PRACTICE AND PROCEDURE IN LABOR ARBITRATION

SECOND EDITION

OWEN FAIRWEATHER

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PRACTICE AND PROCEDURE IN LABOR ARBITRATION

Preface

Beginning in about 1938, when labor arbitration agreements began to include an arbitration procedure, the courts started out misunderstanding the process and frowned upon it; later they began to protect it and enforced the awards; then they began to supervise it. An increasing variety of various types of Section 301 suits have been filed in courts to obtain vacations, revisions, and *de novo* appellate reviews of awards which are now essentially attaching labor arbitration to the bottom of the judicial process, increasing formalism and costs and stretching out resolution time.

In the beginning, when a labor agreement was a relatively primitive document, many arbitrators considered themselves to be private mediators. At the time, arbitrators subscribed to the cliché that arbitration was an informal process in which external rules of practice and procedure were out of place and that the parties had granted to the arbitrator the authority to make whatever rules he believed he needed. The arbitrators quite naturally nurtured this view and when the cliché was operating, courts rarely pried into practice and procedure matters.

When the first edition of this book was assembled in the late sixties the procedural variations in what arbitrators actually did were catalogued. The author said in the preface that he was concerned for fear that cataloguing of the variations in procedures would tend to set up rigidities that might dampen an arbitrator's freedom. He said:

> The process of cataloguing started in various legal memoranda, but the attempt to make a reasonably complete catalogue began in 1967. As material was collected, the risk involved in cataloguing became quite clear. A practice or procedure that is reported might be considered to be endorsed as the preferred practice or procedure. Partly for this reason, an effort was made to report the variety that exists with a conscious effort to avoid editorial identification of the "best" procedure. Some of the flexibility so valuable to the labor arbitration process might inadvertently be damaged if one procedure or another were considered "best."

Beginning in the mid-sixties, statutes and regulations governing the employer-employee relationship came into being and became more complex and pervasive. Matters once regulated by collective bargain-

ing or, in default, left to management decision, became subject to constitutional or statutory command.

These statutes, and the regulations adopted pursuant to their authority, introduced legal principles as the basis for the rights of individual employees, and these rights can be vindicated in courts as well as in arbitration. As arbitration procedures became more formal, arbitration became more expensive. But even the most costly arbitration proceedings are economical by comparison with the cost of the trial of a lawsuit with similar issues. Judge Alvin Rubin of the Fifth Circuit has stated:

> It seems to me that arbitration is not only a just means of resolving disputes, but that even the most formal arbitration proceeding is much faster, less expensive, and more responsive to industrial needs than the best-run courts available today. It is a myth that access to justice must mean access to the courts, especially the federal courts.[1]

In the late seventies, more procedural rigidities sprang up, not because the practices and procedures of arbitrators had been catalogued, but because the Supreme Court in a series of decisions passed on to the trial courts the duty of reviewing arbitration awards if they "touched the law." Chief Justice Warren Burger, a member of the Supreme Court when it contributed to the trend moving grievance cases into courts, explained: "Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal entitlements."[2]

When a Section 301 suit starts up a review of an award the case will have no priority, unless an injunction is sought and, as Judge Rubin explained, the case "dawdles on the calendar. It is not unusual for [such a] case to linger four years before final decision."[3]

No longer is there any concern because the cataloguing of procedures might reduce the "flexibility so valuable to the labor arbitration process." The concern is now the reverse. Will labor arbitrators absorb the simple yet sound legal procedures fast enough to cause courts and agencies to accept the awards without relitigating them, slowing down the resolution of many types of grievances that once were considered the labor arbitrator's exclusive campgrounds?

Chief Justice Burger is now a champion to reverse the trend. He said arbitration awards should again be considered final and binding.

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[1]Rubin, *Arbitration: Toward a Rebirth*, TRUTH, LIE DETECTORS, AND OTHER PROBLEMS IN LABOR ARBITRATION, Proceedings of the Thirty-First Annual Meeting, National Academy of Arbitrators, J. Stern and B. Dennis, eds. (Washington: BNA Books, 1979), p. 30.

[2]Burger, *Isn't There a Better Way?* (1982 report on the state of the judiciary), 68 ABA J. 274.

[3]Rubin, note 1 *supra*, at p. 34.

> [A]rbitration procedures [should] become a realistic alternative rather than an additional step in an already prolonged process. For this reason, if a system of voluntary arbitration is to be truly effective, it should be final and binding, without a provision for *de novo* trial or review.[4]

Judge Rubin adds to Chief Justice Burger's comments a pragmatic suggestion:

> [W]e should ... consider making it possible by statute for unions and employers to agree on the resolution by arbitration of many of the issues that are governed by both statute and agreement. Many issues of employment discrimination, equal pay, age discrimination, and the like could be decided as well or better by an arbitrator as by a federal judge.[5]

Labor arbitrators are good public servants. They are good scholars, and they work hard. However, if they are to help reverse the trend as urged by Chief Justice Burger, Judge Rubin, and others, they and the representatives on both sides must watch carefully: many courts and agencies are standing ready to accept an award for review if the arbitrator has lowered his or her guard and provides them any reason to do so.

Judge Harry T. Edwards, once an active arbitrator and now a busy member of the District of Columbia Circuit Court, believes the trend toward the use of a court to resolve disputes is harmful because "The judicial process is heavily steeped in procedures. Many cases may be won or lost on 'procedural' points that have nothing whatsoever to do with the merits of the case." Thus, he urges arbitrators, who must focus on the growing appellate review, to avoid developing a "magistrate mentality."

> [T]he potential hazard of judicial review is that it will likely result in arbitrators deciding cases and writing opinions in such a way as to insulate their awards against judicial reversal.... If the arbitrator adopts a "magistrate mentality," and performs only as if he or she is "the first link in one or more appellate chains," then it is entirely possible that no one will ever concentrate fully on the merits of the case. Indeed, if arbitrators in any sector begin to think of themselves as magistrates rather than arbitrators, the advantages of the arbitral process will be lost.[6]

I am deeply indebted to Eileen Hickey, my secretary, who also poured effort into the first book. The real backup on the team, how-

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[4]Burger, note 2 *supra*, at p. 277.

[5]Rubin, note 1 *supra*, at pp. 37-38.

[6]Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge,* ARBITRATION 1982: CONDUCT OF THE HEARING, Proceedings of the Thirty-Fifth Annual Meeting, National Academy of Arbitrators, B. Dennis and J. Stern, eds. (Washington: BNA Books, 1983).

ever, has been Tim Darby, a tireless, dedicated, skilled editor, who goes farther than do most editors—and he has been a good challenger, a needed member of any team.

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