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The Role and Rights of the Individual in Labor Arbitration

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THE ROLE AND RIGHTS OF THE INDIVIDUAL
IN LABOR ARBITRATION

HERBERT L. SHERMAN, JR.†

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I. INTRODUCTION AND BACKGROUND

The Supreme Court of the United States has not provided
specific answers to many of the questions that arise concerning
the role and rights of the individual in labor arbitration. Although
many of these questions have been the subject of

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spirited discussions by arbitrators, and some of the various views on these questions have been set forth in the published literature,1 Gerald Aksen, former General Counsel of the American Arbitration Association, has properly said that "arbitration and individual rights cannot be overexplored." 2 Thus, this article will attempt to shed some new light on this subject, particularly as the questions concerning the role and rights of the individual in labor arbitration may call for a ruling or other action by an arbitrator. In connection with such questions this article will examine a series of claims that have been made on behalf of individuals. Relevant judicial rulings and positions which labor arbitrators are likely to take in actual practice when such questions arise will be identified, and observations on the propriety of such positions will be made.

A. Rights Arbitration v. Interest Arbitration

Questions involving the role and rights of the individual in labor arbitration are far more likely to arise in connection with "rights" arbitration than in connection with "interest" arbitration. In rights arbitration a grievant is claiming a violation of rights under an applicable collective bargaining agreement. A grievance has been filed under the grievance procedure provisions of the applicable collective bargaining agreement, and it

1. See McKelvey, The Duty of Fair Representation: Has the Arbitrator a Responsibility?, 41 ARB. J. 51 (June 1986). The author presents a brief review of various views of members of the National Academy of Arbitrators on the nature of an arbitrator's responsibilities to assure due process to individual grievants involved in arbitration procedures. The author begins with the views of W. Willard Wirtz as set forth in 1958 at the Eleventh Annual Meeting of the National Academy of Arbitrators. Mr. Wirtz believed that if the arbitrator failed to protect the individual's rights in an arbitration hearing, the courts would do so. See also Wirtz, Due Process of Arbitration, PROCEEDINGS OF THE ELEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1-36 (J. McKelvey ed. 1958).

has been processed in accordance with the terms of this procedure to the final step—which normally is arbitration. Although no federal law requires that collective bargaining agreements in the private sector of the American economy provide for arbitration as the terminal point of a grievance procedure, about ninety-five percent of the collective bargaining agreements in the United States do in fact provide for “rights” arbitration.

On the other hand, “interest” arbitration, which is used much less frequently than rights arbitration, involves mutual agreement of an employer and a union to arbitrate the question of what shall be the terms of a new collective bargaining agreement or what revisions shall be made in the terms of an expiring or expired collective bargaining agreement. In interest arbitration the issues are more likely to involve such broad questions as general increases in pay in the overall wage structure, installation of a new job classification program, an increase or decrease in the number of paid holidays and broad concession matters in times of economic stress, etc.

In contrast, the most common types of grievances which are arbitrated in rights arbitration involve questions of whether employees have been discharged for just cause, whether an employer had just cause to impose disciplinary suspensions on

3. The adjudication of labor grievances in other countries differs from the way such grievances are handled in the United States:

In many other industrial relations systems, adjudication of grievances has not been left in the hands of private arbitral tribunals.

In Canada, where institutional arrangements most closely resemble those of the United States, labor relations statutes typically provide that: (a) the parties must write no-strike and arbitration clauses into collective bargaining agreements, (b) in the event of their failure to do so, standard form clauses are deemed to be included, and (c) arbitrators enjoy certain procedural powers, including the right to administer oaths, subpoena witnesses, and enforce awards by registering them in the court. See, e.g., Ontario Labor Relations Act, Rev. Stat. Ont. 1960, c.202, as amended, Sections 33, 34. However, the operation of the system otherwise closely conforms to the United States model.

In a number of European countries, labor courts perform some functions analogous to our arbitration boards (as well as many other functions). For example, in France, the labor courts (conseils de prud’hommes) have jurisdiction only over disputes relating to individual employment contracts, in Germany over both individual and collective agreement disputes, and in Sweden over collective agreement disputes only.


4. Id. at 459.

5. Id. at 462.
employees, whether the seniority provisions of the collective bargaining agreement have been properly applied to an employee who has grieved and whether the wage provisions of a collective bargaining agreement have been properly applied to a grievant who has filed a grievance. Thus, it is not surprising that questions involving the role and rights of an individual employee are more likely to arise in connection with rights arbitration since individuals are more likely to identify more personally with the types of issues which are arbitrated in that kind of arbitration.

B. Claim that Individual Should Have a Vested Right to Have a Grievance Arbitrated

Some commentators have claimed that individual employees should have a vested right to use the grievance and arbitration provisions of an applicable collective bargaining agreement, particularly where critical job interests (such as protection from discharge or improper layoff) are involved. Since this is one question concerning the rights of individuals in arbitration that has been answered by the Supreme Court of the United States, the answer to this question should be set forth early in this article. Although it is not an issue which is likely to require a ruling by an arbitrator, the rulings of the Supreme Court on this issue provide important background thinking which affects the views set forth below.

In Vaca v. Sipes an employee was discharged for poor health after he returned from a sick leave. To obtain reinstatement, a grievance was filed, and it was processed through the first four steps of the grievance procedure. Medical evidence concern-
ing grievant’s fitness to work was in conflict. At union expense, the union had the grievant go to a medical doctor to support its position in the event the union took the case to arbitration, but the medical examination did not support the grievant’s claim. Thus, the union did not process the grievance to arbitration. In response, the grievant sued the union in a Missouri state court, alleging that the union had “arbitrarily, capriciously and without justifiable reason or cause” refused to take the grievance to arbitration under the grievance procedure set forth in the collective bargaining agreement. In this action against the union the jury found that the grievant was entitled to $7,000 compensatory damages and $3,300 in punitive damages. Although the trial court set the verdict aside on jurisdictional grounds, the Supreme Court of Missouri reversed and reinstated the verdict.10

An appeal of this well-known case to the Supreme Court of the United States led to a series of important rulings related to the duty of fair representation which a union representing a majority of employees in a bargaining unit owes to members of that unit. Recognizing that “courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions,”11 the Court stated that “[a] breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”12

Of particular relevance to the issue of the rights of the indi-

10. *Id.* at 174.


Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


12. *Id.* at 190. The union's duty of fair representation was first recognized by the U.S. Supreme Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). In *Conley v. Gibson*, 355 U.S. 41 (1957), the Court made it clear that the duty of fair representation is applicable to administration of the collective bargaining agreement as well as to negotiation of the collective bargaining agreement. *Id.* 355 U.S. at 46.
individual in arbitration are the following passages from the Court's opinion:

Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. . . .

[W]e do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration [and that] frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. . . .

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined. . . .

Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here.13

Although the majority opinion in this case recognizes in dicta that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved,"14 Justice Black in his dissent points to the hurdles which the individual must overcome to obtain relief:

The rule is that before an employee can sue his employer under § 301 of the L.M.R.A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory or . . . bad faith" conduct on the part of his union. . . .

It puts an intolerable burden on employees with meritori-

13. Vaca, 386 U.S. at 190-95. The Supreme Court thus rejects the New Jersey view set forth in Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963) that an individual has an absolute right to process a discharge grievance through all steps of the grievance procedure to arbitration, and that the individual has the right to control the presentation of his case.

