most common type of labor arbitration and is the type of arbitration normally characterized as “contract dispute arbitration”.

However, there is another form of arbitration which should be understood. It is entitled “interest arbitration” and is completely different than dispute arbitration because interest arbitration involves the arbitration of a “new” or “next” labor agreement. In this type of arbitration, the parties present evidence, data and arguments in support of their position that a particular provision should be included in the new contract which the arbitrators will propose or even award. Those serving as Arbitrators in interest arbitrations have varying degrees of authority. Some are only given the authority to recommend an agreement, while still others are provided with the authority to make an Award which will embody a new labor agreement binding upon the Employer and the Union. Some “interest arbitration panels” are created by statute, others by the agreement of a union and employer deadlocked in their labor negotiations.<sup>1</sup>

Practitioners should recognize the difference between these two types of arbitration. We will address here only contract dispute arbitration and leave interest arbitration for someone else at another time.

### **THE CONTRACT AND ARBITRABILITY**

Clearly, the lawyer’s first task when retained to handle a grievance arbitration is to study the grievance and the responses given by each party in the course of the processing of the grievance, to fully understand the background of the claim, and the facts supporting your client’s position and to then study the contract to make a determination whether the particular grievance is arbitrable.

Many, if not most, labor agreements define a grievance as “any” claim that the labor contract has been violated, by not being interpreted, applied or enforced in a manner

contemplated by the agreement. Likewise, an arbitrator's authority is generally limited to his interpretation, application or enforcement of the labor agreement.

In many respects this authority does not extend beyond the four corners of the labor agreement. Many contracts also provide that the Arbitrator shall have no power to add to, subtract from, modify or delete any provision of the labor agreement.

Thus, the lawyer should first determine whether the grievance involves a question of contract interpretation or application and whether the remedy sought, if granted, would require an addition to or a re-writing of the contract or any provision of the contract.

Likewise, the practitioner should determine whether the grievance has been processed through the Grievance Procedure of the contract in a timely and proper fashion. If not, does the contract provide any solution to that problem? For instance, if the grievance is not filed within the time specified in the contract, does the contract provide that the grievance is automatically advanced to the next grievance step - or is the grievance waived?

All of these decisions should be made initially and then if your client wishes to raise the issue of non-arbitrability another decision must be made. Questions concerning non-arbitrability are a matter for judicial determination and must be brought to a federal court.<sup>2</sup>

Thus, the last initial question to be determined is whether your client feels strongly enough about the arbitrability question for you to: a) refuse to arbitrate, thus requiring your filing your opposition in Court to the other party's application to compel arbitration, or b) file, on behalf of your client, an application to enjoin or stay the arbitration proceeding. These are technical and difficult questions which many times will increase the cost of prosecution or defense to your client and may well impact on the relationship between the Employer and the Union.

## **THE GOVERNING LAW**

As more and more employment related statutes have been adopted and regulations effectuated, there are more laws which apply to both the procedural and substantive aspects of arbitration than ever before.

However, state law generally applies to the agreement to arbitrate between private parties, and in some cases the manner in which such is created. Most state arbitration law follows the United States Arbitration Act.<sup>3</sup> Railroads and airlines, however, have their own federally mandated and regulated arbitration process.<sup>4</sup>

In the public sector, state and municipal laws and ordinances contain a series of rules defining the role and scope of the jurisdiction of the Arbitrators and provide other procedural regulations.

In addition, the Arbitrator appointing authority has a series of Rules which the practitioner should be aware of. Arbitrators are generally chosen in one of the following ways. First the contract can provide whether the American Arbitration Association or the Federal Mediation and Conciliation Service process shall be used to select the Arbitrator. If that is the situation in your contract then the rules of the appointing agency will apply since the Arbitrator is acting pursuant to that Agency's selection. Secondly, the contract may name the selected arbitrator or a panel of three to five arbitrators from which the parties will select an arbitrator for the instant case. If that is the situation, since the contract does not specify what rules are to govern the arbitration, Counsel could be well advised to stipulate that the Rules of the American Arbitration Association shall apply to the arbitration.

