The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration

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This article presents a model of labor arbitration as a process of rational and principled adjudication based on an established body of arbitral jurisprudence. Labor arbitration is not an ad hoc, random process of decision-making based on the idiosyncratic values of individual arbitrators. As the author explains, the arbitration process has successfully achieved the goals of national labor policy because it has met the needs of labor and management for a private, final and binding system of dispute resolution.

Introduction

Like a Japanese Samurai, the labor arbitrator travels from town to town, bringing justice to all with the swift stroke of his pen. Called upon by labor and management to resolve disputes arising during the term of their collective bargaining agreement, this itinerant problem-solver arrives equipped with wisdom, stature and priestly compassion. Guided only by his own personalized set of values, intent on improving the quality of industrial life, the labor arbitrator brings order out of chaos, settling in a final and binding manner grievance disputes which have divided the parties. In the absence of the learned neutral, strife would be inevitable.[1]

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[1] The late Lon Fuller labeled this imagined all-knowing seer the "labor relations physician." Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3, 4 (1963) (Fuller wrote at a time when physicians still made house-calls). As Fuller makes plain in his masterful piece, the "labor relations physician" will not cure the industrial ills. *Id.*

This heroic scenario has the makings of a prime-time made-for-television movie or, at the very least, a long-running soap opera. But this portrait of the labor arbitrator and the arbitration process he administers is essentially folklore. This august image of the arbitral mechanism was not created by the participants in the labor arbitration process, nor does it reflect the realities of the process. It emerged from what Professor St. Antoine has called the "mythologizing" of Justice Douglas[2] which a majority of the Supreme Court endorsed over two decades ago.[3] Indeed, arbitration has served well as a method of resolving disputes, but not because it is a process guided by the idiosyncratic values of the cadre of labor arbitrators. Arbitration has been successful in achieving the goals of national labor policy because it is not an ad hoc, random process with outcomes determined by the particular value set of privately selected arbitrators. Rather, it is a systematic, principled method of adjudication fulfilling the needs of the partners to a collective bargaining relationship.

We need not pause to examine what the founding fathers of modern labor arbitration intended in the 1930's and 1940's when they developed the process.[4] Nor should we be concerned with normative questions of how the process should operate ideally.[5] It cannot be gainsaid that management and labor have found arbitration advantageous. Its adoption is almost universal;[6] its

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[2] St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1139 (1977).

[3] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [hereinafter cited collectively as *Steelworkers Trilogy*].

[4] For a discussion of the history of labor arbitration, see R. FLEMING, THE LABOR ARBITRATION PROCESS 1, 1-30 (1965); and Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems*, in PROC. OF THE 17TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS 56-73 (Kahn ed. 1964) [hereinafter cited as PERSPECTIVES].

[5] The literature overflows with suggestions on reforming arbitration practices and appropriately locating the process within the current federal statutory law environment. *See, e.g.*, St. Antoine, *supra* note 2; Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 INDUS. REL. L.J. 97 (1977); Cohen, *The Search for Innovative Procedures in Labor Arbitration*, 29 ARB. J. 104 (1974).

[6] The Bureau of National Affairs Annual Survey of collective bargaining agreements states that 96% of the sample contracts contain an arbitration provision. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 51:5 (1979). While it is convenient to discuss grievance arbitration in its original

use has increased exponentially.[7] It may be too late to argue whether or not the process is beneficial. The parties have found it so, and increasingly have used the mechanism instead of employing other available alternatives for settling their disputes.[8] The phenomenon of labor arbitration has achieved a special status in the galaxy of methods for resolving labor disputes. As a matter of national policy, we have bestowed upon the arbitrator almost unreviewable power without really understanding how he decides cases. It is worthwhile, therefore, to examine how modern labor arbitration actually works and how the arbitrator reaches a decision.

The decade of the 1980's will be a period of transition for labor arbitration. In the coming years, the old guard of labor arbitrators, veterans of the War Labor Board, will achieve senior status, no longer able to shoulder their heavy caseloads.[9] The labor relations community must pay increasing attention to the need to train new arbitrators who can take their place.[10] Exper-

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industrial context, its use has spread far beyond the walls of the prototypical manufacturing plant. Consider the recent case decided by Arbitrator Adolph Koven which involved a grievance over the failure to assign Father Bernadicou to teach Theology 162 at the St. Ignatius Institute because he allegedly did not share a specific, narrow theological view and thus was found "unsuitable." University of San Francisco, 74 LAB. ARB. REP. (BNA) 543 (1980).

[7] The Federal Mediation and Conciliation Service reports that 27,298 requests were made for panels of arbitrators in fiscal year 1979, an increase of over 10% from fiscal year 1978 and a tripling since 1969. FEDERAL MEDIATION AND CONCILIATION SERVICE, THIRTY-SECOND ANNUAL REPORT, FISCAL YEAR 1979. The American Arbitration Association Report 1979-80 records a labor arbitration caseload of 16,669 in 1979, a small increase over 1978.

[8] Parties may, of course, choose to allow economic forces to resolve disputes which arise during the term of their agreement. However, when they have adopted an arbitration procedure, courts stand ready to enforce by injunction collateral no-strike promises. Boys Markets Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). Alternatively, in the absence of an arbitration procedure, courts will hear contract grievance disputes. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[9] In general, it is the most senior arbitrators who have the busiest dockets — and not without good reason. Parties will generally seek out the most experienced arbitrators, many of whom have been serving at their posts since shortly after World War II. Christopher Barreca, labor counsel for the General Electric Company, recently stated that the average age of "acceptable" arbitrators is 70. 104 L.R.R.M. 369 (1980).

[10] The National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service have sponsored a few training programs for arbitrators. Teple, *1978 Report of the Committee on De-*

ienced arbitrators must be able to tell these neophytes something about how the decision-making process works.[11] If we are to replenish the Guild, we must first understand the nature of the arbitral process.[12]

I. The Nature of the Arbitral Process: An Overview

Labor arbitration is a process of principled adjudication. Arbitrators make decisions in cases presented to them on the basis of an established body of arbitral jurisprudence. The set of standards which guides arbitral decision-making is known generally to experienced parties and is ascertainable by those who are not experienced. Since these arbitral principles are the product of industrial realities and experiences, they are reflective generally of an accepted accommodation of the legitimate but conflicting interests of the parties to the industrial partnership. Arbitral principles are derived from what might be called the "common law of the labor agreement," a collection of implicit understandings facilitating both the negotiation and the administration of the collective agreement.[13]

As in any process of adjudication, the neutral arbitrator is called upon at times to resolve conflicting questions of fact.

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velopment of Arbitrators, Proc. of the 31st Annual Meeting, National Academy of Arbitrators, Truth, Lie Detectors, and Other Problems in Labor Arbitration 397 (Stern & Dennis eds. 1979) [hereinafter cited as Truth].

[11] General descriptive material about the way an arbitrator should go about his job is not available. The texts which are available are addressed to the needs of the arbitration practitioner. *See, e.g.*, F. Elkouri & E. Elkouri, How Arbitration Works (3d ed. 1973). By comparison, material designed for judges is plentiful. *See, e.g.*, Handbook for Judges (G. Winters ed. 1975) and bibliography at 301.

[12] The charge to study the nature of the arbitration process was laid down more than 20 years ago by Archibald Cox in two seminal articles. In *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489 (1959), Cox wrote, "We should then press on to a synthesis of our notions concerning the interpretation of collective agreements—a coherent description not merely of the trappings of arbitration but of its inner logic . . . ." In an earlier article, Professor Cox suggested that self-analysis is essential in order to aid courts in developing an appropriate stance supportive of arbitration. "Judges cannot be expected to perceive the legal nature of a collective bargaining agreement if those whose lives straddle labor relations and the law cannot articulate their perceptions." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 5 (1958).

[13] *See* notes 38-63 and accompanying text *infra*.

Through the use of an open-ended hearing, the labor arbitrator obtains the basic, raw data upon which to make purely factual determinations. A labor arbitrator resolves controversies as to what in fact occurred much in the same fashion as any adjudicator would, through the use of reasoning, intelligence and a basic understanding of human motivations and patterns of expected behaviors. The accepted allocation of the burden of proof aids the labor arbitrator in the fact-finding process.[14]

Once questions of fact are resolved, the labor arbitrator selects appropriate adjudicatory standards from the body of arbitral jurisprudence and applies those standards by reasoning from the facts to a conclusion.[15] The process of decision-making in labor arbitration is essentially rational and principled. Arbitrators customarily explicate the basis for their decisions in the form of a written opinion, which follows a standard form.[16] We should turn our attention now to the nature of the arbitrator's role and to the particulars of the decision-making process.

II. Alternative Conceptions of the Arbitrator's Role

Practical necessity compels parties to an established collective relationship to attempt to order their relationships within a set of rules normally embodied in the form of a written agreement.[17] The agreement sets forth with varying degrees of particularity the standards that will control the resolution of individual

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[14] *See* notes 75-92 and accompanying text *infra*.

[15] *See* notes 93-94 and accompanying text *infra*.

[16] *See* notes 87-91 and accompanying text *infra*.

[17] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 721-24 (1973). The size and complexity of a modern enterprise requires rules "to guide the conduct of employees" who "must be relied upon to act in expected ways, without minute direction . . . ." *Id.* at 721-22. Moreover, "efficient operation clearly requires at least a minimum reconciliation of the work force with the conditions of employment." *Id.* at 722. The existence of established rules also engenders employee cooperation. Finally, Feller notes the bureaucratic nature of industrial organization. "[T]here must be a set of rules and limits controlling the actions of subordinate members of management in dealing with the work force." *Id.* at 723.