14. Id. at 196.
ous grievances and means they frequently will be left with no remedy.\(^{15}\)

While \textit{Vaca v. Sipes}, decided 1967, dealt with the rights of the individual in the context of a lawsuit under section 301 of the Taft-Hartley Act, it was not until 1975\(^{16}\) that the Supreme Court of the United States interpreted the provisos of section 9(a) of the amended National Labor Relations Act (NLRA).\(^{17}\)

A reading of the provisos, particularly the first proviso, to section 9(a) of the amended NLRA could lead one to believe that the individual has a \textit{legal right} to process his grievance in the grievance procedure of an applicable collective bargaining agreement, since this statutory provision clearly states that employees have the "right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative. . . ."\(^{18}\) Of course, this provision should be considered in the context of a complete statement of section 9(a), which reads as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: \textit{Provided}, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: \textit{Provided further}, that the bargaining representative has been given opportunity to be present at such adjustment.\(^ {19}\)

Although the words of the first proviso "that any individual employee or a group of employees shall have the right at any

\(^{15}\) \textit{Id.} at 203–10 (Black, J., dissenting).

\(^{16}\) Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61 (1975).


\(^{18}\) \textit{Id.}

\(^{19}\) \textit{Id.} The first part of section 9(a) gives the majority union the status of an exclusive bargaining representative for all employees in the bargaining unit regardless of whether they are members of the union. This feature of the American industrial relations system distinguishes the U.S. system from the industrial relations systems of Western Europe.
time to present grievances to their employer"\textsuperscript{20} were con-
tained in the original NLRA of 1935\textsuperscript{21} (popularly known as the
Wagner Act), the Supreme Court of the United States never
resolved the dispute over the various interpretations of this
language which arose between 1935 and 1947. In 1947 the
balance of the current language in section 9(a) was added to
the NLRA by the Labor Management Relations Act, 1947,
(Taft-Hartley Act),\textsuperscript{22} and finally in 1975 in \textit{Emporium Capwell v.}
Western Addition Community Org.\textsuperscript{23} the Supreme Court of the
United States considered the meaning of the current language
in the first proviso to section 9(a).

In \textit{Emporium Capwell} some individual black employees at a
store, who ignored their union (which was trying to help them
with their grievances) and who picketed the store in protest
against the company's allegedly racist employment practices,
were discharged. Holding that the NLRA did not protect
those employees against discharge because their activities
should have been channelled through the grievance procedure
and handled by the union, the Court relied on the exclusive
representation concept set forth in the opening part of section
9(a) of the NLRA.\textsuperscript{24} The Court agreed with the National Labor
Relations Board that these minority employees could not cir-
cumvent the union, their elected representative, to engage in

\textsuperscript{20} 29 U.S.C. § 159(a) (1982).
\textsuperscript{21} Wagner Act, ch. 372, 49 stat. § 449 et seq. (1935).
\textsuperscript{22} Labor management Relations Act, 1947, (Taft-Hartley Act), ch. 120, § 9, 61
stat. 136 (1947). For an analysis of the impact of the 1947 amendments on the pre-
1947 cases, see Sherman, \textit{The Individual and His Grievance—Whose Grievance Is It?}, 11 U.
Pitt. L. Rev. 35 (1949).
\textsuperscript{23} Emporium Capwell, 420 U.S. at 61–73.
\textsuperscript{24} The Court also indicates that employees who elect collective bargaining must
take the "bitter with the better" and that not all individual employees are necessarily
better off under collective bargaining. The Court set forth this philosophy in the
following language: "Central to the policy of fostering collective bargaining, where
the employees elect that course, is the principle of majority rule. In establishing a
regime of majority rule Congress sought to secure to all members of the unit the
benefits of their collective strength and bargaining power, in full awareness that the
superior strength of some individuals or groups might be subordinated to the inter-
est of the majority. . . As a result, '[t]he complete satisfaction of all who are repre-
sented is hardly to be expected.' Ford Motor Co. v. Huffman, 345 U.S. 330, 338
(1953)." Emporium Capwell, 420 U.S. at 62 (citations omitted).

Obviously, \textit{Emporium Capwell} shows that selection of a union as bargaining repre-
sentative by employees reduces the opportunities for individual employees to deal
directly with the employer.
bargaining with their employer over issues of employment discrimination.

The meaning of the proviso to section 9(a) was not a principal issue in *Emporium Capwell*, but in a footnote the Court said the local civil rights organization representing the picketers "misapprehends the nature of the 'right' conferred by [the proviso]" and that:

The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5). The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in *Black-Clawson Co. v. Machinists*.26

Thus, the Supreme Court followed the reasoning of *Black-Clawson*27 where the Second Circuit, in a declaratory judgment action under section 301 of the Taft-Hartley Act, said that section 9(a) does not confer upon an individual grievant the power, enforceable in a court of law, to compel the employer to arbitrate his [discharge] grievance. . . . Despite Congress' use of the word "rights" . . . we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer. . . . The proviso was apparently designed to safeguard . . . the employer who voluntarily processed employee grievances. . . . "The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before."28

Therefore, it is clear that an individual employee does not have a vested right to appeal his grievance to arbitration or to have his grievance taken to arbitration where the collective bargaining agreement does not provide any such right.29 An

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26. *Id.* (citations omitted).
27. *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962).
28. *Id.* at 184–85.
29. A collateral question, though not involving an issue of a ruling by an arbitrator, is whether an individual employee may obtain relief in a state court action under state law for alleged violation of a collective bargaining agreement. In such an action
elaboration of this view and some of the underlying policy reasons in support of this view are set forth in the following excerpt from an opinion of Betty Murphy, former Chairman of the National Labor Relations Board:

Thus, an employee who feels aggrieved by some action of the employer can file a grievance under the contract but has no standing to compel the union to process the grievance through arbitration if the grievance is resolved against the employee. Arbitration is a costly process and unions for the most part lack the resources necessary to [arbitrate] every grievance filed. Indeed, short of a failure to fairly represent, unions have wide discretion in determining which grievances to pursue to arbitration and which to abandon or to trade off in favor of some other advantage.30

It is against this backdrop that the present article will turn to a series of specific claims involving the role and rights of an individual employee in labor arbitration which may call for a ruling or other action by an arbitrator.

II. CLAIM THAT A NON-GRIEVANT EMPLOYEE WHO WILL BE AFFECTED BY THE ARBITRATION AWARD HAS A RIGHT TO PARTICIPATE IN THE ARBITRATION HEARING

A common type of grievance which is appealed to arbitration is a grievance by a senior employee who is claiming that he should have been promoted to fill a vacancy in a higher-paying job rather than the junior employee (with less seniority) who was promoted by the employer on the ground that the junior employee has greater ability than the senior employee to perform the duties of the higher-paying job. Most unions in the United States are strong believers in the role of seniority, and most collective bargaining agreements contain seniority provi-

the plaintiff may be defeated by precedents illustrated by Newspaper Guild of Greater Philadelphia v. Philadelphia Daily News, 401 Pa. 337, 164 A.2d 215 (1960), where the Supreme Court of Pennsylvania noted that

in Falsetti v. Local Union No. 2026, [400 Pa. 145, 161 A.2d 882 (1960)]... we held that a union member-employee cannot individually enforce seniority rights governed by a grievance procedure in a collective bargaining agreement even though the provisions relied upon inure directly for the benefit of the employee and make him in effect a third party beneficiary of the agreement.

Newspaper Guild, 401 Pa. at 344, 164 A.2d at 219.

sions. If the collective bargaining agreement contains a seniority provision applicable to promotions to higher-paying jobs, the union normally supports the grievance of the senior employee who is seeking the promotion.

If the grievance is not settled in the grievance procedure and is appealed by the union, on behalf of the senior employee, to arbitration, does the junior employee who has been promoted by the employer and who will be displaced if the union wins in arbitration have a right to notice of the arbitration hearing and a right to participate in the hearing? Professor Clyde Summers, a respected scholar and long-time strong advocate for individual rights, takes the position that "the promoted employee should be given an opportunity to be heard," and that the arbitrator should refuse to proceed with the arbitration hearing until the junior promoted employee is notified of a right to attend the arbitration hearing and is given the right to be heard.