In addition, the practitioner should determine whether an unfair labor practice charge has been filed with the NLRB claiming that the same allegations which have been made in the grievance to be arbitrated, have been included in the Charge, and whether the interpretation of

the contract is at the center of both the unfair labor practice charge and the arbitration. If that is the case, then under the NLRB's deferral policy enunciated in *Collyer Insulated Wire*,<sup>5</sup> and later cases, the Board may defer processing of the unfair labor practice charge until the arbitrator has rendered his decision. After the Arbitrator has rendered his decision the Board will then examine the Decision and Award of the Arbitrator, and if the Board determines that:

- the arbitration process was fair and regular,
- all parties have agreed to be bound by the Award, and
- the decision is not repugnant to the National Labor Relations Act,

then the board will dismiss the unfair labor practice charge -- or complaint, if such has been issued.<sup>6</sup>

Lastly, you should be cognizant of any external law that applies to your case. Many times there is no applicable external law particularly when arbitration involves a question of contract interpretation or even an issue of discipline or discharge of a bargaining unit employee. However, sometimes there are external and even internal law matters which the parties must be aware of. Take for example the situation where the Employer discharges an over-the-road truck-driver for failing a drug test. Since the Department of Transportation has regulations specifying what an employer must do to comply,<sup>7</sup> those regulations may be important to your case. Review and study them. There are many other possibilities, such as seniority vs. accommodation obligations under the American with Disabilities Act<sup>8</sup> and the impact of such Act on the union's claim or the employer's position etc.

### **PAST PRACTICE**

Where the application of a contract provision is being challenged in arbitration, and where such is not clear and is subject to interpretation, past practice becomes important.<sup>9</sup> When such an interpretation question is involved, Arbitrators heavily lean on how the parties have

previously applied the particular provision. Previous instances where there has been no challenge to the same application of the contract are also helpful to show no contract violation has occurred because there has been an understanding that the agreement is to be interpreted in a similar manner. Settled grievances which interpret the contract provision - even withdrawal of filed grievances challenging the interpretation should be reviewed for possible consideration by the arbitrator in making his determination. The practitioner MUST review past practice and use it as competent evidence most carefully when the contract provision is not clear.

### **NEGOTIATING HISTORY**

Suppose for an instant that the employees have gone on strike in protest of the working schedule and that such strike is in violation of a no-strike clause which provides that:

“No agent of the Union will participate in any strike.”

Let us further suppose that the Company filed an arbitration claim for contract breach damages because the Shop Stewards engaged in the strike. If the Union were able to show that in the negotiations, the Company and Union agreed that they understood “agents” to mean only Union Officers and Business Representatives, then that understanding would exclude Shop Stewards - and it would go a long way toward defeating the Company’s claim for damages - because the striking shop stewards were not understood by the parties to be defined as “agents” in the clause.

Another example might be where in a similar arbitration claiming violation of the no-strike clause and utilizing the same clause specified above, it can be shown that the *Company* in the negotiation of the clause initially proposed that the no strike clause read:

“no agent, *including shop stewards*, shall participate in any strike.” (emphasis added),

but when the final agreement was concluded the clause read:

no agent shall participate in any strike.”

Thus, where the Company withdrew its proposal to include shop stewards - the clause cannot now be interpreted to mean that agents included shop stewards.

### **WITNESS PREPARATION**

There are as many methods of preparing witness, as every practitioner knows, as there are witnesses. However, one thing is clear - witnesses must be prepared.

Since most arbitrations are fact specific and may involve somewhat inconsequential fact situations in the work place which thereafter blossom into larger problems, precise factual recollection is many times difficult. Conflicts in recollections, haziness of detail and an understanding of the case are important for witnesses to understand and to resolve in his/her mind, for the lawyer to get the essential facts properly on the record for a successful presentation.

### **RESEARCH AND PRIOR PRECEDENT**

*Stare decisis* is not alive and well in the arbitration process because the:

- a. Contracts being interpreted are generally substantively and substantially different.
- b. bargaining history in two cases are never identical and thus different meaning is often given to identical language.
- c. Arbitrators view identical contract provisions differently.

This does not mean that previous arbitration decisions found in the Labor Arbitration Reports<sup>10</sup> are not useful. They are many times most persuasive and helpful and should not be overlooked.

This is particularly so, if the decision to be cited is rendered by an Arbitrator who is a well respected Arbitrator or a member of the National Academy of Arbitrators.

Many practitioners cite prior Arbitration Awards in their briefs or attach copies as appendices thereto. Certainly, some research should be done, particularly in cases where there are other laws, such as the National Labor Relations Act, involved.