Professors Hart and Sacks recognize more generally that rules are essential in any society: "People who are living together under conditions of interdependence must obviously have a set of understandings or arrangements of some kind about the terms upon which they are doing so." H. Hart & A. Sacks, The Legal Process Basic Problems in the Making and Application of Law 2-3 (Ten. ed. 1958).

problems which arise during its term. With the wisdom born of experience, parties have realized that these standards—even the most definitive and exacting ones—are not always easily applied[18] and that their internal grievance machinery will not be able to resolve successfully all disputes.[19] Accordingly, they normally provide for an arbitration procedure which will resolve unsettled matters in a final and binding manner.[20]

Generally, the arbitration mechanism created by the parties is only vaguely described in the parties' contract. While the blueprint may indicate the outline of the arbitral structure,[21] it rarely, if ever, delineates in full the particulars of how the process is to function. Other than the occasional hortatory reference to the achievement of dispute resolution without strife, the text of the agreement does not explain the purpose and policies of the private tribunal. Nor, when negotiating their agreement, do unions and management consciously explore the issue of how they want their arbitrators (if they require any during the term of the contract) to go about deciding cases. Instead they buy a

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[18] Hart and Sacks suggest that "it is probably a flat impossibility to frame a legal rule applying to any considerable mass of transactions without leaving . . . uncertainities." H. HART & A. SACKS, *supra* note 18, at 156. Arbitrator Samuel Edes recently wrote:

> I am constrained to observe that, perhaps of all the creations of man, language is the most astonishing in what it can at the same time both reveal and obscure. From which I am led to believe that the following colloquy by Lewis Carroll is not inappropriate:
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> "The question is," said Alice, "whether you can make words mean so many different things."
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> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Waukeegan News-Sun, 80-2 LAB. ARB. AWARDS (CCH) ¶ 8347 (1980) (Edes, Arb.).

[19] The Bureau of National Affairs reports that 99% of the agreements in its sample contained grievance procedures. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 51:1 (1979).

[20] *See* note 7 *supra*.

[21] A typical arbitration clause will set forth (1) the method for initiating arbitration (*e.g.*, "the Union may submit the grievance to arbitration by filing written notice with the Company within five days . . ."); (2) which appointing agency's services will be used (*e.g.*, "the arbitrator shall be selected through the American Arbitration Association"); (3) the limits of the arbitrator's power (*e.g.*, "the arbitrator shall not add to, subtract from, or otherwise modify the provisions of the Agreement"); and (4) the effect of the arbitrator's award (*e.g.*, "the award issued shall be final and binding upon both parties").

package labeled "labor arbitration." Parties, however, are not unsophisticated consumers. They generally appreciate the nature of the dispute-resolution mechanism to which they have agreed. The persons they select to serve as arbitrators share the parties' conception of the decisional role. Otherwise, one would expect to see either an increase in attempts to vacate arbitration awards in court or an increase in specificity of contract provisions concerning the intended mode of arbitral decision-making. Neither has occurred.

While one may appropriately posit that participants in the arbitration process contemplate a common conception of the decision-making process, the nature of that intended and expected method of resolving disputes is not easily explicated. The arbitrator's decisional function is not prescribed by any form of legislation, nor, as noted above, is it discussed by the parties in their collective text. There are several possible definitions of the arbitrator's role which can bridge this gap in the parties' agreement. To determine which conception best fulfills the intention of the parties, we must test each against the obligations of the arbitral process. Like the image Michelangelo perceived hidden within a block of granite, once spurious formulations of the arbitrator's functions are chipped away, the most reasonable description of the decision making function emerges.

A. Arbitrator-as-Manager

One way of thinking about the arbitrator's role is to conceptualize a decision-making process guided by the idiosyncratic, self-defined values of an arbitrator. This arbitrator, as a benevolent and informed consultant, enters a dispute when the parties have been unable to resolve their own conflict. He solves their dispute based upon his own understanding of their often competing needs in regard to productivity, efficiency and employment security. This wise manager is guided only by his personal vision of justice and fairness. His purely discretionary resolution announces binding policy drawn only from his subjective appreciation of what is necessary to improve the quality of the parties' joint enterprise.[22]

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[22] This conception of the arbitrator approaches the dictionary definition of the word: "One who decides or ordains according to his own absolute pleasure; a supreme ordainer." OXFORD ENGLISH DICTIONARY 426 (Compact ed. 1971).

It is obvious that this conception of the nature of the arbitration process must be considered sophistic.[23] Arbitration decision-making cannot be a random process producing widely varying outcomes in similar situations, determined solely by the individual values of a chosen arbitrator. Such an adventitious system would be intolerable to both unions and management.[24] It would fail to fulfill the expectations of the parties in adopting arbitration as part of the collective agreement. Fundamentally, the parties have sought a reading of their mutual undertaking,[25] not the wise directives of an arbitrator-as-manager.[26] Moreover, in order to function as an integral part of a system of autonomous self-government, arbitration decisions must be predictable, at least within a range of outcomes anticipated by both parties.[27]

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[23] It would be unfair to suggest that any arbitrator has actually claimed that his role should be that of benevolent manager, a "knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). However, the Supreme Court has told us that the arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Parties select a particular arbitrator based on

> their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574, 582 (1960).

[24] The parties might as well accept Judge Bredlegoose's method of resolving disputes by a throw of the dice. 3 F. RABELAIS, THE HISTORIES OF GARGANTUA AND PANTAGRUEL Ch. 39 (J.M. Cohen trans. 1955).

[25] *See* St. Antoine, *supra* note 2, at 1140.

[26] "Arbitrators are not soothsayers and 'wise men' employed to dispense equity and goodwill according to their own notions of what is best for the parties, nor are they kings like Solomon with unlimited wisdom . . . ." American Sugar Ref. Co., 37 LAB. ARB. REP. (BNA) 334, 337 (1961) (Beatty, Arb.). One wonders how the arbitrator-as-manager would be able to give advice which would be considered "wise." "Clearly an ad hoc arbitrator, who comes in to decide a grievance in a particular shop which he has never seen before and may never see again, has no special knowledge of the 'common law' of that shop." Feller, *supra* note 5, at 98. During the course of a hearing, an arbitrator rarely is informed of all the factors necessary to give controlling guidance to the parties as to how they should reorder their relationship to achieve greater benefits for all concerned.

[27] While the adversary nature of the collective relationship mandates di-

Arbitration decision-making based on an individualized set of values is not predictable within any range.

While, as noted above, the partners to a collective bargaining relationship appreciate that their written compact will not be sufficiently definite to resolve all subsequent disputes without the assistance of an outsider, there is no reason to suspect that the parties, by agreeing to the intervention of the neutral, have decided to cede decision-making power without limitation. A central characteristic of collective bargaining is mutual determination by the parties of the rules which will govern their workplace. The parties make choices across the table, allocating certain prerogatives for discretionary determination by management, establishing standards with varying degrees of particularity for the control of other matters arising out of the employment relationship and omitting reference to still other potential concerns in the body of the collective agreement. Where parties have made these choices, why should they be seen as having established a free-wheeling arbitral mechanism unbound by these choices in resolving disputes? The conception of arbitrator-as-manager is inconsistent with a bargaining process during which at least some of the guiding values have been mutually set.[28] This does not mean that the arbitrator-as-manager might not be a beneficial advisor, at least in the short run. However, the arbitration process contemplates a less expansive role. Fidelity by an arbitrator to the choices made by the parties supports not only the integrity of the bargaining process, but also, on a larger scale, the entire autonomous system of industrial self-government. If an arbitrator is to roam freely among his self-defined

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verse, partisan expressions of anticipated outcomes in any given case, subjectively each party appreciates that an arbitrator may, in many instances, legitimately resolve a dispute in favor of its opponent. Any given case presents a range of anticipated outcomes, *e.g.*, a particular discharge may be upheld, converted to a suspension, or set aside with the grievant reinstated with full back pay. The ranges of anticipated outcomes of two parties to a dispute may not be coincident, but in most instances they do overlap. *See* Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 239 (1977).

[28] It is not completely accurate to say that "what both parties want from their private judge is a fair and practical decision." Hepburn & Loiseaux, *The Nature of the Arbitration Process*, 10 VAND. L. REV. 657, 660 (1957). While indeed the parties seek fairness and practicality, they also seek a decision based on choices that they have already made in ordering the workplace. The parties may have decided already what is "fair," and their choice, while perhaps "impractical," must control.

equities, why bother to attempt to reach an agreement at all?

It must also be remembered that arbitration is typically the final step in the parties' grievance procedure. That procedure would be rendered meaningless were the outcomes at its terminal step a matter of roulette on a wheel rigged by the arbitrator. Were arbitral outcomes randomly distributed, incentives for settlement prior to the invocation of the process would be much reduced. There would always exist the chance that the arbitrator's value set would coincide with the partisan views of one party or the other. Effective grievance resolution without the intervention of an arbitrator would be impossible. The parties should not be seen as having created a grievance procedure which would be rendered a useless charade by arbitral capriciousness as its final step.

National labor law policy supports the finality of an arbitrator's award. Courts are not to review the merits of an arbitrator's decision.[29] The private parties would countenance such a principle of unreviewability only so long as arbitral outcomes were generally consistent with their expectations. Were the process guided solely by the arbitrator's adventitious "judgment," no expectations would be legitimate other than that the dispute would be resolved. While it is true that the parties benefit from the mere fact of resolution of their dispute, the detrimental impact of arbitral fiats, based on values external to a collective relationship and the realities and needs of the shop, would outweigh the utility of a finalized verdict. Such a dispute-resolution system would disserve its creators and would not long enjoy their support.

The model of arbitrator-as-manager would also be unworkable on a practical level. If one party knows and favors the value set of an arbitrator-as-manager prior to selection, the other party to the arbitrable dispute would refuse to accept the person as decision-maker. Such an arbitrator would not, in fact, be neutral on the issue at hand. Assuming that selection was somehow made (perhaps because the arbitrator's views were unknown), how would the parties present their cases? What facts would be proffered? Or would it even matter what evidence was presented? Since the decision of an arbitrator-as-manager is essentially discretionary rather than adjudicatory, the derivative therapeutic

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[29] *Steelworkers Trilogy, supra* note 3.

benefits of the adversary hearing process would be impaired.[30] Certainly it can be concluded that the arbitrator cannot serve as manager to the parties. We must examine an alternative formulation of his role.