Nevertheless, in actual practice, it is a rare arbitrator who follows this view. Most arbitrators believe that such a procedure is not normal nor necessary. At meetings of veteran arbitrators, they have been asked by the present author how many have arbitrated cases involving a union claim that a senior employee should have been promoted rather than a junior employee. All of these arbitrators had heard such routine cases. The arbitrators were then asked whether they had refused to proceed with the arbitration hearing until they were assured

31. This problem was raised as far back as 1958 at a meeting of the National Academy of Arbitrators. See Wirtz, supra note 1, at 23–25. Intervening developments show that the matter has not been resolved and that it is still controversial.


34. E.g., response of arbitrators from three states at Arbitrator's Symposium, in Pittsburgh, Pennsylvania (March 9, 1988).
that the junior employee had been given an opportunity to be present. None of the arbitrators had followed this procedure.\textsuperscript{35}

The basic position expressed by most arbitrators is that the employer, who promoted the junior employee, represents the interests of the junior employee at the arbitration hearing. Although the employer’s interests may not be identical with those of the promoted employee, most arbitrators properly believe that in actual practice the employer vigorously defends the decision that he made in promoting the junior employee and that the interests of the junior employee are presented adequately to the arbitrator.

There is not much law on this subject. Nevertheless, in a situation in which an employee was not a grievant in an arbitration case but whose seniority was reduced as a result of the arbitration award, thereby causing his layoff from work, the Seventh Circuit Court of Appeals said:

Petitioner [the employee who was laid off as a result of the arbitration award] contends, \textit{inter alia}, that his rights were denied since he was not given notice of the arbitration hearing and did not appear there. We disagree. There is no statutory or constitutional right of an employee to be present at an arbitration hearing. It appears that the company fully and adequately defended petitioner’s position at the hearing.\textsuperscript{36}

\textsuperscript{35} The views expressed in this article about actual arbitration procedure do not purport to be the result of a scientific survey. The understandings of the present author about arbitration practices have been developed over a period of forty years of teaching labor law and labor arbitration during which the present author, for the past thirty-six years, has arbitrated well over 1,000 cases in all parts of the United States and in parts of Canada. He has served as a member of the Board of Governors of the National Academy of Arbitrators as well as on other committees of the National Academy. As a member and former national chairman of the Labor Law Group Trust, he has researched and published books (with other members of the Group) relating to labor arbitration.

It is not unusual for authors of books and articles involving practices in labor arbitration to rely on discussions with arbitrators. \textit{See}, e.g., H. Sacks & L. Kurlantzick, Missing Witnesses, Missing Testimony and Missing Theories n.n. 2, 4 & 63 (1988); R. Fleming, The Labor Arbitration Process 134–64 (1965) (chapter six, which deals with problems of procedural regularity, relies heavily on discussions among arbitrators as to their views, since not many reported cases discuss these issues). Likewise, the present author relies on discussions with arbitrators in all parts of the United States about their practices as well as the published literature in the field.

\textsuperscript{36} Ramsey v. NLRB, 327 F.2d 784, 788 (7th Cir. 1964), \textit{cert. denied}, 377 U.S. 1003 (1964).
The same reasoning could properly be deemed to be applicable to a promotion case in which the promoted junior employee claims that he should have a legal right to be present at the arbitration hearing where the union protests his promotion and supports the senior bidder for the job.

An argument may be made that the arbitrator has a duty to maintain the integrity of the arbitration process, and that the arbitrator therefore must affirmatively seek to determine whether the union has complied with its duty of fair representation. Since a union owes a duty of fair representation to a junior promoted employee as well as to a senior bidder for the job, it may be argued that the arbitrator should refuse to proceed with the arbitration hearing until he is assured that the junior promoted employee has been given an opportunity to be present at the arbitration hearing.

The Rhode Island case of Belanger v. Matteson is sometimes cited in support of the view that a court will vacate an arbitration award where the union does not consider the interests of the junior promoted employee and that the arbitrator, therefore, has a greater responsibility to be concerned about the adjudication of individual rights. However, a close reading of this case shows that it does not support this proposition. In fact, the Supreme Court of Rhode Island disagreed with the lower court and expressly refused to vacate the arbitration award.

In Belanger, two teachers applied to fill a vacancy in the school system. When the junior employee was promoted, the senior employee's grievance was processed to arbitration. Under the terms of the collective bargaining agreement the board of arbitration upheld the grievance. The junior employee who was displaced as a result of the arbitration award brought suit to vacate the award. Although the court found that the union had violated its duty of fair representation be-

40. Id. at 334-35, 346 A.2d at 127-28. Cf. Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1250 (8th Cir. 1980), cert. denied, 449 U.S. 839 (1980). In Hussmann the court criticized the union for blind adherence to a policy of favoring employees with greater seniority. The court, however, demonstrated a lack of knowledge of the reasons why unions have such strong beliefs about the role of seniority and a lack of knowledge of the realities of collective bargaining relationships. See id. at 1250, n.3.
cause the union did not check on the relative qualifications of the applicants to fill the job vacancy before proceeding to arbitration, the Supreme Court of Rhode Island refused to vacate the arbitration award.\textsuperscript{41} Since the court found that the employer's position at the arbitration hearing was coextensive with that of the junior promoted employee and that the employer had forcefully presented the employee's position, the court held that the union's breach of its duty of fair representation in this type of situation did not justify vacating the arbitration award.\textsuperscript{42} Although the junior employee testified on his own behalf at the arbitration hearing (a fairly unusual procedure), the court did not put any special emphasis on this fact.\textsuperscript{43}

The Rhode Island court expressly rejected the Wisconsin view,\textsuperscript{44} expressed in the old case of \textit{Clark v. Hein Werner Corp.}\textsuperscript{45} The \textit{Clark} court held that "[e]mployees not fairly represented by the union should never be put in the position of having to solely depend upon the employer championing their rights under the collective bargaining contract."\textsuperscript{46} In this Wisconsin case some production employees who had been promoted to supervisory positions later returned to the production bargaining unit. A dispute arose between the union and the company over whether these employees had continued to accrue seniority. Employees who were laid off as a result of the supervisors' return to the bargaining unit filed a grievance in protest, which the union processed to arbitration. The arbitrator upheld the grievance. In response, the supervisors who were not present at the arbitration hearing because they had not received specific notice of it brought an action in court to enjoin enforcement of the arbitration award. This was based solely on the contention that the arbitrator had exceeded his jurisdiction.\textsuperscript{47}

The Supreme Court of Wisconsin held that the supervisors were not bound by the arbitration award because they had not been given proper notice of the arbitration hearing.\textsuperscript{48} Ironically, in the course of finding that the arbitration award was

\\textsuperscript{41} Belanger, 115 R.I. at 350, 346 A.2d at 138.
\textsuperscript{42} \textit{Id.} at 346-47, 346 A.2d at 132-35.
\textsuperscript{43} \textit{Id.} at 348-49, 346 A.2d at 134.
\textsuperscript{44} \textit{Id.} at 346, 346 A.2d at 133.
\textsuperscript{46} \textit{Id.} at 275, 99 N.W.2d at 138.
\textsuperscript{47} \textit{Id.} at 269, 99 N.W.2d at 134.
\textsuperscript{48} \textit{Id.} at 275, 99 N.W.2d at 138.
not binding because of a procedural deficiency in the arbitration process, the court engaged in the questionable procedure of deciding the case on the basis of a claim which was not made by the plaintiffs and apparently was not argued by the parties. This left unanswered the only contention raised by the plaintiffs—that the arbitrator had exceeded his jurisdiction.