## **PRE-HEARING BRIEF**

Some attorneys prepare and file pre-hearing briefs which outline their view of the facts and what they intend to prove. Sometimes arbitrators in complicated cases will ask for such Briefs, but generally, that option is left to the attorney presenting the case. Again, depending on the issue and the complexity of the case (a complex seniority grievance, subcontracting case etc.), this option should be considered.

## **COURT REPORTER**

Whether to have a Court Reporter or not is sometimes a difficult decision. Clearly, the cost of the arbitration is substantially increased if a reporter is used, but on the other hand, the transcript of the testimony is most helpful in brief preparation and as previously noted where failure to represent cases may be brought. But court reporters are not necessary. Generally, arbitrators take extensive notes which helps them check their recollection of the facts with the factual presentation made by counsel in his/her Brief. Court reporters may be prohibited, and some contracts and some special arbitration procedures preclude the use of a court reporter.

Serious consideration should be given to using reporters and obtaining a transcript copy of the testimony in discharge and discipline cases, as well as cases where an unfair labor practice has been filed with the NLRB and where the Board has deferred the processing of the case until the arbitration decision is rendered. Since the Labor Board's adherence to the arbitration award sometimes depends upon whether specific points were covered and opportunities to cross examine etc. given, it is well to have a copy of the transcript to attach to the brief the attorney submits to the NLRB.

## **THE SELECTION OF THE ARBITRATOR**

You are now ready to select an arbitrator. If the contract under which you are arbitrating has an agreed upon panel of arbitrators - there probably is a method of selection of such either specified or adhered to as a matter of practice.

If you have no panel of arbitrators specified, the arbitration provision in the contract will specify the use of either the American Arbitration Association for such process or the Federal Mediation and Conciliation Service process. Whichever you utilize, you will receive a biographical sketch of each arbitrator on the list from which you are to select. You should try to match your selection of arbitrator with the type of cases he has heard. You should then read some of his cases on the subject. Then you should select the arbitrator(s) you feel most comfortable with.

Some practitioners engage in extensive study of the arbitrator, his decisional history and employment history and prepare statistics on whether he favors management or labor, before making a selection.

Because the selection of the Arbitrator is important, and you do not want to select an arbitrator with whom your client will feel uncomfortable. There are many good, fair, bright, and articulate arbitrators.

## **THE SITE OF THE HEARING**

The selection of the site of the hearing is generally left to counsel representing the Union and the Company, unless there has been an established practice between the Company and the Union as to where the arbitration hearings will be held.

Usually a hotel meeting room, a room in a public building (Courthouse) if available, is selected. Company and Union offices should be avoided since such a selection could create a feeling of bias. Usually there is little difficulty in reaching agreement on the site.

## **THE HEARING**

You are now ready to proceed to the hearing. You have checked the past practice, the facts, talked with the witnesses, researched the applicable external law, if any, and selected a court reporter. The arbitrator, you and your adversary are sitting in the room you decided upon, waiting to open the hearing.

### *A. The Issue*

The first thing you should do, after you introduce yourself and you client(s) and/or witness(es), is to tell the Arbitrator you wish to develop an issue under which the case can be presented to him.

Coming prepared with a written issue is always a good idea.

The issue you propose and agree upon can be one of the most important aspects of your case. Why? Because an arbitrator is bound, under the law of most states, to write a decision which clearly only responds to the issue presented. An Arbitrator who exceeds that standard will run the risk of having one of the parties seek to have the Award set aside because the Arbitrator has exceeded his or her authority.

Be careful in drafting your issue and always try to reach agreement on an issue. If you cannot agree upon the issue you can always paraphrase the grievance to reach agreement on the proper issue. For instance:

“Did the action taken by the Company which the Union complains about in Grievance 94-16 violate the labor agreement between the parties?”

A concise statement of the issue narrows the authority of the Arbitrator to contract interpretation.

## **THE BURDEN OF PROOF**

In all but disciplinary and discharge cases, the Union, the party normally presenting the grievance for arbitration, has the burden of proving that the Company has violated the contract.

In discharge and other disciplinary cases, the Employer has the burden of proving that the discipline or discharge was in accordance with the contract standard - for "just cause," "for cause," for "good cause" or for "proper cause."

The presentation of your case should be adjusted accordingly.

## **OPENING STATEMENT**

Certainly a short opening statement - well organized, clear and concise is helpful to the Arbitrator. If a Pre-Hearing Brief is submitted - an opening statement might be a little "much." On the other hand, a good opening statement may well be a good substitute for a Pre-Hearing Brief. It is suggested not to present a Pre-Hearing Brief with an Opening Statement unless your case involves a legal question - a question of evidence or external law or some other such issue which is central to your case, and which the Arbitrator should be made aware of before the hearing for you to have your case presented in the best possible light.