B. Arbitrator-as-Literalist

A second conception of the nature of the arbitral decision-making process would narrowly circumscribe the arbitrator's function. The arbitrator would resolve disputes *solely* on the basis of the express agreement of the parties who selected him. However, the collective agreement is a collection of broad, loosely drawn and vaguely worded rules and standards. It is an incomplete document in the sense that major areas of potential dispute are often unexplored in the text, either by design, by inadvertence or by lack of perfected foresight. The rigors of the negotiation process mandate agreement on less than a complete code of detailed regulations.[31] Under the conception of arbitrator as "literalist," what is the arbitrator to do when asked to resolve a dispute which the parties have not foreseen or have not addressed in their agreement in a manner sufficiently definite to mandate a certain decision?

The arbitrator may refer to established past practices of the parties, which may indicate an appropriate outcome to the arbitrator. Such practices, if sufficiently definite, may be seen as binding upon the parties in much the same way as express contract references.[32] The arbitrator-as-literalist could read these

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[30] The Supreme Court has recognized that arbitration of even frivolous grievances serves "therapeutic values of which those who are not part of the plant environment may be quite unaware." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). The success of this therapy depends in part on the participants' belief that the arbitrator is listening to their arguments. While the arbitrator-as-manager might want to conduct a hearing to ascertain some facts upon which he could then superimpose his own vision of the parties' needs, it is difficult to see the usefulness of the procedure in terms of fulfilling this expected therapeutic function. Since the arbitrator-as-manager retains unbounded power to establish his own decisional standards, the presentations of the parties cannot be considered to be meaningful participation.

[31] One description of the dynamics of the negotiation process is set forth in Abrams, *Negotiating in Anticipation of Arbitration: Some Guideposts for the Initiated*, 29 CASE W. RES. L. REV. 428 (1979).

[32] A past practice is one where there had been a consistent response to a given set of circumstances over a reasonably extended period of time with the knowledge and agreement of, or tacit acceptance

unexpressed undertakings in much the same way as he reads the express criteria of the agreement. However, such practices are not always present, especially where the contested management action presents a "case of first impression."

Alternatively, the arbitrator may rely on a broadly drafted contract reference to the issue. However, the arbitrator-as-literalist would be writing rules for the parties were he to supply particulars to the vague references of the collective agreement in order to resolve the dispute. One might argue that in such a case the arbitrator would simply be "interpreting" the parties' agreement. But upon what basis is the arbitrator to say that a vague formulation should be given a particular meaning? Certainly the parties have not mutually agreed upon such a particular rule or application. The fact that they were unable to settle the matter through use of their grievance procedure indicates a lack of mutuality on the particular application. Under the model of arbitrator-as-literalist, if the contract does not clearly address the issue in dispute and there exists no definite past practice, the arbitrator would not be able to issue a decision. Faced with this situation, the arbitrator-as-literalist would be forced to return the dispute to the parties in an envelope marked "Return—Insufficient Bargaining."[33]

This conception of arbitrator-as-literalist coincides with the way many arbitrators talk about their decision-making func-

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> by, both parties . . . . Under certain circumstances, where a contract is silent, the establishment of the existence of the practice becomes in effect an unwritten agreement, which makes the practice a part of the labor agreement between the parties.

Master Builders' Ass'n, 74 LAB. ARB. REP. (BNA) 1072, 1075 (1980) (McDermott, Arb.). *See generally* Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961).

[33] On occasion, arbitrators have remanded a dispute to the parties for negotiation when they have concluded that the parties have not reached a "meeting-of-the-minds" on the issue in dispute.

> [The] Arbitrator is of the opinion that the interests of the parties would be best served in the long-run if the question is resolved by the parties themselves after negotiation and the writing of a contract clause which will clearly convey their agreement in regard thereto.

Boston Sausage & Provision Co., 6 LAB. ARB. REP. (BNA) 667, 669 (1947) (Copelof, Arb.); *See also* Eastern Stainless Steel Corp., 12 LAB. ARB. REP. (BNA) 709, 714 (1949) (Killingsworth, Arb.).

tion.[34] The arbitrator, as a "creature of the parties," is bound immutably to the terms of the agreement in resolving disputes. The arbitrator has no power to modify or amplify the express provisions of the collective agreement. He cannot substitute his views for those of the parties. He must simply inform the parties of that to which they have already agreed. It must follow that if the parties before the arbitrator have not reached a mutual understanding that will determine the outcome of a dispute either in the body of their contract or in their prior practice, the arbitrator-as-literalist cannot decide the case.[35]

Since it is unreasonable to think that the parties would create an arbitration procedure that would repeatedly fail to resolve interm conflicts because of the absence of clear directions in writing or in practice, this second conception is not satisfactory. Parties know that their mutual undertaking is incomplete, and they know that the gaps and omissions of their agreement will generate disputes. They create an arbitration procedure to resolve these disputes—not to have an arbitrator remand their controversies for further negotiations. By establishing an arbitration mechanism as part of their collective regime, the parties must be seen as expecting that the arbitrator will do something more than ascertain whether there exists an apposite rule of their particular relationship which has crystallized in precise contract or past practice form. The parties contemplate that during the term of their agreement disputes will arise which require for their resolution more than the skills of a proofreader. If limited solely to prior mutual conduct of the particular parties to a dispute as evidenced by the terms of their formal agreement or established practices, the arbitrator could not fulfill successfully the parties' needs for an effective, final and binding dispute-res-

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[34] "The Arbitrator will fulfill his duty. That duty is at bottom to find the intent of the parties as expressed in their Agreement and put into effect by them." Wolverine Aluminum Corp., 74 LAB. ARB. REP. (BNA) 252, 255 (1980) (Dorby, Arb.). "[A]n arbitrator should be bound to the 'four corners' of the contract. . . ." Beecher, Peck & Lewis, 74 LAB. ARB. REP. (BNA) 489, 492 (1980) (Lipson, Arb.).

[35] Even if the parties have specified precise rules to govern the resolution of particular disputes, the arbitrator acting as literalist may be dysfunctional. As Lon Fuller pointed out: "A perversely literal interpretation is one of the surest ways of making a contract unworkable . . . . The most common cause of an inept literalness, however, lies not in bias but in a lack of understanding." Fuller, *supra* note 1, at 11. At times, parties do not mean what they say.

olution mechanism.

C. Arbitrator-as-Adjudicator

It is clear that in order to function in a manner which meets the needs and legitimate expectations of the parties to a collective relationship, the arbitrator must look beyond the express agreement and established prior practices of the parties to a particular dispute in resolving their controversy. Under this third conception of arbitral decision-making, the arbitrator owes his first allegiance to the parties' collective agreement, but he will interpret and apply that agreement in light of established norms of construction. The parties bestow upon the arbitrator the power to elaborate in a reasoned and principled manner the parties' contract to accomplish his assigned task of dispute resolution. In order to decide cases in a way that is consistent with the needs and expectations of the parties who have established his office, the arbitrator employs a body of established arbitral principles. Under this third conception, the arbitrator functions in the role of an adjudicator.

The body of arbitral principles employed by the neutral serving as an adjudicator consists of widely shared standards for resolving disputes under collective agreements in the labor-management community. These standards are articulable principles known to unions, management and arbitrators who participate in the arbitral process.[36] Even a quick perusal of published arbi-

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[36] Like any comprehensive body of "law," the principles and standards which guide arbitral adjudication are many and varied. A selection of these principles is discussed in the text and footnotes throughout the remainder of this article. No one has attempted to collect all the principles employed in arbitral adjudication in the form of a "Restatement of Labor Arbitration Law," though Frank and Edna Elkouri have discussed many of these guiding standards in their much-cited book, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973).

The body of arbitral jurisprudence is contained in prior arbitration decisions reprinted by the major services. Arbitration decisions are published by the Bureau of National Affairs, Inc. (BNA), in the Labor Arbitration Reports series, and by the Commerce Clearing House, Inc. (CCH), in the Labor Arbitration Awards series. BNA and CCH each publish over 600 decisions a year. Prentice-Hall also publishes decisions of labor arbitrators.

A reading of these decisions indicates that there are in fact ascertainable arbitral principles. Arbitration opinions often contain a sentence which begins "Under the common law of collective bargaining agreements, it is well established that . . .," Black, Sivalis & Bryson, Inc., 80-1 LAB. ARB. AWARDS (CCH)

trator's opinions reveals the principled basis upon which decisions are made. While writing styles vary,[37] each opinion contains an expression of one or more neutral standards against which the arbitrator judged the case at hand. Often an arbitrator will cite other arbitration opinions in support of his use of a particular principle in resolving the parties' dispute.[38] While an examination of arbitration opinions and the decisional habits of arbitrators suggests the existence of a body of arbitral jurisprudence, the question remains as to the source of this body of "law."

The fountainhead of arbitral jurisprudence lies in the context of collective bargaining and the prior behaviors and interactions of unions and management. The guideposts for resolving disputes—the private law of labor relations—are derived from prior solutions in similar conflicts. While it is possible that some elements of the body of arbitral jurisprudence have sprung full-grown from the heads of various arbitrators,[39] the body of arbi-

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¶ 8277 (1980) (Goetz, Arb.), or "It is axiomatic in arbitral cases . . .," Riback Supply Co., 74 LAB. ARB. REP. (BNA) 1030, 1031 (1980) (Heinsz, Arb.).

[37] Some arbitrators use the early style of Justice Blackmun and number the paragraphs of their opinions. *See, e.g.*, Chesterfield Steel Serv. Co., 69 LAB. ARB. REP. (BNA) 1169 (1977) (Young, Arb.). Others write as if they were talking informally to the parties, *e.g.*, "Your Arbitrator has carefully read the post-hearing briefs . . . ." Morrell & Co., 74 LAB. ARB. REP. (BNA) 756, 760 (1980) (Stokes, Arb.). Still others employ flowing, expressive prose. *See, e.g.*, Kaiser Steel Co., 49 LAB. ARB. REP. (BNA) 507, 508 (1967) (Jones, Arb.) ("Among a group of boilermakers manhandling heavy equipment, the words and expressions are often as tough, blunt and rasping as the metal they handle").