The basic facts of the Clark case are almost identical with one of six problems used by National Academy of Arbitrators members W. Willard Wirtz, Benjamin Aaron and R.W. Fleming as a basis for discussion by arbitrators in meetings held in various metropolitan areas in 1959 and 1960. Their report is a survey of these meetings which were designed to ascertain the reaction of arbitrators to the problems presented. The report stated that the arbitrators uniformly believed that the lack of notice to a supervisor of the arbitration hearing on the grievance of the employee who was displaced by the supervisor did not constitute a due process violation because the arbitrators felt that the company was responsible for representing the interests of the supervisor. Thus, most of the arbitrators did not believe that the arbitration award in the Clark case was invalid because the union did not, and could not, fairly represent the former supervisors.

As noted supra, the thinking of most arbitrators in the late 1980s is consistent with the thinking of the arbitrators expressed in the 1960 survey. In balancing individual interests against group interests, most arbitrators do not believe that an employee is entitled, as a matter of due process to maintain the integrity of the arbitral process, to notice of an arbitration hearing or an opportunity to participate in the hearing simply because the employee probably will be affected by the arbitration award. Most arbitrators do not believe that it is their duty to call a promoted junior employee as a witness or to make sure that he has been given an opportunity to be present at the arbitration hearing in order to ensure that the union has not violated its duty of fair representation.

Relevant to the union's duty of fair representation in seniority cases are two decisions of the Supreme Court of the United


50. See text supra between notes 33 and 35.
States which specifically deal with seniority issues. These decisions show the broad range of discretion that a union has regarding its duty of fair representation in seniority matters. One case, Ford Motor Co. v. Huffman, involved a reduction of the relative seniority of the plaintiff because of a negotiated grant of seniority credit for military service prior to employment. This in turn led to a layoff. The Court said:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such difference does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The other case, Humphrey v. Moore, which involved the dovetailing of seniority lists following a merger of two companies, is relevant to the question of the validity of the statement by the Supreme Court of Wisconsin in Clark that:

Where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause... to espouse, the union acts completely objectively and with the best of motives.

It appears that this proposition of law is no longer valid in light of the ruling of the Supreme Court in Humphrey that there is not necessarily any inadequacy of representation any time that a union represents employees having antagonistic interests.

51. 345 U.S. 330 (1953).
52. Id. at 338.
53. 375 U.S. 335 (1964). This case involved use of a joint conference committee consisting of employer and union representatives (but no neutral) to resolve a seniority dispute. The present author concurs with Professor Rabin who “deplores the fact that these joint committees have been accorded by the Supreme Court the status of an arbitration tribunal, when they should more properly be viewed as the penultimate step in the grievance procedure, preceding arbitration.” See McKelvey, supra note 1, at 54.
54. 8 Wis.2d 264, 99 N.W.2d 132.
55. Id. at 272, 99 N.W.2d at 137.
56. See R. Fleming, The Labor Arbitration Process 110, 119–20 (1965). Fleming notes that Humphrey v. Moore contravenes the view that there “is per se inade-
The Court expressed this view as follows:

But we are not ready to find a breach of the collective bargaining agent’s duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurrent fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.57

III. Claim that Grievant Is Entitled to Notice of, and to Be Present at, the Arbitration Hearing

Unlike the basic issue in the preceding section of this article which deals with possible rights of non-grievant employees who will be affected by an arbitration award, this section of the article deals with the question of whether every grievant is legally entitled to notice of the arbitration hearing at which that person’s grievance will be heard and whether every grievant is legally entitled to be present at the hearing of that person’s grievance. It may surprise some to read that there is no clear legal answer to this question. Of course, as noted supra,58 the Seventh Circuit Court of Appeals has noted that “[t]here is no statutory or constitutional right of an employee to be present at an arbitration hearing.”59 Although this statement was made in the context of determining whether an employee who is not listed as a grievant, but who probably will be affected by the arbitration award, is entitled to be present at the hearing,
the question remains as to whether this view should be extended to apply to a grievant.

A reasonable argument can be made that not all grievants should have a legal right to notice of and to be present at the arbitration hearing where their grievance is heard. Examples involving job classification, seniority, disciplinary suspensions and discharge will demonstrate the practical complexities of this matter.

One example involves a job classification grievance seeking a higher job class for a job of Boiler House Operator. The grievance has been signed by the twelve regular incumbents of the job and by all employees who may serve as temporary incumbents of the job. If the union does not seriously attempt to notify more than eight of the regular incumbents about the date of the hearing (two from each shift where a 20-turn per week schedule is used) and asks only four of these employees to appear as witnesses at the hearing, have the rights of the other grievants been violated? Arguably not all of the other signers of the grievance have a legal right to notice and to be present at the hearing. This is especially true if, by their presence at the hearing, the boiler house would have to be shut down for the day. Moreover, under the job classification program, the dispute may primarily concern the employer and the union as an entity, over the proper relationship of the job in dispute to other jobs in the wage structure.

Another example involves a seniority grievance. Suppose all thirty employees of an important department have signed a seniority grievance involving interpretation of the layoff provision of the collective bargaining agreement. It may be reasonably argued that not all of the signers of the grievance have a legal right to notice and to be present at the arbitration hearing that will determine proper interpretation of the contract. This is particularly true if by attending the hearing the signers' department would have to be shut down for the day. Perhaps the same observation is valid where the same thirty employees have received staggered disciplinary suspensions of ten days each (because they all engaged in the same conduct in walking out in breach of the collective bargaining agreement), all have signed a grievance to protest their suspension, and this grievance is scheduled for arbitration.

For some arbitrators, discharge cases seem to present more
procedural difficulties. These difficulties have produced a great diversity of views, among arbitrators, as to how certain procedural issues should be resolved. One type of discharge case involves the following problems. Assume that three employees are involved in one incident (such as fighting) and they are discharged. They file grievances to protest their discharges, but only two of the three grievants appear at the arbitration hearing. It seems that, at the least out of curiosity, every arbitrator asks, if not told in advance, why the third grievant is not present. In this type of case, many arbitrators have been told by the union that the absent grievant was given notice of the hearing, but that he has obtained a job with another employer and does not wish to take time off from the other job to attend the hearing. Where no request for a postponement of the hearing is made by a party (the union or the employer), it may be reasonably argued that the arbitrator should proceed with the hearing since an employee ought to be able to waive any right that he may have to be present at the hearing. If it subsequently is discovered that the union's answer (as to why the third grievant is absent) was untrue or that the union had engaged in some other form of bad faith conduct, the absent grievant could seek relief against the union for breach of its duty of fair representation. In that context, a court or the NLRB could decide whether a specific grievant had a legal right to appear at the arbitration hearing under the specific circumstances of that case.

In actual practice, it appears that most arbitrators accept the union's statement that the absent grievant was notified and that he chose not to attend the arbitration hearing. These arbitrators then proceed with the hearing. In fact, at least one veteran arbitrator has proceeded with the hearing in a discharge case where more than one grievant was involved but where no grievant was present and the union representative simply asserted that in his judgment his case was so good that the grievants' presence was not necessary.

On the other hand, a few arbitrators, basing their decision on a duty to maintain the integrity of the arbitration process, refuse to accept the union's statement that a discharged grievant does not wish to take time off from a job with another employer to attend the arbitration hearing. In one such case the arbitrator telephoned the grievant and told him he had a right to attend the arbitration hearing. The employee confirmed
that he did not want to attend the hearing because it would interfere with his new job. Such a procedure has some obvious disadvantages. A telephone call to grievant at his new place of employment may in itself interfere with grievant's work. It may distress the grievant and annoy his new employer. Moreover, an arbitrator's challenge of the truthfulness of the union representative at the outset of the hearing (without any evidence that the union representative is lying) may justifiably cause the union representative to doubt the impartiality of the arbitrator.