Obviously, your opening statement should present your case in the most advantageous manner for your client, so as to initially incline the arbitrator to your view. It should also include a definition of the parameters of your position and what your position is not.

For instance, in a situation where an employee has been transferred to another position, at no loss of pay or benefits, because he was unable to do the job from which he was transferred, an opening statement might well state, "this is not a discipline case - this is purely an exercise of the Employer's management rights to properly run the Department." The Union may certainly claim the transfer was disciplinary. As a result, both parties have helped the Arbitrator, for he then

knows that one of the real issues he will have to grapple with is whether the transfer was disciplinary or not.

Practitioners should remember, however, to keep their Opening Statements short - clear and concise. If you are reading it, it should not fill more than one side of one sheet of paper - any more than that - put it in a Brief or re-analyze your case.

### **THE HEARING**

The Hearing itself is much the same as any other non-judicial hearing - possibly even more informal, depending upon the Arbitrator. Discharge hearings tend to be somewhat more formal and judicial because of the seriousness of the matter, and the fact that both the Employer and the Union know they face the possibility of a failure to represent claim filed by the employee against them both, if the grievant feels that he or she was not adequately represented and heard.

### **SWEARING THE WITNESS**

Some Arbitrators always ask whether the parties wish the witnesses to be sworn. Some lawyers always require the swearing of witnesses because they feel it adds more seriousness and solemnity to the proceeding. This, they feel, is important for all the witnesses to understand.

Swearing of witnesses is normally a personal choice. However, if one Party requests that witnesses be sworn then the Arbitrator will swear all witnesses.

### **EXAMINATION AND CROSS EXAMINATION**

As in all hearings, the party with the burden of proof proceeds to put on his/her case first. As explained elsewhere in this paper, in discipline and discharge cases, the Employer customarily has the burden of proof - but in all other cases the grievant has the obligation to proceed, since he/she has the burden of proof. We say “customarily” because the contract might well provide otherwise. For instance, if a no strike provision provides that:

“if an employee participates in a slowdown in violation of the contractual no strike clause, he/she will be deemed terminated unless there are extenuating circumstances which result in his/her being treated in any other way,”

Then, even though a discharge was involved, the contract, it could be argued, changed the management’s burden of proof to merely proving there were no “extenuating circumstances.” If such was the Arbitrator’s decision, the grievant would have the burden of proof since the discipline was not at issue. Always remember that the Arbitrator is governed by the contract, the contract controls the limits of arbitral authority.

### **WITNESSES AND SEQUESTRATION**

Witnesses are obviously presented in the order counsel chooses. Sequestration requests are generally allowed, but the party’s counsel and the grievant are always allowed to remain in the room, as is the Employer’s counsel and one representative from the Employer. There may be special circumstances which allow others to also remain in the hearing room, and usually an arbitrator will allow an equal number of representatives from each side to remain in the hearing room.

### **EVIDENCE**

It has been observed many times that the rules of evidence generally are not strictly adhered to in arbitration.<sup>11</sup> For example, there is greater toleration of leading questions and less insistence on proper authentication of documentary exhibits, and there are fewer relevancy objections made than in court hearings. There are probably several reasons for this. Many distinguished arbitrators are not lawyers and lack formal training in the subject of evidence. In some instances, the advocates themselves may be non-lawyers (for example, a union officer or company personnel director) without formal legal training. And even when the arbitrator and advocates are all lawyers, there tends to be greater relaxation of the rules, perhaps out of a recognition that the parties generally do not wish to over-formalize what was intended to be a

more expeditious form of dispute resolution than court litigation. Frequently, arbitrators allow into the record even what would be almost universally regarded as irrelevant evidence, taking it for “what it’s worth”, sometimes on the theory that allowing a grievant or other witness to “get it off his chest” ultimately may have a beneficial effect in the work place or on the collective bargaining relationship.

Some evidentiary issues that frequently arise in arbitration are as follows:

(a) *Hearsay*. Hearsay evidence frequently is offered and generally admitted at arbitration hearings.<sup>12</sup> Of course, there are occasions when hearsay will be excluded altogether, depending upon the arbitrator, the nature of the particular testimony and the particular dispute at issue. However, even when hearsay is admitted, arbitrators may tend to place less reliance upon it than other testimony.