[38] Consider, for example the recent opinion by Arbitrator Leon J. Herman in Lovejoy, Inc., 74 LAB. ARB. REP. (BNA) 811, 813 (1980): "The right of the Company to give tests to job bidders to determine ability and qualifications in the absence of explicit contractual provision to the contrary has now been well established." He then cites and quotes at length from Arbitrator Louis Kesselman's 1969 opinion in Olin-Matheson Chemical Crop., 69-2 LAB. ARB. AWARDS (CCH) ¶ 8657. Kesselman, in turn, had cited five earlier decisions issued by arbitrators Kates, Florey, Wagner, Duff and Volz in support of this principle.

[39] Dean Harry Shulman might be credited with "creating" arbitral principles during his 12-year tenure as permanent umpire for Ford Motor Company and the United Auto Workers. For example, his interpretation of the promotion provisions of the Ford-UAW collective bargaining agreement appears to be the origin of the arbitral principles which have guided decision-making in the promotion area for more than 35 years. Ford Motor Co., 2 LAB. ARB. REP. (BNA) 374 (1945). Even so, his "creations" drew their inspirations from the competing interests of the parties and the needs of the establishment, which Shulman

tral principles in large measure is "drawn out of the institutions of labor relations and shaped by their needs."[40] While arbitration law is private law, it is a fundamental error to think of this private law as unique to each particular collective relationship. Even if the parties desired to do so, they would be hard put to adjust and order their relationship along *sui generis* lines. It would be foolish to, and indeed parties do not, ignore the lessons learned from the negotiation and interpretation of other collective agreements. Conflicting interests which give rise to industrial disputes follow fairly predictable patterns. In discussing the body of arbitral principles that guides the arbitrator-as-adjudicator in construing an agreement and applying it to these recurrent fact patterns, it is reasonable to see the parties as adopting prior principled accommodations on the same issues. Parties agree to words that will control the resolution of later-arising disputes, but the words they select are given meaning by the context within which they are negotiated.[41] The parties are bargaining out a collective agreement. By virtue of entering into the enterprise of ordering the workplace, they reasonably can be seen as adopting as an implied textual gloss the normal way the words they select have been interpreted in prior circumstances. By negotiating a collective agreement, the parties adopt this "common law" gloss for the later interpretation of their agreement by an arbitrator.

Do the parties consciously appreciate that when they adopt a certain formula as their contract rule they are also adopting prior notions of the meaning of those words? It is difficult to say in any particular case. However, when at the same time parties include an arbitration provision in their contract and provide that this method should be used to resolve disputes which arise during the term of their agreement, their conduct indicates that they have adopted this uniform interpretive gloss upon the words they have chosen for their contract.

Thus, the source of the body of principles used by labor arbi-

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understood as a permanent arbitrator.

[40] Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 605 (1956).

[41] Judge Learned Hand's thoughts in NLRB v. Federbush Co., 212 F.2d 954, 957 (2d Cir. 1941), are useful in gaining an appreciation of the importance of the context within which words are expressed: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ."

trators in resolving disputes is the common law of the labor agreement, the generally understood implications of what is expressed or unexpressed in the parties' contract.[42] The existence of this body of principles facilitates the bargaining process. Substance is given to the bare bones of vague contract terms. The failure to include contract references is given foreseeable import. In the absence of evidence to the contrary, it is necessary and certainly reasonable that the arbitrator view the parties as bargaining within this context. They should be thought of as "reasonable bargainers in the circumstances."[43] Reasonable bargainers certainly contemplate that their product will require interpretation and interstitial completion. Unless they have indicated that they do not wish to adopt the body of principles that would otherwise be used by an arbitrator in fulfilling his appointed role, parties can be seen as having adopted the *lex non scripta* of the labor agreement as their interpretive gloss.[44]

This explication of the common law of the labor agreement shows why the maxim that precedent is not binding in labor arbitration has little meaning. Of course, the decision of one arbitrator interpreting one contract is not formally binding upon another arbitrator interpreting another contract, much in the same way as the decision of one court is not binding upon a court in another jurisdiction.[45] The influence of any particular prior arbi-

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[42] "There is a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist." Feller, *supra* note 5, at 104. The common law of the labor agreement acts as a "custom" employed to fill in contract omissions and give meaning to vague contract references. It "helps to add definiteness to otherwise vague directions, and facilitates the flexible adaptation of general propositions to fit special situations." H. HART & A. SACKS, *supra* note 18, at 445.

[43] While some may scoff at the premise that bargainers are ever "reasonable," the adjective is applied here in the same way as tort law employs the term in describing the common person. Perhaps it might be preferable to label the construct the "ordinary" or "usual bargainer in the circumstances."

[44] The arbitrator's lodestar remains the intentions of the parties joined in a collective relationship. In the absence of evidence to the contrary, it is sound for the arbitrator to conclude that parties who bargain collectively share with other, similarly behaving industrial partnerships a common conception of the purpose of their joint enterprise. One can certainly generalize concerning the objectives, intentions, values and needs of the participants as evidenced by their conduct.

[45] The Supreme Court and commentators have characterized collective relationships as distinct jurisdictional units. "A collective bargaining agreement is an effort to erect a system of industrial self-government." United Steelworkers

tration decision is based upon the persuasive power of its reasoning and the coincidence of its guiding rationale with the principles which have guided other arbitrators in resolving similar cases.[46] Were each decision unique in its determining principles—a chaotic system which does not and could not exist—then prior cases would have no value in resolving future disputes. However, as discussed above, an arbitration procedure would not fulfill the needs and intentions of its creators were it somehow to operate in a vacuum, hermetically sealed away from the body of established arbitral principles.[47] The precedential value of an opinion which lies in the mainstream of this body of principles is based on its reasoned explication and application of the decisional standard.

An arbitrator would jeopardize the arbitration process and frustrate the legitimate expectations of the parties he serves were he to abjure his role as principled adjudicator. A decision based on standards other than those in the established body of principles would not be one drawing its essence from the parties' agreement, because the parties' agreement itself was negotiated within the context of this body of principles. A decision based solely upon an arbitrator's own conception of the proper compromise between the parties' competing interests is at odds with the legitimate expectations of the parties. They provided for arbitration, not binding management. A decision limited only to the clear prior rules of a particular relationship will not suffice in resolving disputes in those numerous situations where the parties have not defined their rules with particularity. Were the rules clearly defined, there would be no need for an arbitrator. The only mode of decision-making that allows for an effective and predictable process of dispute resolution, consistent with

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v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[46] [B]ecause one arbitrator is not bound by the decision of others, other arbitration awards are suggestive, not conclusive. Nevertheless, the weight of arbitrators' opinions deserves consideration, in part because it may point to the most appropriate solution of a problem, and in part because parties may reasonably expect that a generally accepted solution of a particular contract problem will be applied to them, unless they express an intent to the contrary.

Hawaiian Telephone Co., 59 LAB. ARB. REP. (BNA) 366, 369 (1972) (Seidman, Arb.).

[47] *See* Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 L. & CONTEMP. PROB. 698, 701-02 (1952).

the needs of the parties and their inability to define all areas of potential dispute in their agreements, is one in which the body of arbitral principles that transcends a particular relationship is recognized and applied in a rational manner. It is certainly reasonable to suggest that the parties who create an arbitration system anticipate a rational decision-making process. Rationality means fundamentally that like cases will be treated alike and that each case will be decided on the basis of identifiable principles rather than caprice or ad hoc judgment.

Another advantage of resolving disputes in accordance with the body of arbitral principles is that it enhances acceptability by parties of negative results. Acceptability of the products of arbitration serves the needs and fulfills the intentions of the parties. Typically, parties specify that the results of their arbitration mechanism are to be final and binding. They seek to avoid vexatious litigation or damaging self-help once an award has issued.[48] The arbitrator must go about his decisional duties, therefore, in a way which encourages the losing party to accept the issued award as final. A decision-making system based on pre-existing standards, as opposed to ad hoc rationales or idiosyncratic values, has increased legitimacy. A losing party in a problem-solving system where finality is an indispensable goal must be made to appreciate that the case was lost on the merits, based on generally recognized principles as applied to the facts of the conflict and the provisions of its collective agreement. Thus, when the arbitrator decides a case in accordance with the body of arbitral principles, achieving outcomes within the ranges of expectancy of the parties, he enhances the legitimacy of his decision and thereby fulfills the parties' intentions to create a private and meaningful dispute-resolution system.

The model of the arbitrator-as-adjudicator fulfills the needs of public policy as well as the needs of the private parties. Private dispute resolution in a peaceful manner, without loss of production or disturbance of the public peace, lies at the core of national labor policy goals.[49] While it may be true that voluntarism in the ordering of collective relationship is a primary goal as well,[50] parties have been allowed to "write their own ticket" only

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[48] *See* Donau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969).

[49] Labor Management Relations Act, 29 U.S.C. §§ 151, 173(d) (1976).

[50] "The basic theory of the law [is] that the arrangement of substantive

so long as their destination coincides with the public interest.[51] Labor arbitration, as practiced today, has successfully achieved the actualization of these public aims only because it has also met the private needs and expectations of the parties, thereby obviating the need to find recourse in self-help measures to resolve disputes.

One can have certain objections to the conception of arbitrator-as-adjudicator. The role as described suggests that the arbitrator may impose upon the parties a rule to which they did not agree because other similarly situated parties have been bound to such a rule by arbitrators. For example, when an arbitrator-as-adjudicator interprets a contract omission as having a certain implication with regard to a pending dispute, he is importing goods foreign to the parties' regime. How can it be said that the parties intended something when they said nothing? The argument is well taken. When the arbitrator-as-adjudicator divines import from silence, he is not determining what the particular parties before him in fact intended, and it would be a contortion of reasoning to suggest that such was the case. On the other hand, the parties did insert an arbitration mechanism into their collective bargaining agreement. They did contemplate that the arbitrator would resolve unforeseen disputes which might arise during its term. Their conduct both in acting to create the agreement and in failing to act to specify certain rules in the body of their agreement can be seen as significant. After all,

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terms and conditions of employment [is] a private responsibility from which the government should stand apart." A. Cox, D. Bok & R. Gorman, Labor Law: Cases & Materials 84 (8th ed. 1977).