Another arbitrator insists at the outset of the hearing that a discharged grievant be present at the hearing, apparently even though the grievant does not wish to attend the hearing. The arbitrator insists that the grievant come to the hearing immediately or that the hearing will be postponed to a date and time when the discharged grievant will be present.\footnote{See Levin, \textit{supra} note 2, at 315. This suggestion that the grievant be present at the hearing is also posed in Levin.} Such a procedure causes delay and increases the cost of arbitration proceedings. In this connection it should be noted that increasing cost and increasing delays are two of the current criticisms of the arbitration process. The arbitrator may view the increased costs as justified. Many parties, however, may reasonably feel that it should be their decision as to whether to assume the burden of the increased costs and the inconvenience of such a delay. The arbitrator could waive his fees for the additional time, but it is doubtful that many arbitrators would wish to do so.

It may be reasonably argued that the grievance of a discharged employee is so distinguishable from grievances involving basically group interests (such as a job classification grievance\footnote{See the example above in this section involving classification of a Boiler House Operator job.} or a seniority grievance\footnote{See the example above in this section discussing the seniority grievance involving interpretation of the layoff provision of the collective bargaining agreement.} that such a grievant should be entitled to notice of the arbitration hearing on his grievance and to be present at the hearing. This is so because an individual employee has a strong sense of personal identity with his job. Also, a strong sense of personal dignity usually is involved with this type of case. A substantial number of arbi-
trators have expressed the view in informal discussions that discharge grievances present special problems.

In actual practice, of course, most discharged employees are given notice, and do in fact appear at the hearing. Nevertheless, if a grievant chooses to waive the opportunity to be present, most arbitrators believe this does not violate due process.

IV. CLAIM THAT AN ARBITRATOR HAS A LEGAL RESPONSIBILITY TO DETERMINE WHETHER THE UNION HAS VIOLATED ITS DUTY OF FAIR REPRESENTATION

In this section of the article, the question posed is whether an arbitrator owes a legal duty to grievants and others to examine the union in sufficient depth at the arbitration hearing to ascertain whether the union has violated its duty of fair representation, a duty it owes to bargaining unit employees. Some arbitrators believe that the answer is "yes," but many arbitrators assume that the union is performing its job properly and is complying with its duty of fair representation (unless, of course, evidence to the contrary is disclosed). Moreover, many arbitrators conduct their hearings under this assumption even though they know that under the law the arbitration award may be vacated if the union has violated its duty of fair representation. These arbitrators do not believe that they have an affirmative duty to take the initiative to examine the union in depth to determine whether the union has violated its duty of fair representation.

Much of the current ferment over whether arbitrators should adopt a more activist role and more control of an arbitration hearing, even despite the wishes of the parties, stems from the decision of the United States Supreme Court in Hines v. Anchor Motor Freight, Inc. In that case the Court addressed judicial action in vacating an arbitration award where a union breaches its duty of fair representation.

In Hines, the union protested Anchor Motor Freight's discharge of several truck drivers for alleged dishonesty during June of 1967. The applicable collective bargaining agreement required just cause to discharge employees. Anchor's practice

63. See generally McKelvey, supra note 1, at 51; Wirtz, supra note 1, at 1.
64. See Summers, supra note 33, at 148-50.
was to reimburse drivers for money they spent for lodging while the drivers were on the road overnight. Anchor claimed that the drivers had sought reimbursement for motel expenses in excess of their actual charges by submitting motel receipts which overstated the actual room charges. At a meeting with the union and the drivers, Anchor produced these motel receipts, copies of the motel registration cards showing a lower room rate, a notarized statement of the motel clerk stating that the motel registration cards were accurate, and an affidavit of the motel owner also stating that the motel registration cards were accurate and that inflated receipts had been furnished to the drivers. Since the union claimed that the drivers had in fact paid the amount reflected on the motel receipts and that they were innocent of any wrongdoing, the case was submitted to a joint union-company arbitration committee. The drivers suggested that the motel be investigated. The union representative replied that “there was nothing to worry about” and that it was not necessary for them to hire a private attorney.

At the arbitration hearing the drivers denied that they were guilty of any dishonesty. However, no other evidence was presented by the drivers or the union to contradict the company’s written evidence. The arbitration committee sustained the discharges. The drivers then retained a private attorney. The attorney obtained a statement from the motel owner that he had no personal knowledge of the events, but that it was possible that the discrepancy between the motel receipts and the motel registration cards could have been caused by the motel clerk's recording on the registration cards less than the drivers actually paid (with the clerk retaining the difference between the amount of the receipt and the amount recorded). Nevertheless, the private attorney failed to obtain a rehearing from the arbitration committee on the basis of the speculative possibility suggested by the new evidence.

The drivers brought an action against Anchor for breach of contract (based on a claim of no just cause for the discharge) and an action against the union. The claim against the union asserted that the falsity of the charges could have been discovered by the union by a “minimum of investigation” and that the union's failure to investigate properly had arbitrarily and in bad faith deprived the drivers of employment. One year after

66. Id. at 557.
the discharges were sustained in arbitration, the private attorney obtained a deposition from the motel clerk, who admitted that he was the culprit. He admitted that he had falsified the records and that he, not the drivers, had pocketed the difference between the amounts shown on the motel receipts and the amount on the registration cards.

The District Judge granted summary judgment for both Anchor and the union. The court held that, at worst, the union had demonstrated bad judgment in failing to investigate the motel but that this failure did not prove a breach of the union's duty of fair representation.

The drivers appealed. On appeal, the court held that summary judgment should not have been granted to the union. The court of appeals held that from the facts in the record, it was possible to infer arbitrary or bad faith conduct by the union. Thus, the drivers should have had an opportunity to prove the charge of breach of the duty of fair representation. The union did not seek review of this ruling. Because of the manner in which the issue in this case was presented to the Supreme Court under the petition for certiorari, the Court assumed without deciding that the reversal of the District Court's summary judgment for the union was correct and held, in a 6 to 2 decision, that the summary judgment for Anchor had to be reversed.

The employer contended that, under the terms of the collective bargaining agreement, the arbitration award should be viewed as final. However, the Court noted that the individuals were suing the employer for breach of contract for unjust discharge as well as suing the union for breach of its duty of fair representation. Hence, the Court held that “if [the union's breach of its duty of fair representation] seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.”67 In the same vein the Court said “we cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.”68

67. Id. at 567.
68. Id. at 570.
Thus, the Court did not consider the arbitration award to be a bar to the individual drivers' suits under Section 301 of the Taft-Hartley Act.

In the course of its reasoning the Court stated that:

Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity. In our view, enforcement of the finality provision where the arbitrator has erred is conditioned upon the Union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings.69

Perhaps the first observation that should be made about this case is that the Supreme Court did not find that the union had violated its duty of fair representation.70 Because of the procedural posture of the case the Court assumed that summary judgment should not have been granted for the union and the employer, and said that "[p]etitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union."71 Moreover, the Court also said that the "[drivers] are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause."72 Another observation is that the Court made a very general reference to minimum levels of integrity when it said that Congress anticipated that "the contractual machinery would operate within some minimum levels of integrity."73 Nowhere in the Hines opinion is there any specific statement by the Court that the joint committee, or an independent arbitrator, should take particular steps in this type of case to prevent injustice to grievants. The Court did not shed any specific light on what the arbitrator should do, if anything, as distin-

69. Id. at 571 (emphasis added).
70. The only specific allegation that might suggest a breach of the union's duty of fair representation in the handling of the case, as summarized by the court of appeals, is "the assertion that there existed political antagonism between local union officials and plaintiffs [the drivers] because of a wildcat strike led by some of the plaintiffs and a dispute over the appointment of a steward, resulting in denunciation of plaintiffs as 'hillbillies' by Angelo, the union president." Id. at 559–60 n.4.
71. Id. at 572 (emphasis added).
72. Id. at 571.
73. Id.
guished from what the union should do under its duty of fair representation, to comply with minimum levels of integrity. Furthermore, the union was not given much guidance by the Court on what it must do to represent the employees "fairly" under the duty to represent them "honestly and in good faith and without invidious discrimination or arbitrary conduct." 74

Disagreement among arbitrators in this connection is not so much over the abstract standards set forth in *Hines*. The disagreement among arbitrators is more over what *Hines* means for arbitrators in concrete situations. In part, the disagreement among arbitrators is based upon different views as to the nature of the collective bargaining agreement and different views as to the nature of the arbitration process.