(b) *Affidavits and other witness statements*. One form of hearsay frequently introduced at arbitration is an affidavit or other written statement from a third-party witness to an incident on the job, a medical doctor who has examined a grievant, or someone else who may not actually be called to testify at the hearing. Such evidence generally is admitted “for what it’s worth”, either because some such witnesses may not be subject to the compulsion of a subpoena or on the theory that requiring all such witnesses to testify will delay the hearing making it unduly expensive for the parties.

(c) *Parole Evidence*. The parole evidence rule, which holds that oral or other evidence cannot be used to vary the clear language of a written agreement,<sup>13</sup> frequently is invoked by one side or the other in arbitration, when the other party seeks to offer testimony or documentary evidence on the negotiation or administration of the collective bargaining agreement. However, such evidence frequently is admitted in many forms (for example, oral

testimony from the agreement's negotiators, written bargaining proposals of one side or the other, or testimony on how the agreement has been applied in practice), on the theory that the relevant language of the agreement is ambiguous and that such evidence can aid the arbitrator in resolving the ambiguity and interpreting the language.<sup>14</sup>

(d) *Offers of compromise.* As in other litigation contexts, evidence of offers to settle generally is not admitted in arbitration hearings.<sup>15</sup> The issue takes on particular significance in grievance arbitration because arbitration usually is preceded by consideration of the grievance at the various levels of the collective bargaining agreement's grievance procedure, during which various proposals to settle frequently are exchanged. Arbitrators are obviously reluctant to admit evidence at a price of discouraging free and full exchange during the grievance procedure.

#### **CLOSE OF THE HEARING AND THE ARBITRATOR'S DECISION**

After all evidence has been introduced, arbitrators frequently will give the parties the opportunity to present closing arguments. More often than not, the opportunity is declined, with the parties opting instead to file written briefs with the arbitrator. Post-hearing briefs can be useful to the arbitrator as a vehicle for summarizing the evidence, setting forth the contractual and other arguments of the parties, and discussing relevant decisional authority.

The arbitrator's written decision usually takes the form of an "Opinion and Award". After setting out in writing the issue to be decided, a statement of the facts, and a summary of the parties' contentions, the written opinion usually then sets forth the arbitrator's analysis, concluding with a brief "Award" section, which sustains or denies the grievance at issue and which describes any affirmative relief directed by the arbitrator.

Many collective bargaining agreements spell out time limits within which the arbitrator is supposed to issue his award. The time limits are frequently ignored by arbitrators. The fact that an award is issued in an untimely fashion generally does not in itself render the award ineffective

or provide a basis for vacating it. (See discussion below).<sup>16</sup> A party unhappy with unreasonable delay in the issuance of an award generally must object and seek action (such as withdrawal of the case from the arbitrator's jurisdiction) before the award is issued, if the delay is to be the basis for such action.<sup>17</sup>

### **INTERPRETING CONTRACTUAL LANGUAGE**

One of the primary functions of the arbitrator is to interpret and apply the language of the parties' collective bargaining agreement.<sup>18</sup> In a "contract interpretation" case, of course, that function is paramount; but even in a simple discharge or discipline case, where the issue may be whether or not there was "just cause" for the discipline, arbitrators frequently are called upon to construe the agreement's written provisions.

Obviously, a collective bargaining agreement is just one variety of written contract and, thus, the same rules of construction applicable to contracts generally apply in labor arbitration. Nevertheless, given the specific nature of the collective bargaining agreement as a product of labor negotiations, a number of principles of construction are frequently relied upon by arbitrators, among them as follows:

(a) *A party cannot obtain in arbitration what he sought but failed to obtain in negotiations.*

As we previously discussed, evidence that the interpretation of the agreement urged by one party is the same as a provision the party unsuccessfully sought to incorporate into the agreement during negotiations generally is fatal to that side's position.<sup>19</sup>

(b) *Specific language takes precedence over general language.*

Frequently, both sides will urge that various provisions of the agreement support their positions. Arbitrators generally will place greater reliance on the contractual provisions that more specifically pertain to the issue.<sup>20</sup>

(c) *To express one thing is to exclude another.*

A listing of specific classes of benefits, conditions requirements, or circumstances generally will be construed by an arbitrator to exclude those items not listed.<sup>21</sup>