[51] As Professor Fuller explains in *Arbitration: The Days of Its Glory are Numbered, supra* note 5, at 107, Congress has preempted private ordering of the terms and conditions of employment in situations where there has been a "failure in the organized sector to deal satisfactorily with minority interests" or with "some issues of great complexity . . . ." He cites the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 65-678 (1976), Title III of the Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677 (1976), and the Employee Retirement Income Security Act of 1974 (ERISA), 42 U.S.C. §§ 5, 18, 26, 29, 31 (Supp. V 1975), as examples of federal regulation which will "necessarily undermine the hegemony of the collective agreement and the private system of governance . . . ." *Id.* It is not fanciful to suggest that Congress would rethink its support for private dispute resolution were it to conclude that labor arbitration was not effective in achieving the goal of labor peace.

they negotiated a collective bargaining agreement which is necessarily incomplete. Unless the arbitrator is to stop once he finds nothing in the agreement on point—an approach which we have seen will not fulfill the needs of the industrial partners for an effective method of dispute resolution—an arbitrator must give meaning to contract omissions.[52] Arguing that this process adds an undertaking not contemplated in the agreement ignores the practical realities of the collective bargaining context within which the deal is made.

Another objection to the model of arbitrator-as-adjudicator rests on the premise that industrial practices are not fungible and that the adoption of a body of arbitral principles may result in the application of inapposite criteria. Again, the point is well taken. Arbitration is no longer, assuming it ever was, the dispute-resolution mechanism only of the prototypical manufacturing enterprise. Review of any volume of published decisions of arbitrators shows that the process is utilized in sectors which vary from asbestos to zoos. The arbitrator-as-adjudicator must be cognizant of the relevant differences between arbitral situations. An essential protocol of this model of arbitrator-as-adjudicator requires that the arbitrator fine-tune his selection of the appropriate guiding principles to the particular situation at hand.[53] Once this is said, however, it seems clear that the various arbitration settings have more in common than in conflict. All involve systems of self-government ordered by incomplete documents. The issues brought to arbitration appear across the broad

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[52] As Professor Russell A. Smith has pointed out, the "gap filling" function is consistent with the parties' intentions, even when they have expressed the common admonition to the arbitrator not to "add to" their agreement. Witness their continual selection of "legislating" arbitrators.

> The parties by and large presumably agree [that arbitrators must perform this function], since they keep retaining both us and the "don't add to" contract language. They must figure that we have enough horse-sense expertise to come to conclusions that are acceptable within the general framework of the agreement and the shop context or milieu that surrounds it.

Smith, *The Search for Truth—The Whole Truth*, TRUTH, *supra* note 11, at 44.

[53] One common example of the fine-tuning involves the application of the concept of "shop talk" as a defense to discipline for speaking foul language to a supervisor. What is the *lingua franca* of the industrial plant is not the language permitted in other workplaces, such as a school or nursing home. *Compare* Kaiser Steel, 49 LAB. ARB. REP. (BNA) 507 (1976) (Jones, Arb.), *with* Little Forest Medical Center, 69 LAB. ARB. REP. (BNA) 671 (1977) (Smoot, Arb.).

spectrum of enterprises.[54] Even though there are differences that must be taken into account, it remains true that an arbitrator must look beyond a particular relationship for guidance in interpreting agreements and resolving disputes.

The model of arbitrator acting as an adjudicator is thus the most reasonable description of the nature of the arbitrator's decision-making function. The conception is consistent with the context of collective bargaining and, when carried out appropriately, it should fulfill the needs and expectations of the parties who decided voluntarily to create an arbitration procedure. The source of the body of arbitral jurisprudence is the practices, understandings and accommodations of unions and management over the years. The common law of the labor agreement is private law, but not a private law particularized and distinct for each bargaining relationship. The body of arbitral jurisprudence is not a set of standards external to the contract, but one implied in the contract's very existence, providing a necessary gloss on the contract's interpretation and application.

D. An Example of the Arbitrator Functioning as Adjudicator

It would be useful to examine an example of an arbitral principle acting as an essential gloss to a private collective agreement. Consider the following situation. The parties' agreement contains a clause recognizing the union as the exclusive bargaining representative of certain employees, sets forth the wage rates, seniority provisions and other customary matters, and includes a clause preserving management's right to "manage the business." It makes no mention of management's right to subcontract, and it places no express prohibition or limitation on management's right to subcontract. How does an arbitrator rule

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[54] For example, discharges contested under a "just cause" provision arise in a variety of enterprises and will be resolved in accordance with the same guiding principles. Volume 73 of the Labor Arbitration Reports includes, *inter alia*, discharge cases where the employer is a steel mill, Quandex, Mac Steel Div., 73 LAB. ARB. REP. (BNA) 9 (1979) (Klein, Arb.); an electric utility, Tampa Elec. Co., 73 LAB. ARB. REP. (BNA) 98 (1979) (Rimer, Arb.); a union, International Ass'n of Machinists, 73 LAB. ARB. REP. (BNA) 144 (1979) (Merrifield, Arb.); an airline, Hughes Air Corp., 73 LAB. ARB. REP. (BNA) 148 (1979) (Barsamian, Arb.); and a hospital, Mt. Sinai Medical Center, 73 LAB. ARB. REP. (BNA) 297 (1979) (Dolnick, Arb.). Threading through this potpourri of settings is a universal understanding of the elements of "just cause."

on a grievance concerning the subcontracting of work customarily performed by employees in the bargaining unit?

One well established arbitral principle provides that, in the absence of an express contractual prohibition or limitation on subcontracting, management retains the prerogative to contract out work.[55] An absolute prohibition against subcontracting will not be implied. However, the "right to subcontract" is not unlimited. Arbitrators will sustain union grievances contesting subcontracting effected in bad faith, such as subcontracting designed to undermine the union or the unit. They will disapprove arbitrary and capricious subcontracting. In sum, arbitrators will assess the reasonableness of management's action.[56]

It is obvious that arbitral standards such as the reasonable subcontracting principle are not self-applying. There is much room for judgment in application in any given case. What is "arbitrary and capricious conduct" as opposed to "reasonable conduct" cannot be determined mechanically. However, the body of arbitral jurisprudence is as definite and precise as any body of law. It is the nature of any standard that it requires a reasoned application to varying fact situations.

Continuing the hypothetical case, why should the arbitrator uphold "reasonable" subcontracting and not "arbitrary and capricious" subcontracting? The contract is silent on the issue. Let us assume that the parties *never* focused on the issue of subcontracting during their bargaining sessions and that the employer had never previously subcontracted work. One might argue that in agreeing to a management-rights clause which preserves for the company the right to manage the business, the parties have affirmatively allocated to management the power to make the

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[55] *See* F. ELKOURI & E. ELKOURI, *supra* note 12, at 501-08.

[56] In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work so long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contract language.

Shenango Valley Water Co., 53 LAB. ARB. REP. (BNA) 741, 744-45 (1969) (McDermott, Arb.). For an exhaustive discussion of the arbitration of subcontracting disputes, see Singer Co., 78-2 LAB. ARB. AWARDS (CCH) ¶ 8280 (1978) (Kossoff, Arb.).

entrepreneurial decisions that it determines are in its own interest. But it is clear in the industrial setting that some management decisions, such as subcontracting a major portion of unit work to an outside contractor, have a potentially devastating impact on the integrity of the parties' express agreement concerning wages, seniority and other terms and conditions of employment. The parties would not have intended that the employer be able to nullify these provisions at its discretion. Since the parties have not expressly dealt with the issue before, it would be a mere fiction to suggest that the arbitral principle regularly employed by arbitrators, which allows reasonable subcontracting, is derived from a conscious, mutual understanding of these parties. The reasonable subcontracting principle reflects an accommodation of the conflicting interests of the parties in a manner consistent with the evidence of their mutual undertaking. Management seeks efficiencies in operating its business; the union seeks protection for the job rights of the persons it represents. The interests of the parties in our hypothetical situation mirror those of other parties who have faced the same issue before and have sought the assistance of arbitrators in resolving their conflicts. The product of these prior adjudications has been the establishment of the principle of reasonable subcontracting.[57]

The reasonable subcontracting principle fills in the gap left by the parties in their agreement. Its formulation is the product of a myriad of prior disputes over the same basic issue of management's rights to exercise managerial discretion in this manner. At some moment in the indefinite past, a labor arbitrator "announced" the principle as a reasonable accommodation of the conflicting interests of union and management. The parties could not have intended that management would be able to arbitrarily and unilaterally avoid its contractual promises on terms and conditions of employment. At the same time, the parties could not have intended that management would be foreclosed absolutely from taking advantage of the economies of subcon-

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[57] Does this resolution come as a surprise to the parties? Perhaps. Such "surprise" would be analogous to that felt by a party to a written commercial agreement when he discovers that he is bound by what he has signed. Principles external to his subjective appreciation of the effect of his behavior determine the legal effect of his conduct. Consensual arrangements would be ineffective and therefore impossible were parties able to reject their undertakings with a facile denial of the import of their actions.
See Mentschikoff, *supra* note 57, at 709.

tracting when motivated by business considerations. A balancing of these conflicting interests, in the absence of express guidance from the contract, is consistent with the overall intentions of the parties to order their relationship along rational lines protective of the productivity of the enterprise and of the security of the bargaining unit's working conditions. The source of the reasonable subcontracting principle, therefore, is the bargaining relationship itself and the needs of the parties to that relationship.

The reasonable subcontracting principle, once "announced," was followed by other arbitrators in resolving similar disputes. They did not base adherence to the principle on the compulsion of *stare decisis* but rather on the principle's sound industrial sense. Some arbitrators found alternative principles to be more suitable; for example, the principle that, in the absence of contract restriction, subcontracting of any form for any reason would be permitted,[58] or that, even in the absence of contract limitation, subcontracting of any form would be prohibited.[59] These alternative formulations, however, proved to be dead-end branches because they did not reflect appropriate accommodations of the conflicting interests of the parties. The reasonable subcontracting principle has emerged as the guiding standard.[60]

In selecting arbitrators, parties will seek out a person who understands and utilitzes established arbitral principles. Published opinions by an arbitrator are generally available as evidence of his adoption of the traditional criteria. Parties normally select well experienced arbitrators to serve as their neutral because the fact of experience is some indication that the person has served well as an applier of the common law of the labor agreement. A union and a company jointly select arbitrators. Thus, it is unlikely, in the absence of gross negligence or misdealing, that the parties would appoint an arbitrator with a skewed set of standards. Arbitrators who have proven themselves incapable of meeting the legitimate expectations of the parties with regard to the norms of substantive decision-making will not long maintain

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[58] *See, e.g.*, Amoskeag Mills, Inc., 8 LAB. ARB. REP. (BNA) 990 (1947) (Copelof, Arb.).