In *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 75 the Supreme Court of the United States commented on the nature of a collective bargaining agreement. It said that a "collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." 76 Also, in *Alexander v. Gardner-Denver Co.*, 77 the Court distinguished the fact-finding process of arbitration from judicial fact-finding. In doing so, the Court said:

[T]he fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. 78

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74. *Id.* at 570. Although there has been an increase in the volume of litigation involving the duty of fair representation and the arbitration process, it is a very rare case where the individual employee prevails with a complete victory. See McKelvey, *supra* note 1, at 54.


Thus, whatever the Court had in mind in *Hines* when it referred to "minimum levels of integrity," it appears from *Warrior and Gulf* that the Court does not expect the parties and the arbitrator in a labor arbitration case to follow procedures that would be applicable in a breach of contract action filed in court for breach of a commercial contract. Moreover, it is apparent from a reading of *Alexander* that the Court does not expect the parties and the arbitrator, even where an alleged violation of a collective bargaining agreement is involved in a labor arbitration case, to engage in the same type of fact-finding process that would be involved in a judicial fact-finding process.

In light of these observations it is not at all clear that the union, the employees, the company or the arbitration committee in *Hines* were acting in bad faith or were "at fault." The union apparently relied in good faith on the receipts obtained from the motel by the drivers to show that they paid the amounts for which they sought reimbursement, just as the drivers relied in good faith on these receipts. The company relied in good faith on the discrepancy between these receipts and the amounts on the motel registration cards, and the arbitration committee believed, in weighing the evidence, that the company's evidence was more credible.

Did the arbitration committee have a legal obligation in *Hines* to do something more to assure that "the contractual machinery would operate within some minimum levels of integrity[?]" Should the arbitration committee have criticized the company for relying on a notarized statement of the motel clerk (a critical part of the company's evidence) rather than trying to bring the motel clerk (from some out-of-town location) to testify as a live witness so that he could be cross-examined? Should the arbitration committee have criticized the union for not trying to bring the motel clerk from the out-of-town location to the arbitration hearing? Of course, the motel clerk undoubtedly would have resisted any attempt to bring him to the hearing, and it may have been impractical to try to compel him to travel a long distance. Moreover, although it is common for a party in labor arbitration to rely on notarized statements and

82. *Hines*, 424 U.S. at 571.
affidavits, it is also common for the other party, the union in this case, to contend that the testimony of live witnesses such as the drivers, who are subject to cross examination, should be given more weight by the arbitrator where there is a conflict between a notarized statement and the testimony of live witnesses with first-hand knowledge of the critical evidence, in this case the validity of motel receipts. Thus, it is not surprising that the union in *Hines* did believe, or at least could have believed, in good faith that it would prevail in arbitration on the basis of the testimony of its live witnesses.

Did the union have a legal obligation to attempt to obtain a deposition from the motel clerk prior to the arbitration hearing? Probably not. At that time the clerk had only recently stated his position on the notarized statement. No court action had been filed, and as the Supreme Court stated in *Alexander*, in arbitration proceedings “rights and procedures common to civil trials, such as discovery, compulsory process [and] cross-examination . . . are often severely limited or unavailable.”

After the arbitration award had been rendered, the private attorney retained by the drivers instituted lawsuits against Anchor and the union. Although he alleged that the falsity of the charges against the drivers could have been discovered by the union with a “minimum of investigation,” the record shows that it was not until one year after the discharges of the drivers were sustained in arbitration that the private attorney resorted to judicial fact-finding procedures, deposed the motel clerk, and obtained a confession. If only a “minimum of investigation” was involved, as the attorney alleged, one may wonder why it took him so long to obtain the deposition. Thus, it appears that the position of the District Court in *Hines* was valid when it held that “at most” the union had demonstrated bad judgment when it did not investigate the motel, but that this did not prove a breach of the union’s duty of fair representation. It is also unlikely that the arbitration committee could have done anything significant that was both practical and within the scope of its authority to provide greater assurance that the “minimum levels of integrity” test would be met in

85. *Id.* at 559.
86. *Id.* at 571.
Of course, the innocent drivers who suffered a loss of earnings as a result of their discharge had a legal remedy for damages in a tort action for deceit against the motel clerk and a legal remedy for damages against the motel owner under the doctrine of respondeat superior (the employer is liable for the torts of his employee committed within the scope of the employee’s employment). In fact, under some modern theories of tort law Anchor and the union, who were innocent victims of the fraud of the motel clerk as well as the truck drivers, could prevail in an action of fraud against the motel clerk and in a vicarious liability action against the clerk’s employer. One such tort theory is set forth in section 531 of the Restatement, Second of Torts, which provides as a general rule:


88. Id. It should be noted that the American Law Institute adds the following “caveat” to this section of the Restatement: “The Institute expresses no opinion on whether the liability of the maker of a fraudulent representation may extend beyond the rule stated in this Section to other persons or other types of transactions, if reliance upon the representation in acting or in refraining from action may reasonably be foreseen.” Id. Extension of the ambit of liability for misrepresentation beyond those in contractual privity to persons a misrepresenter should reasonably foresee as relying on the misrepresentation was recognized in Michigan in Williams v. Polgar, 391 Mich. 6, 9-18, 215 N.W.2d 149, 150-53 (1974). The Williams court reviewed the law on this point in many other jurisdictions. Although this case deals with the liability for misrepresentation in a title abstract, the reasoning could be deemed to be applicable to the company and the union in Hines.
Perhaps the Court in *Hines* should not have held that the availability of a remedy for the drivers against the company depended on whether the union breached its duty of fair representation. The Court could have noted that the drivers had complied with its decision in *Republic Steel Corp. v. Maddox*\(^89\) and section 301 of the Taft-Hartley Act,\(^90\) and determined that no one except the motel clerk was at fault but that the company did not in fact have just cause under the terms of the collective bargaining agreement to discharge the drivers in light of the evidence subsequently discovered after the arbitration award had been rendered. Moreover, the critical evidence on which the company relied to establish just cause was not only false but was tainted by the surreptitious fraud of an employee of another employer. The Court could then have held that these very unusual circumstances presented a narrow exception to the holding in *Vaca v. Sipes*\(^91\) that an employee must establish a breach of duty of fair representation by the union as well as a breach of contract by the employer in order to prevail against the employer. This would have allowed the drivers to obtain an appropriate judicial remedy. The Court could have phrased a very narrow exception and cautioned that it was a narrow exception, just as it did in *McCulloch v. Sociedad Nacional de Marineros de Honduras*\(^92\) when it said that "we hold that the action falls within the limited exception fashioned in *Leedom v. Kyne* . . ."\(^93\) Although *Sociedad* and *Leedom v. Kyne*\(^94\) dealt with representation proceedings, the technique used by the Court in those cases could have been adopted, by way of analogy, and applied to the situation in *Hines*.