(d) *Avoidance of Harsh result.*

Arbitrators will tend to avoid a construction of the agreement that will read some provision out of the agreement or otherwise result in a clearly unintended, harsh or nonsensical result.<sup>22</sup>

### **VACATING OR ENFORCING THE AWARD**

A great number of collective bargaining agreements specifically provide that an arbitrator's decision shall be "final and binding." Even in the absence of such specific language, the general understanding shared by both labor and management is that the arbitrator's award should end the dispute without further litigation, in that the arbitration process itself was intended as a means of resolving industrial disputes without the costs, delays and other stresses of court litigation.<sup>23</sup>

Nevertheless, it frequently occurs that the issuance of the arbitrator's award is not the end of the story, and that suits either to set aside (or "vacate") the award or to enforce (or "confirm") it are common. Such suits may be brought either in state or federal court, under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.<sup>24</sup> Section 301(a) provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ."; and the courts have recognized that this statutory provision provides a sufficient jurisdictional basis for a suit to vacate or confirm.<sup>25</sup> Such a suit filed in state court under § 301 may be removed to federal court.<sup>26</sup>

Section 301 itself provides no time limits within which such suits must be filed. Instead, the courts generally will look to analogous state statutes of limitation.<sup>27</sup> Some states have

adopted specific statutes of limitations for vacating an award, which are generally very short in duration (e.g., ninety days in many states).<sup>28</sup> On the other hand, fewer states have adopted specific statutes of limitations for confirming or enforcing an arbitration award, and in those states that have done so, the period usually is longer than that for vacating an award. A party who fails to bring an action to vacate an award may be barred from asserting defenses in a suit to confirm or enforce after the statute of limitations for vacating has run.<sup>29</sup> The grounds recognized by the courts for vacating an award are quite limited. It is frequently recited that the courts will not relitigate or second-guess the merits of an award.<sup>30</sup> Errors in fact or even errors of law in an arbitrator's decision generally are not regarded as a sufficient basis for overturning the decision.<sup>31</sup> While the different Courts of Appeals have formulated various statements indicating the wide latitude afforded arbitrators on the merits, perhaps the most oft-cited standard grows out of the United States Supreme Court's statements that an award should be enforced so long as it "draws its essence" from the collective bargaining agreement.

A party seeking to vacate an arbitration award is likely to have more success when the ground asserted is that the arbitrator exceeded his or her authority by going beyond the issue submitted.<sup>32</sup> The courts are more ready to act in such cases where there are due process concerns than they are when the issue is simply the "correctness" of the arbitrator's award.

More recently, there has been considerable litigation as to whether a reviewing court may vacate an arbitration award on public policy grounds. The Supreme Court first indicated that an award should not be enforced if it is contrary to public policy, although indicating at the same time that such instances should be limited to "well defined" policy.<sup>33</sup> Later, in *Misco v. Paperworks, Inc.*, the court failed to make clear when such cases were appropriate, although

observing that the violation of such a policy must be clearly shown if an award is not to be enforced.”<sup>34</sup>

We trust that this paper has been helpful and instructive to those practitioners who are beginning to engage in labor arbitration and serves as a refresher for those who have been engaged in labor arbitration previously.