[59] *See, e.g.*, A.D. Julliard Co., 21 LAB. ARB. REP. (BNA) 713 (1953) (Hogan, Arb.).

[60] *See generally* Wallen, *How Issues of Subcontracting and Plant Removal Are Handled by Arbitrators*, 19 INT'L L. R. REV. 265 (1966); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 INT'L L.R. REV. 221 (1963).

their acceptability to the opposing groups. In this way, private and joint selection of arbitrators weeds out those arbitrators who do not apply the established body of arbitral jurisprudence. An arbitrator who believes that management has an unrestricted, absolute right to act always as it sees fit or, alternatively, believes that an employee has an absolute right to his job which can never be disturbed in any instance, will not long serve in the arbitration profession.

This analysis of the essential nature of the body of arbitral jurisprudence with its source in the common law of the labor agreement does not suggest that all arbitrators will decide every case in the same way. It does suggest that in similar cases arbitrators will identify the same principles as the standards for adjudication. Arbitration is universally accepted primarily because those standards exist and are known and applied. The principles reflect an accommodation of the conflicting interests of the participants in the industrial community within an essential congruity of purpose in achieving a productive enterprise ruled by established guideposts. These established guideposts for interaction between the private parties in their special purpose community have proven their worth and their acceptability. But they are not immutable. The parties may, if they wish, alter their own rules and reject the body of principles when it suits their mutual purpose.

It is a fundamental error to conceive of the arbitrator's function as ad hoc, random and purely judgmental. Arbitration is at base a principled process of decision-making in a specialized area. The wisdom required of the arbitrator is not that of the sage, but rather that of an informed adjudicator involved in a process guided by established standards.

III. The Process of Finding Facts

Before the arbitrator can apply principles derived from the common law of the labor agreement to resolve a grievance dispute, he must determine the facts which underlie the dispute. A labor arbitrator makes decisions on controverted questions of fact by employing his understanding of normal patterns of human behavior. Fact-finding is a process of reasoning from evidence, of probabilities and possibilities. Based on the evidence presented by the parties at a hearing, the arbitrator ascertains the facts in much the same way as a judge or administrative

tribunal.

In many cases, especially those involving contract interpretation, there is little dispute between the parties as to the underlying facts. The parties summon the arbitrator primarily to interpret and apply the terms of the parties' agreement. Even if the facts are not controverted, the parties must educate the arbitrator as to what occurred.[61]

In discipline and discharge cases, the arbitration record will typically contain contradictory evidence. In such a situation, the arbitrator will find it necessary to resolve purely factual disputes before applying the relevant principles of arbitral jurisprudence. It is obvious that the arbitrator must strive to ascertain accurately the facts underlying the controversy. The entire dispute-resolution process would be unsound were outcomes based on erroneous factual premises. An arbitration process where fact-finding was purely random or judgmental would not meet the legitimate expectations of the parties to have *their* dispute, and not some hypothetical controversy, resolved by the neutral. While the parties cannot demand, or reasonably expect, perfect accuracy in the determination of what occurred, they can certainly anticipate that an arbitrator will make use of his adjudicatory talents in the fact-finding process and at least attempt to reconstruct accurately the factual basis for decision-making in a particular case.

The labor arbitrator approaches the fact-finding process with a collection of pre-established assumptions about human behavior in the industrial environment which he shares with other members of the arbitrator corps. While commentators have rhapsodized eloquently about the uniqueness of the workplace milieu,[62] in truth people interact within that setting much in the

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[61] Occasionally, parties will submit a formal stipulation of facts, or one party will draft such a document and, at the hearing, the opposing side will agree to the accuracy of the statement. More likely, the parties will present their cases in turn through witnesses and documents, and it will become apparent to the arbitrator at some point in the hearing that the controversy lies not in what occurred, but in the contractual import of these incidents and events. There are other times when the parties will submit a case for decision by the arbitrator without hearing, based on stipulated facts and arguments set forth in brief form. *See, e.g.*, Central School Dist., 74 LAB. ARB. REP. (BNA) 1221 (1980) (Seitz, Arb.).

[62] The Supreme Court in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 n.2 (1960), quoted the following passage from Walker,

same way as people do outside the four walls of a plant. When provoked, employees respond aggressively. Some employees are diligent, others lazy, still others insubordinate. Persons in the workplace act out a variety of behaviors triggered by a multiplicity of motives and stimuli. Industrial conduct is a microcosm of ordinary, day-to-day life within a special-purpose community.[63]

To ascertain what in fact transpired that gave rise to the dispute, an arbitrator will draw upon his own past personal and professional experience. He will rely on these informed perceptions to sort out and evaluate the mix of evidential raw events.[64] Necessarily, the process of fact-finding relies on abstractions, a set of expectancies, impressions as to how bits and pieces of testimony fit within or without customary patterns of behavior.[65]

The arbitrator will take into account the inevitable unreliability of perception in the real world. Recollection is not error-free, despite a relator's desire to tell the truth. A witness may not know the truth or may have consciously or unconsciously deceived himself in order to speak an untruth.[66] Either by de-

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Life in the Automated Factory, 36 HARV. BUS. L. REV. 111, 117 (1958):

> Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded ways men think and act when at work. The newly hired employee, the "green hand," is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often with different "weather conditions" such as sudden drafts of heat, cold, or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.

[63] *See generally* Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, PERSPECTIVES, *supra* note 4, at 125.

[64] Cook, *'Facts' and 'Statements of Fact,'* 4 U. CHI. L. REV. 233, 240 (1937).

[65] *See* S. LANGER, PHILOSPHY IN A NEW KEY 89-91 (3d ed. 1957), *quoted in* S. NETH, PROBLEMS AND MATERIALS ON CONFLICT RESOLUTION 155 (Temp. ed. 1976).

[66] When two people are involved in a highly emotional confrontation, their recollection of the facts is far from reliable. Each tends to repress whatever wrong he'd done. Each quickly recasts the event in a light most favorable to himself. As time passes, this distorted view of the event slowly hardens. By the time the arbitration hear-

sign or inadvertence, the partisans to a dispute will present differing versions of key events. Accuracy in fact-finding, while not a quixotic goal, may be difficult to achieve.[67]

To facilitate fact-finding, typical arbitration practice allows for an open-ended hearing not conducted in accordance with the civil rules of evidence.[68] Hearsay is ordinarily admitted, though its reliability can be tested through cross-examination. As Dean Shulman said years ago, the greater risk to the arbitrator is not finding out enough information to render an informed decision.[69] It must be remembered that the participants in the arbitration process are generally untutored in the traditional modes of presenting proof in a formal adjudicatory setting.[70] Parties are

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> ing is held, each man is absolutely certain that his account of what happened is true. Perhaps neither man is then telling a deliberate untruth. Their own self-interest and self-image operate to limit their capacity for reporting the truth.

Mittenthal, *Credibility—A Will-O'-The Wisp,* TRUTH, *supra* note 11, at 62.

[67] *See* Feller, *supra* note 5, at 98.

[68] *See* Abrams, *supra* note 28, at 251-54. The evidentiary rules of a hearing are a matter of the parties' choice, though generally they select the open-ended model. Occasionally, the parties will choose to follow a civil court model. I recall an arbitration years ago in which I represented management in a matter where the company sought an award of two million dollars for damages caused by a wildcat strike. Union counsel insisted on compliance. When reminded that in prior cases we had not followed those rules, he responded with alacrity that this was the first case that the company had brought to arbitration! *Cf.* Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712, 106 L.R.R.M. 3016 (D.C. Cir. 1981).

[69] *See* Shulman, *Reason, Contract, and Law in Labor Relations,* 69 HARV. L. REV. 999, 1017 (1955). A protocol of open-ended receipt of evidence encourages free and uninhibited expression without the encumbrances of the often technical rules of evidence. Those rules were designed to keep prejudicial matters from the ears of untutored jurymen. The open-ended hearing process also serves the collateral, therapeutic purposes of arbitration, allowing the participants to speak freely about their problems and concerns, some of which may not be remediable in arbitration.

[70] Hearings are conducted in an orderly manner under procedures designed to generate the basic information needed by the arbitrator to develop an understanding of the factual underpinnings of a dispute. Witnesses are often sworn to tell the truth. Representatives of the parties are allowed to cross-examine opposing witnesses in order to test the reliability of testimony and demonstrate inconsistencies. At the request of a party, the arbitrator will separate witnesses. In this manner, conformity of recollection by witnesses becomes a useful guide in truth-finding.

Unlike the members of a jury, an arbitrator can take notes on the hearing testimony and, after the hearing, verify his impressions by review of his record.

often not represented by counsel. The trained and experienced arbitrator is expected to be able to sift out the relevant and probative from the irrelevant and prejudicial evidence in making a decision.[71]

The process of finding facts is essentially one of assembling the disparate fragments of proof into a composite picture of what occurred. Some pieces will not fit.[72] Other bits of corroborated testimony may fit nicely. Demeanor of witnesses plays a role.[73] The arbitrator will develop impressions and tentative conclusions as to factual matters as the hearing progresses.

More so than in other adjudicatory proceedings, the arbitrator may affirmatively seek the information that he needs and test the veracity and consistency of witness testimony.[74] As inquisitor, he may ask the questions necessary to lift the facade of a witness and elicit testimony closer to the truth.[75] An experienced arbitrator knows what facts are needed to establish a claim's merit. By affirmatively seeking out the existence or the absence of certain particulars, he can insure that a case is not deter-

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Transcripts, while expensive, are sometimes taken. Increasingly, arbitrators have used tape recorders to assist their notetaking. Any of these methods will aid the adjudicator in reaching factual conclusions.