Although arbitrators believe that they have an obligation to conduct a fair hearing, they do not agree on what this concept

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\(^89\) 379 U.S. 650 (1965). This case involved an employee who sued his employer in an Alabama state court for severance pay. The court held that, as a general rule, an employee must attempt to use the grievance procedure in the collective bargaining agreement before bringing suit in state court under section 301 of the Taft-Hartley Act. *Id.* at 652.

\(^90\) *Id.* at 652. The Court recognized that "[i]f the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available." *Id.* The Court, however, concluded that the union must at least be afforded an opportunity to act on the employee's behalf. *Id.* at 653.


\(^93\) *Id.* at 16.

means in actual situations. Disagreements arise in part because of differing views over the function of the arbitrator. A few believe that an arbitrator should be very passive, while some others believe the arbitrator should adopt a very active role as a participant in the hearing. The procedures used by most arbitrators fall somewhere in between these two views.

Under the strong-activist view some of the suggested procedures could conflict with the provisions of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. One suggestion in response to Hines is that the arbitrator should require a transcript of the arbitration hearing if the arbitrator anticipates potential problems of fair representation. However, although the Code provides that "[a]n arbitrator may seek to persuade the parties . . . to use a transcript if the nature of the case appears to require one," the Code also says that "[m]utual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator." The Code states further that "if an arbitrator intends to make his or her appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment." Unfortunately, in most ad hoc arbitration cases the arbitrator knows almost nothing about the case prior to the arbitration hearing and thus normally is not in a position to anticipate a problem of fair representation.

Although many arbitrators follow the traditional view that the arbitration process involves only two parties, the union and the employer, a few arbitrators think of the process as involving three parties: the union, the employer and the individual. It should be noted that the Code contemplates two

95. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1974) [hereinafter cited as Code]. This Code, as amended, has been adopted by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service.
96. McKelvey, supra note 1, at 54. See also Sacks & Kurlantzick, supra note 35, at 10–18 (where the authors support "limited arbitrator activism," a role which they characterize as "The Educator-Facilitator Role").
97. Code § 111.
98. Code § 109 (emphasis added).
100. For the traditional view, see the view of Arbitrator Harry Dworkin in Summers, The Individual Employee’s Rights Under The Collective Bargaining Agreement: What Constitutes Fair Representation?, Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators at 57 (B. Dennis & G. Somers eds. 1975). Some of the most articulate arbitrators in America are also some of the most innova-
parties since it calls for a "hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."\textsuperscript{101} Some believe that an arbitrator has a responsibility to examine each witness, to intervene on behalf of the grievant to develop the facts, to intervene (where the union is submitting a weak and perfunctory presentation) by taking the initiative to ask questions, to request more evidence, to call witnesses and to ask the parties to explore other sections of the collective bargaining agreement which they have not cited.\textsuperscript{102} Although each of these devices has been used in arbitration at one time or another, most arbitrators are reluctant to proceed very far along this line because to do so may conflict with Code provisions which state that "[e]ssential personal qualifications of an arbitrator include . . . impartiality"\textsuperscript{103} and that "[a]n arbitrator must demonstrate ability to exercise these personal qualifications faithfully and with good judgment, both in procedural matters and in substantive decisions."\textsuperscript{104} Of course, these provisions of the Code do not preclude an arbitrator from seeking "to clarify" the presentations of the parties (as distinguished from "making a case" for one of the parties), and the technique of "clarification" can be utilized in some depth.\textsuperscript{105}
Some arbitrators have tremendous confidence in their own ability to resolve matters through arbitration, making resort to the courts unnecessary. Although it is desirable to keep the judiciary out of such matters as much as is fair and practical, arbitrators should be realistic and recognize that the judicial fact-finding process is superior to the arbitral fact-finding process in some instances. Arbitrators should concede that the type of factual situation exemplified in *Hines*, involving surreptitious fraud by an employee of another employer, did not lend itself to adequate fact-finding under normal arbitral procedures.

V. CLAIM THAT AN ARBITRATOR HAS A DUTY TO DISCLOSE SUGGESTIONS FOR AN "INFORMED AWARD"

In 1970, the present author published two articles dealing with a labor arbitrator's duty of disclosure. These articles were based on a nation-wide survey of labor arbitrators, union representatives and management representatives. The survey consisted of thirty questions, the last three of which were as follows:

**Does A Labor Arbitrator Have A Duty to Disclose—**

1. That a Union representative has advised the arbitrator that he agrees with the Company's position [but that a hearing must be held for "political" reasons], and that the Union representative has asked the arbitrator to agree in advance of the hearing to adopt the Company position?
2. Same question as #1 except that the arbitrator is not asked to make a commitment on the decision that he will render.
3. That on a plant visit, after the hearing, the Union representative, who presented the Union's case, indicates that he has done his best in presenting the case but that he will understand if the arbitrator rules in favor of the Company under the Contract?

Respondents to the questionnaire could answer "yes," "no,"


or "it depends" to each question. More arbitrators, union representatives and company representatives answered "yes" than "no" to question No. 1, and more answered "no" than "yes" to question No. 2. All three categories (arbitrators, union representatives and company representatives) overwhelmingly answered "no" to question No. 3.

As noted in the articles published by the author in 1970, "when arbitrators are asked what information they should disclose to the parties, they frequently respond on the basis of unarticulated premises concerning the role of the arbitrator. Their answers tend to reflect varying underlying premises." When arbitrators do articulate their premises, some will say there is a duty to disclose because "an arbitrator is like a judge." Other arbitrators respond that an arbitrator, unlike a judge, is a creature of parties in a private process, and he can properly help the parties solve an industrial relations problem arising out of political problems within the union without any disclosures. The answer of some arbitrators is that there is a duty of disclosure in a case involving individual rights, such as discharge, but that there is no duty of disclosure in a case involving contract interpretation affecting all employees the same. Still other arbitrators believe that an ad hoc arbitrator has greater duties of disclosure than a permanent umpire.

In 1974, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes was promulgated. This Code contains several provisions which are relevant to the three questions excerpted from the author's 1970 survey.

In the first of these three questions, the arbitrator is asked by the union representative to make a commitment to adopt the company position. This situation is similar to the "rigged

109. Id. at 382–83.
110. Relevant to the role of the arbitrator in the situation where the parties tell the arbitrator what award they want is the following comment:

Some view [the arbitration process] as an extension of collective bargaining, in which case it is an act of statesmanship for the arbitrator to help the company and the union arrive at a mutually satisfactory solution. Others believe it is more nearly a judicial proceeding, in which case the rules of due process familiar to the courts apply. . . . [Nevertheless] there are a host of court matters in which the judge accepts the advice of counsel for the two sides as to an acceptable solution, though this fact is not always known to the clients of the respective counsel. Divorce suits, juvenile proceedings, mental health cases, and other examples could be cited.