## ENDNOTES

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- <sup>1</sup> See e.g., Connecticut Gen. Statutes Title 10, Chapter 166 (10-153(f)).
- <sup>2</sup> *AT.T. Technologies v CWA*, 475 US 643, 121 LRRM 3329 (1986).
- <sup>3</sup> 9 USCA §§1-14.
- <sup>4</sup> 45 USCA §§151-184.
- <sup>5</sup> 192 NLRB 837, 77 LRRM 1931 (1971).
- <sup>6</sup> *Spielberg Mfg. Co.*, 112 NLRB 837, 36 LRRM 1152 (1955), *Int'l Harvester*, 138 NLRB 932, 51 LRRM 1155 (1962).
- <sup>7</sup> 49 C.F.R. Part 40, eff. Oct. 1, 1993.
- <sup>8</sup> 42 USCA § 12101-12117.
- <sup>9</sup> *Bethlehem Steel Co.*, 13 LA 556, 560 (1949).
- <sup>10</sup> Published periodically by Bureau of National Affairs.
- <sup>11</sup> *Instrument Workers v. Minneapolis-Honeywell Co.*, 54 L.R.R.M. 2660, 2661 (E.D. Pa. 1963); *Harvey Aluminum Inc. v. Steelworkers*, 64 L.R.R.M. 2580, 2581 (C.D. Cal. 1967); *Tectum Corp.*, 37 Lab. Arb. 807 (1961) (Autrey, Arb.).
- <sup>12</sup> *Problems of Proof in Arbitration*, 90-91, 187-189 (BNA Books, 1967); *Apollo Merchandisers Corp.*, 70 Lab. Arb. 614, 618 (1978) (Roumell, Arb.); *Chippewa Valley Bd. of Education and Chippewa Valley Education Ass'n.*, 62 Lab. Arb. 409 (1974) (McCormick, Arb.).
- <sup>13</sup> *United Drill & Tool Co.*, 28 Lab. Arb. 677, 679-683 (1957) (Cox, Arb.); *Labodie v. Boehle*, 288 Mich. 223, 230, 284 N.W. 707, 709-710 (1939).
- <sup>14</sup> *Brigham Apparel Corp.*, 52 Lab. Arb. 430, 431 (1969) (Andersen, Arb.); *International Paper Co.*, 86 Lab. Arb. 396, 398 (1986) (Nicholas, Arb.); *Rodioeas Corp. and Electrical Workers, IUE, Local 633*, 61 Lab. Arb. 709 (1973) (May, Arb.); *Television Station KXTV*, 33 Lab. Arb. 421 (1959) (Ross, Arb.); *Higgins, Inc.*, 37 Lab. Arb. 297 (1961) (Morvant, Arb.).
- <sup>15</sup> *Price-Pfister Brass Mfg. Co.*, 25 Lab. Arb. 398, 403-404 (1955) (Prasow, Arb.); *Stylon Southern Corp.*, 24 Lab. Arb. 430, 436 (1955) (Marshall, Arb.); *Koppers Co.*, 61-1 ARB ¶ 8041, 3193-4 (Duff, 1960).
- <sup>16</sup> *IAM v. Geometric Tool Co.*, 406 F.2d 284, 286-287, 70 L.R.R.M. 2228 (2d Cir. 1968); *Ingram Mfg. Co. and Electrical Workers, IUE, Local 1013*, 77 Lab. Arb. 1198 (1982) (King, Arb.).
- <sup>17</sup> *IAM v. Mooney Aircraft*, 71 L.R.R.M. 2121 (5th Cir. 1969); *Teamsters v. Anchor Motor Freight, Inc.*, 71 L.R.R.M. 3205, 3208-3209 (3d Cir. 1969); *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 57 L.R.R.M. 2573 (9th Cir. 1964); *Amicizia Societa Navegazione v. Chileam Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 809 (2d Cir. 1960).
- <sup>18</sup> *Construction Indus. Comm.*, 69 Lab. Arb. 14, 17-18 (1977) (Mansfield, Arb.).