[71] This expectation may not be fulfilled in every instance. While it is generally thought that an arbitrator can insulate himself against prejudicial evidence, it must be remembered that arbitrators are human, too, "limited by the frailties of the mind." Central Soya Co., 74 LAB. ARB. REP. (BNA) 1084, 1089 (1980) (Cantor, Arb.). Testimony once heard cannot be easily forgotten.

[72] "The unexplainable . . . will have to remain." Pickand Mather & Co., 74 LAB. ARB. REP. (BNA) 1163, 1168 (1980) (Beilstein, Arb.).

[73] Credibility resolution based on witness demeanor can be quite difficult.

> There is only *one* reliable guide to credibility, and that is: there are *no* reliable guides to credibility. . . . Anyone driven by the necessity of adjudging credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill at ease, fidgity witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers.

Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 U.C.L.A. L. REV. 1241, 1285-86 (1966). *See also*, Mittenthal, *Credibility — A Will-O'-The-Wisp*, TRUTH, *supra* note 11, at 63.

[74] *See* Fuller, *supra* note 1, at 11-12.

[75] "He must seek to inform himself as fully as possible and encourage the parties to provide him with the information." Shulman, *supra* note 74, at 1018. *See also* Damaska, *Presentation of Evidence and Fact-finding Precision*, 123 U. PA. L. REV. 1083 (1975); Mittenthal, *supra* note 10, at 71-3.

mined simply by the comparative abilities of the parties' representatives.[76]

The process of fact-finding may be aided also by well established burdens of proof. A discharge case, for example, is the type of dispute where fact-finding is often necessary. In such a case, parties generally expect that arbitrators will require more than a mere preponderance of the evidence in order to establish the just cause of management's disciplinary action. While arbitrators differ in expressing the quantum of proof required, review of the different decisions suggests that arbitrators are essentially using the same approach. In the absence of convincing evidence that the grievant actually committed the censurable act, arbitrators will generally set aside a contested penalty.[77]

Sifting the evidence, drawing inferences and weighing the probabilities based on an understanding of human motivations and behaviors, the arbitrator resolves conflicts in facts. He knows the industrial context in which the activities took place, and he knows how people normally behave in that context. His expertise shortcuts the process of presenting proof. He knows the vocabulary used by the parties, and he is familiar with their customs and behavioral norms.[78] Much like any expert adjudicator, the labor arbitrator will bring to bear a full measure of common sense in resolving evidentiary conflicts.[79] The fact-finding

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[76] Judge Frank in COURTS ON TRIAL, MYTHS AND REALITY IN AMERICAN JUSTICE (1949), recalls Balzac's definition of a jury as "twelve men chosen to decide who has the better lawyer." An arbitrator would be unfaithful to the charge of the parties were he to sit back and judge a private moot court competition. On the other hand, he must allow the parties to present their cases as they wish, as long as they present the evidence essential to the arbitrator's task. *See* Smith, *The Search for Truth—The Whole Truth,* TRUTH, *supra* note 11, at 45-46.

[77] "In discharge cases, it is commonly accepted practice to place the burden on the employer to prove the allegations upon which the discharge was based. To sustain that burden, the persuasive power of the employer's evidence must emerge with forceful clarity." VRN International, 74 LAB. ARB. REP. (BNA) 806, 808 (1980) (Vause, Arb.).

[78] An experienced arbitrator has become fluent in typical shop procedures. He understands "industrial processes, modes of compensation, complex incentive plans, job classifications, shift arrangement, and procedures for layoff and recall . . . ." Fuller, *supra* note 1, at 11.

[79] Consider the following situation which involved the resolution of a factual controversy. A few years ago, General Electric Company at its Lamp Division in Cleveland, Ohio, discharged an employee for attacking a co-employee on the company's parking lot with the flat end of a machete. General Elec. Co., 70

process in arbitration is aided by the fact that scenarios repeat

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LAB. ARB. REP. (BNA) 1174 (1978) (Abrams, Arb.). The grievant claimed that he had hit his co-employee with a plastic ice scraper and not a machete. The grievant had been in the process of scraping ice from his car windows when the argument erupted. At the hearing, it became clear that the parties considered the type of instrument used by the grievant to be a crucial element in deciding the case. The attacked employee testified forcefully that the instrument was a knife with a long blade and was certainly not an icescraper. He testified that the grievant had reached into the back seat of a car, emerged with the machete and proceeded to hit him. Considering this conflicting testimony in isolation, it would have been most difficult to resolve the factual dispute. How can an arbitrator determine what instrument was used? A basic understanding of human behavior suggests that a normal person does not fabricate a story as bizarre as being attacked with a machete. While it is likely, based on this behavioral assumption, that a machete was used, this evidence alone could not be considered to have shown convincingly that a machete was employed.

There were other bits of evidence presented at the hearing which supported a factual conclusion that a machete had been used. The grievant admitted owning a machete at some earlier time. (He claimed to have given it away to his brother-in-law the prior year.) He admitted having kept the machete (when he owned it) in the back seat of a car, but only his wife's car and not the car he took to work on the day in question. The grievant testified that he had never told the attacked employee that he had owned a machete. After the incident, the attacked employee immediately ran to report the event to the plant guard as the grievant sped out of the parking lot. There was also testimony by a company supervisor that a machete had been seen in the grievant's car the prior week. Not all the testimony pointed in one direction; the one eyewitness to the incident testified that he thought the grievant had used an ice scraper.

Thus, in addition to the behavioral assumption that one normally does not fabricate a story of being hit by a South American knife, other premises were at work in resolving the machete caper. The grievant confirmed that he had once owned a machete (not a customary household utensil), and had kept it in a car. It would have been possible, therefore, for a machete to have been in the grievant's car in the company parking lot on that date, though understandably the grievant denied it. As far as the evidence showed, the attacked employee had no motive for creating a machete story. He certainly thought he was being attacked with a machete and immediately after the incident reported that precise perception to the plant guard, who confirmed the attacked employee's story in his testimony. Concluding that the grievant used a machete did not mean that the arbitrator was totally free from any doubt on the matter. However, the coincidence of circumstances was sufficient to convince the adjudicator that the grievant had used a dangerous knife in attacking a co-employee.

In resolving the factual controversy in the machete case, the arbitrator was not faced with the most difficult problem of directly resolving witness credibility. There were enough bits of evidence in the record to allow the reasoning process to go forward without simply having to determine whether the grievant or his co-employee was lying in their testimony under oath. One-on-one truth-telling contests are most difficult to judge. Even in such a situation, testimony

themselves in the industrial context. The insubordinate employee confronting authority, the employer reassigning work, the incorrigibly absent employee with a bag full of excuses—these scenarios and their typical variations fill the volumes of published decisions. An arbitrator, while hearing the evidence, will match the facts of the case at hand against those of cases that have come before. He will inquire of witnesses and the parties in order to fill in the blanks. People in one industrial plant behave in much the same way as people in similar settings. Human behavior is patterned and predictable.[80] Were it not, we could not function in an interactive society. Nor could an arbitrator perform his function of resolving controverted questions of fact. While the open-ended receipt of evidence facilitates the endeavor, arbitration fact-finding is, at base, a familiar, if not simple, process of sifting evidence and matching probabilities against understood norms of human behavior.

IV. The Application of Principles to Facts

Once the labor arbitrator has ascertained a case's relevant facts and selected the appropriate standards for adjudication from the body of arbitral jurisprudence, he then applies those principles to the particular fact situation and resolves the dispute. The application of principles to facts, however, is not a mechanical process. It requires a great deal of judgment. Many arbitral standards are loosely formulated: What is "arbitrary and capricious"? What is "reasonable and fair"?[81] Only in the extreme cases are the answers self-evident, and those cases rarely make their way to arbitration.

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can be evaluated on the basis of internal consistency and conformity with the customary patterns of employee and employer behavior.

[80] *See, e.g.*, H. Hart & A. Sacks, *supra* note 18, at 126.

[81] For example, is it "reasonable" for a telephone company to prohibit its coin telephone collectors from wearing shorts during the sultry summer months in Jacksonville, Florida? Arbitrator Clair Duff recently concluded that this was a reasonable work rule. Southern Bell Tel. & Tel., 74 Lab. Arb. Rep. (BNA) 1115 (1980). This conclusion, while undoubtedly correct, was the product of the exercise of a full measure of judgment guided by the established arbitral principle that management's interest in its "image" should be recognized by an arbitrator.

A. Judgment and Decision-Making

It is, of course, only a matter of analytic convenience to think of the process of arbitral decision-making as scrupulously divided into three discrete stages of fact-finding, standard-finding and application. The process of fact-finding operates within the analytic framework set by the established standards of decision-making. An arbitrator evaluates controverted evidence in light of the principles that he and the parties expect will guide the ultimate decision process. Once the arbitrator ascertains the facts, he must reassess prior interlocutory decisions involving the appropriate guiding principles. Throughout the decision-making process the arbitrator must recognize and consider the outcome implications of selecting certain guiding standards and of finding certain events to have occurred. In the mind of the arbitrator, the application process is ongoing, but it is subject to revision as fact-finding is fine-tuned and the appropriate guiding principles finally selected. All three analytical steps operate concurrently. Once the factual and principled underpinnings for decision-making are finally fixed, the arbitrator can complete the application process with finality and determine the outcome of the controversy.[82] There is much room for judgment at this stage, but it is not uncontrolled, randomly exercised discretion.[83]

Another major task of the arbitrator in resolving disputes is to determine the appropriate remedy, if any is in order. The remedial question is especially pertinent in discharge cases, where arbitrators will not only review whether the ultimate penalty of

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[82] Professors Hart and Sacks refer to this final task of the adjudicator as "the job of linking up the particular with the general . . . ." H. HART & A. SACKS, *supra* note 18, at 375.

[83] While the formulation of arbitral principles has remained fairly stable over the past four decades, the application of those principles in any given case may change over time. Good examples of this developmental process include the many "long hair" and "beard" cases. *Compare* Kraft Dairy Group, Inc., 79-2 LAB. ARB. AWARDS (CCH) ¶ 8376 (1979) (Sacks, Arb.), *with* Western Air Lines, Inc., 52 LAB. ARB. REP. (BNA) 1282 (1980) (Steese, Arb.). The changing mores of the community have influenced arbitral decision-making. *See, e.g.*, New York Air Brake Co., 74 LAB. ARB. REP. (BNA) 875, 877 (1980) (McDonnell, Arb.) ("Words like 'gay, queer, Lesbian, butch, etc.' cannot be measured as foul, given the moral standards of a 1980 community."); and Southern Bell Tel. & Tel., 74 LAB. ARB. REP. (BNA) 1115, 1116 (1980) (Duff, Arb.) ("Contemporary standards of clothing are constantly changing and employers must keep alert to such changes and a periodic revision of dress rules may be appropriate to reflect such standards.")

termination is warranted, but will also consider whether some intermediate penalty, such as reinstatement without back pay, is appropriate.[84] In such cases, the arbitrator's function is much like that of a trial judge sentencing a convicted defendant. Again, the remedy-fixing process is fundamentally a principled one, guided by established understandings of the import of mitigating circumstances, proportionality of penalty and, ultimately, the notions of fairness infused within the contract formulation of "just cause." The parties will normally present evidence directed at those standards to influence the review of the penalty affixed by management, such as the prior work record of the grievant.[85] The arbitrator will evaluate evidence within the established boundaries of this power under the parties' collective agreement.[86]

B. Arbitration Opinion Writing

The arbitrator is expected to explain his resolution of the dispute in a reasoned decision.[87] The protocol of explaining one's judgment inhibits irrationality, though, of course, it does not prevent incorrect decisions. The very activity of expressing the basis for decision channels an adjudicator's mind along rational lines.[88] Writing an opinion orders the decision-making process in

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[84] *See* Seitz, *Substitution of Disciplinary Suspension for Discharge (A Proposed "Guide to the Perplexed" in Arbitration)*, 35 ARB. J. 27 (June 1980).

[85] *See, e.g.*, East Bay Motor Car Dealers, Inc. 70-2 LAB. ARB. AWARDS (CCH) ¶ 8846 (1970) (Kenaston, Arb.) (ten-year employment record considered); Hospital Service Plan of New Jersey, 62 LAB. ARB. REP. 616 (1974) (Kaplan, Arb.) (twenty-year employment record considered).

[86] A few collective agreements expressly require the arbitrator to reinstate a grievant with full back pay if the arbitrator determines that a discharge was not based on "just cause." In such an instance, the arbitrator would be foreclosed from awarding intermediate remedies, such as reinstatement without back pay or reduction of a suspension.

[87] Dean Shulman recognized that the arbitrator's opinion may be "a valuable means of seating reason in labor relations." Shulman, *supra* note 69, at 1021. He cautioned, however, that "the opinions must be carefully restrained. I venture to think that the greater danger to be guarded against is that too much will be said rather than too little." *Id.*

[88] "When an adjudicator knows he must record his judgments and give reasons for them, there are fruitful psychological effects. In Felix Frankfurter's words, we all feel much more responsible if we have to sit down and write out why we think what we think." W. GELLHORN, SECURITY, LOYALTY AND SCIENCE 212-13 (1950), quoting Frankfurter's remarks in *Functions and Procedure of*

a way that increases the legitimacy of the private adjudicatory procedure. The arbitrator tells the parties why they won or why they lost. Assuming that the arbitrator has done his judging job and his writing job successfully, the parties are assured that the decision was made in accordance with established norms and based on true facts.

Review of published opinions indicates that arbitrators follow a standard form for opinion writing which mirrors the decisional process. Typically, the opinion begins with a statement of the issue that the parties have asked the arbitrator to resolve. Implied in the statement of the issue is a preliminary prediction of the class of principles that the arbitrator will employ in resolving the dispute.[89] Here the arbitrator may highlight the controverted facts that will be the basis for resolution of the contested contract matter. The parties can decide for themselves whether or not the arbitrator understood the evidence presented.

The opinion will often include a section setting forth the disparate contentions of the parties. These will include the arguments made at the hearing and those elaborated in post-hearing briefs, if any are filed. In this portion of the opinion, the parties' positions on controverted facts may be presented. The parties' contentions as to guiding principles and appropriate applications of those principles to facts are also explicated. By setting forth the contentions of the parties in a neutral manner, the arbitrator assures them that he has listened to and understood their arguments.

In the decisional section of the opinion, the arbitrator sets forth the principles from the body of arbitral jurisprudence that are apposite to the case at hand. The arbitrator interprets contract provisions, resolves controverted questions of fact and applies the controlling arbitral principles to the facts of the controversy. The arbitrator may labor to explain why he rejected an approach suggested by the losing party. He will often indicate not only what he is deciding, but also what he is not deciding. Gratuitous dictum can be dangerous indeed, but the private parties should be informed of the limits of the arbitrator's

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Administrative Tribunals (A Report on the Cinicinnati Conference), 12 U. CIN. L. REV. 117, 276 (1938).

[89] For example, a reference in the statement of the issue to subcontracting indicates that the "reasonable right to subcontract" principle will come into play unless the contract expressly addresses the issue.

decision.[90]

The arbitration decision always closes with a statement of the award, phrased in terms of granting or denying the grievance in whole or in part. The award also contains the arbitrator's direction to the parties as to how they must act as a result of the arbitrator's resolution of their dispute. It is normally phrased in terms which the parties can carry out privately, without the further intervention of the arbitrator. On occasion, the arbitrator will retain jurisdiction in a matter for a certain period to allow the parties to bring any remedy problems back to his attention for resolution.[91]

C. The Challenge to Make Sense

The culmination of the decision process through the application of principles to facts is undoubtedly the most difficult of the arbitrator's tasks. He is asked to make a final and binding resolution of a dispute which may involve the jobs of employees or what management believes are prerogatives absolutely essential to the productive efficiency of the enterprise.[92] The arbitrator must make sense in this phase of his duties. Nothing less is required. Nothing more can be expected. One cannot view the application process as an open-ended invitation to the arbitrator to do "justice" and exercise "wisdom." The parties pre-establish the outer boundaries of the arbitrator's judgment when they adopt an arbitral mechanism within the context of a collective bargaining relationship. Decisional principles, while flexible guides, are not plastic molds to be reshaped at the whim of the adjudicator. The understood and practiced role of the arbitrator limits decisional discretion by requiring attention to the facts of the particular dispute in decision-making. The powers of the ar-

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[90] *See, e.g.*, Youngstown Hosp. Ass'n, 80-1 LAB. ARB. AWARDS (CCH) ¶ 8322 (1980) (Teple, Arb.).

[91] And on rare occasions the arbitrator's services are sought to clarify his remedy. *See, e.g.*, Piscataway Township Bd. of Educ., 74 LAB. ARB. REP. (BNA) 1107 (1980) (Jacobsen, Arb.).

[92] Not all arbitrations, of course, involve "life-and-death" issues. Quite often seemingly trivial matters take on grand proportions in the workplace and warrant the expense of time, energy and money in arbitration. One recent case, for example, contested the company's removal of the old couch in the women's restroom. Caterpillar Tractor Co., 80-1 LAB. ARB. AWARDS (CCH) ¶ 8241 (1980) (Belshaw, Arb.). Many a wildcat strike has been provoked by a lesser "offense."

bitrator are thus limited, bounded both by the terms of the parties' agreement and the recognized protocols of arbitral adjudication.

CONCLUSION

The charge to a labor arbitrator is formidable. He is asked directly by the parties, and indirectly by the national labor law system, to resolve controversies which arise during the terms of collective agreements. He must act in a manner which furthers the private goals of the parties, and in doing so he serves the public goal of national labor policy of achieving the peaceful resolution of disputes. That arbitrators have done so successfully is clear, based upon the overwhelming acceptance of the process without governmental compulsion. Only in rare instances does a losing party refuse to accept the outcome and seek its reversal in court. The primary reason for the success of the arbitration process is that, as a principled method of decision-making, it achieves outcomes that meet the expectations of the parties in a manner consistent with their intentions in creating the mechanism. This does not mean that in any given case the arbitrator's resolution satisfies both sides. However, it does mean that an arbitrator goes about his decision-making in a way which the parties contemplated when they agreed to a private arbitration system as part of their collective bargaining regime. The arbitrator's application of the principles of arbitral jurisprudence, derived from the common law of the labor agreement, is the mainstay of the adjudicatory mechanism. A system of dispute resolution based on purely discretionary decisions or decisions limited to the expressed statements of the parties' contract would breed conflict rather than assuage it.

As we have seen, there is much in the nature of the arbitral process which corresponds to other forms of adjudication. This conclusion, of course, does not denigrate the importance of the role played by the arbitration process in labor relations. Parties to the industrial partnership have found the mechanism to be essential. Once unions and management institute arbitration as part of their private scheme of self-government, they rarely resort to another method of dispute resolution.

The continuing importance of labor arbitration makes it necessary to focus upon improving the quality of those persons who are privileged to serve as arbitrators. Arbitration deserves its

special status in national labor law policy and its overwhelming adoption by private parties because it has fulfilled successfully the needs of the industrial partners. New arbitrators must be trained to meet those needs. In the first instance, it is essential that arbitrators understand the limits of their decisional roles and the manner in which they are expected to go about their duties. While this discussion will continue the process of understanding the nature of arbitral decision-making, further study is certainly required.[93] Only through continuous self-examination will arbitration be able to meet the increasing challenges of the coming years.[94]

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[93] It is surprising and regrettable that the techniques of empirical research have been applied infrequently to the arbitration experience. Professor Fleming's studies of the 1960's have not been replicated, nor has his agenda for further research been pursued. R. FLEMING, *supra* note 4, at 203-22. The existing institutions and policies of the American labor law system would benefit from such empirical study. *See, e.g.*, Roomkin & Abrams, *Using Behavioral Evidence in N.L.R.B. Regulation: A Proposal*, 90 HARV. L. REV. 1441 (1977).

[94] The ideals that keep a social institution alive and functioning are never perceived with complete clarity, so that even if there is no failure of good intentions, the existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles.

Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356 (1978).