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- <sup>19</sup> *Honeywell Protection Servs.*, 90 Lab. Arb. 559, 561-562 (1988) (McIntosh, Arb.); *Twin Coast Newspapers*, 89 Lab. Arb. 195 (1987) (Christopher, Arb.).
- <sup>20</sup> *Bristol Steel & Iron Works*, 73 Lab. Arb. 573, 578 (1979) (Nicholas, Arb.); *Department of Labor*, 74 Lab. Arb. 977, 979 (1980) (Shister, Arb.); *Carling Brewing Co., Inc. and IBEW*, 46 Lab. Arb. 715 (1966) (Kates, Arb.); *Haloid Co. and Amalgamated Photographic Supply Workers Union*, 29 Lab. Arb. 376 (1957) (McKelvey, Arb.).
- <sup>21</sup> *Wolf Baking Co.*, 83 Lab. Arb. 24, 26 (1984) (Marlatt, Arb.); *Hoover Universal*, 77 Lab. Arb. 107, 112-113 (1981) (Lipson, Arb.); *Houston Symphony Society*, 92 Lab. Arb. 585 (1989) (Allen, Arb.); *Genova Pennsylvania*, 99 Lab. Pennsylvania, 99 Lab. Arb. 475 (1992) (DiLauro, Arb.); *Mason & Hanges-Silas Mason Co.*, 96 Lab. Arb. 1150 (1991) (Anthony, Arb.).
- <sup>22</sup> *Material Servs. Corp.*, 82 Lab. Arb. 244, 248 (1984) (Peterson, Arb.); *Carnation Co.*, 84 Lab. Arb. 863, 865 (1985) (Madden, Arb.); *Marblehead Lime Co.*, 48 Lab. Arb. 310 (1966) (Anrod, Arb.); *Pan American World Airways, Inc.*, 48 Lab. Arb. 513 (1967) (Duff, Arb.).
- <sup>23</sup> Bornstein, Tim; Gosline, Ann, *Labor and Employment Arbitration* § 1.01 (Bender, 1994); *Canuso v. Philadelphia*, 326 Pa. 302, 192 A.133 (S. Ct. Pa. 1937); *Sapp v. Barenfeld*, 34 Cal. 2d 515, 520 (1949).
- <sup>24</sup> *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 49 L.R.R.M. 2619 (1962); *Avco Corp. v. Machinists Aero Lodge 735*, 390 U.S. 557, 67 L.R.R.M. 2881 (1968); *Jan re Fay*, 36 Lab. Arb. 1017 (N.Y. S.Ct. 1961); *Ryan Aero-antical Co. v. UAW, Local 516*, 179 F. Supp. 1, 45 L.R.R.M. 2321, 33 Lab. Arb. 649 (S.D. Cal. 1959).
- <sup>25</sup> *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Machinists West Rock Lodge 2120 v. Geometric Tool Co.*, 496 F.2d 284 (2d Cir. 1968); *Textile Workers v. American Thread Co.*, 291 F.2d 894, 36 Lab. Arb. 1062, 48 L.R.R.M. 2534 (4th Cir. 1961); *Textile Workers Union of American v. Case Mills Corp.*, 268 F.2d 920 (4th Cir.); cert. denied, 361 U.S. 886 (1959).
- <sup>26</sup> *Keystone Printed Specialties Co. v. Printing Pressmen Local 119*, 386 F. Supp. 416, 87b L.R.R.M. 3191 (M.D. Pa. 1974), *aff'd* 517 F.2d 1398 (3d Cir. 1975).
- <sup>27</sup> *Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *In re Brotherhood of Railway and Steamship Clerks*, 36 Lab. Arb. 224 (N.Y. S. Ct. 1961).
- <sup>28</sup> *United Parcel Service v. Mitchell*, 624 F.2d 394, (2d Cir. 1980), *rev'd*, 451 U.S. 56 (1981); *Nix v. Spector Freight Systems*, 34 Lab. Arb. 796 (1960) (Goldmann, Arb.).
- <sup>29</sup> *Service Employees Local 36 v. Office Center Services*, 670 F.2d 404, 109 L.R.R.M. 2552 (3d Cir. 1982); *Emporium Area Joint School Authority v. Anundson Construction & Building Supply Co.*, 402 Pa. 81, 166 A.2d 269 (1960); *Pennsylvania Labor Relations Board v. Pennsylvania*, 478 Pa. 582, 387 A.2d 475 (1978).
- <sup>30</sup> *Piper v. MECO, Inc.*, 412 F.2d 752 (6th Cir. 1969); *Howard v. U.S. Rubber Co.*, 36 Lab. Arb. 62 (U.S.D.C. 1961); *United Steel Workers v. Enterprise Wheel or Car Corp.*, 363 U.S. 593, 46 L.R.R.M. 2423 (1960); *American Machine & Foundry Co. v. UAW, Local 116*, 256 F.Supp. 161, 54 L.R.R.M. 2184, 41 Lab. Arb. 320 (S.D. N.Y. 1963).

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<sup>31</sup> *In re Pioneer Watch Case Co.*, 4 L.R.R.M. 810, 811 (N.Y. Sup. Ct. 1939); *Harris v. R.C. Harvester*, 169 Cal. 2d 531, 337 P.2d 832 (1969).

<sup>32</sup> *Kansas City Luggage & Novelty Workers Local 66 v. Neevel Luggage Mfg. Co.*, 325 F.2d 992, 55 L.R.R.M. 2153 (8th Cir. 1964); *Retail Clerks Local 782 v. Sav-On Groceries*, 508 F.2d 500, 88 L.R.R.M. 3205 (10th Cir. 1975); *United Steel Workers of America v. Warriier & Gulf Navigation Co.*, 363 U.S. 574, 46 L.R.R.M. 2416 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 46 L.R.R.M. 2414 (1960).

<sup>33</sup> *W. R. Grace & Co. v. Rubber Workers L. 759*, 461 U.S. 757, 113 L.R.R.M. 2641 (1983).

<sup>34</sup> *Misco v. Paperworks, Inc.*, 484 U.S. 29 (1987).