Fleming, supra note 49, at 89.
award" where the parties jointly request, prior to the hearing, that the arbitrator make a commitment to adopt the company position in his arbitration award. Most arbitrators would refuse to make such a commitment because it would probably be viewed as a violation of Paragraphs 11, 12, and 18 of the Code.\footnote{See Code §§ 11, 12 & 18 (requiring an arbitrator to be honest, impartial and have integrity).} Paragraph 11 includes "honesty" and "integrity" among the important personal qualifications of an arbitrator.\footnote{Code § 11.} Paragraph 12 continues with the provision that an arbitrator "must demonstrate these personal qualities faithfully and with good judgment."\footnote{Code § 12.} Paragraph 18 states that "[a]n arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties."\footnote{Code § 18.}

Despite these provisions of the Code, other provisions permit what some "purists" might describe as "rigged awards." Other commentators describe these as "informed consent" awards. "Consent awards" are permitted in some circumstances. Paragraph 65 of the Code provides that:

Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.\footnote{Code § 65.}

Nevertheless, Paragraph 66 of the Code, which is a subsection, contains the following cautions:

Before complying with such a request, an arbitrator must be certain that he or she understands the suggested settlement adequately in order to . . . appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.\footnote{Code § 66.}

If the "informed consent" award meets the qualifications of

\footnote{111. See Code §§ 11, 12 & 18 (requiring an arbitrator to be honest, impartial and have integrity).} \footnote{112. Code § 11.} \footnote{113. Code § 12.} \footnote{114. Code § 18.} \footnote{115. Code § 65.} \footnote{116. Code § 66.}
Paragraphs 65 and 66 of the Code, then it seems that the award probably would not violate Paragraphs 11, 12 and 18 of the Code concerning the use of integrity in arbitration. Moreover, it appears that the award probably would not violate Paragraph 26 of the Code. Paragraph 26 provides that an arbitrator has an obligation to recognize diversity in arbitration arrangements and to try to understand the principles governing the arbitration system in which he or she is serving. It also states that: "Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose."

"Collusive" may be defined as "secretly arranged for fraudulent purposes." Thus, not all secret arrangements are banned by Paragraph 26. Paragraph 26 when read in conjunction with Paragraph 65 of the Code suggests that a secret arrangement under which the arbitrator incorporates certain agreements of the parties in his award is permissible if this is done for a proper purpose, and if the qualifications of Paragraphs 65 and 66 are met.

If the union representative advises the arbitrator prior to the arbitration hearing that he agrees with the company's position in the case and that no commitment is requested, the arbitrator is free to decide for the union if the evidence indicates that the union should prevail. In this situation views of arbitrators vary. Some arbitrators feel that whether any action should be taken depends on the nature of the case. Others believe that they should withdraw from serving as an arbitrator in such a case. Still others feel that they have a duty of disclosure to the company and/or the grievant.

Many arbitrators make a distinction between the arbitration of a discharge case, involving "rights" arbitration under a collective bargaining agreement, and arbitration of new or revised terms of a collective bargaining agreement, involving "interest" arbitration. Many arbitrators believe that "an informed award" is proper and that there is no duty of disclosure in the

117. Code § 26 (emphasis added).
latter type of case. When a representative of one of the parties tells the arbitrator that the other party's position is "very reasonable," such a statement in that situation is often viewed as an act of a "statesman." One difficulty with this distinction is that under the Scope of the Code it is stated that: "This Code is a privately developed set of standards of professional behavior. It applies to voluntary arbitration of labor-management grievance disputes and of disputes concerning new or revised contract terms. Both 'ad hoc' and 'permanent' varieties of voluntary arbitration, private and public sector, are included."\(^{120}\) The preamble tends to reject a distinction between a discharge case and a case involving a revised wage structure. Perhaps the practical differences between the two types of cases can be recognized in light of Paragraph 25 of the Code. Paragraph 25 states that "[r]ecognition of special features of a particular arbitration arrangement can be essential with respect to procedural matters and may influence other aspects of the arbitration process."\(^{121}\)

Use of a tripartite board, consisting of a partisan union-appointed arbitrator, a partisan employer-appointed arbitrator and a neutral arbitrator, poses special problems. After an arbitration hearing before a tripartite board, it is common for the three arbitrators to hold an executive session to discuss contemplated procedures and to make comments on the substance of the case. Suppose that at one such executive session a union-appointed arbitrator remarks, "to be frank and honest, the union has a loser. . . . I know that the company has to win, but you understand that I'll have to be listed on the award as dissenting from the award." Would the Code apply in such a situation? The Code in its Preamble states that it "does not apply to partisan representatives on tripartite boards."\(^{122}\) The provisions of Paragraphs 11 and 12 of the Code concerning "integrity" and "impartiality" clearly do not apply to the partisan arbitrators. But, does the neutral arbitrator in the hypothetical case have a duty to disclose to grievants and to the rest of the union what the union-appointed arbitrator said?\(^{123}\)

\(^{120}\) CODE § 4 (emphasis added).
\(^{121}\) CODE § 25.
\(^{122}\) CODE § 6.
\(^{123}\) Suppose that the roles were reversed and the company-appointed arbitrator on the tripartite board said in the executive session: "To be frank and honest, the company has a loser. . . . I know that the union has to win, but you understand that
Most neutral arbitrators would undoubtedly be surprised if they were told that they had a duty to disclose such a statement, and would probably disagree that any such duty existed.

A union-appointed arbitrator on a tripartite board is viewed as a partisan representative, and is so characterized by the Code. Is there any significant difference between a situation where a union representative makes a statement to a neutral arbitrator in the presence of a company representative on the board and a situation where no arbitration board is used but a key union representative (perhaps the union representative who presented the union’s case at the hearing) makes essentially the same statement to a single neutral arbitrator in the presence of a key company representative? For example, the union representative might say, after the hearing: “To be honest and frank, I know that I have a loser. . . . I know that the company has to win this case.” Of course, there is a difference of procedure where a tripartite board is used and where no such board is used, but one might ask whether the difference is more of form than substance. Nevertheless, the Code could be interpreted to distinguish between the two situations on the question of an arbitrator’s duty of disclosure. This is so because the Code in its Preamble states that the Code does not apply to partisan representatives of tripartite boards.

It is not clear whether the Code permits a distinction to be drawn, for purposes of ascertaining whether there is a duty of disclosure, between a grievance dispute over whether a provision in a collective bargaining agreement for a revised wage structure is to be made retroactive to an earlier date (where the award would be made applicable to all employees) and a grievance dispute over whether an employer had just cause under a collective bargaining agreement to discharge an employee. In this connection it should be noted that the Committee on Professional Responsibility and Grievances of the National Academy of Arbitrators has issued a series of Advisory Opinions on the meaning of the Code, and that Opinion No. 6, dated June

I’ll have to be listed on the award as dissenting from the award.” Should the neutral arbitrator be deemed to have a duty to disclose to the production supervisors who were responsible for the alleged violation of the collective bargaining agreement what the company-appointed arbitrator said? Most arbitrators would undoubtedly say “no.”

10, 1980, deals with the subject of "Arbitrator's Duty Regarding Off-the-Record Union Representative's Remarks Prejudicial to Grievant in Discharge Case." The facts as stated in Opinion No. 6 are as follows:

Prior to the start of a discharge hearing, the Union representative approached the arbitrator and remarked, out of earshot of the Company representative: "I've got a loser. I don't expect to win this one." The arbitrator admonished [the union representative] that he had misbehaved, and that his remarks could prejudice the grievant's rights. The arbitrator stated that he would excise the remarks from his evaluation of the dispute and would decide the case on its merits without regard to them. Before the hearing began, the arbitrator disclosed to the Company the Union representative's remarks and the arbitrator's response. Neither the Company nor the Union interposed any objection to the arbitrator's continued service in the case. 126

The Opinion states that the issues are: "What is the arbitrator's duty in such a case with respect to disclosure to the grievant and withdrawal?" In the discussion, the Opinion distinguishes between a joint effort by the parties in a discharge case to induce the arbitrator to sustain the discharge and a unilateral effort by the union to induce the arbitrator to sustain a discharge. The Opinion describes the professional responsibility duties of the arbitrator in these situations as follows:

[I]n a discharge case, where the parties make a joint effort to induce the arbitrator to sustain the discharge, this constitutes a collusive attempt by the parties to use arbitration for an improper purpose. The arbitrator has a responsibility to seek to discern such an effort. Where the arbitrator discerns such an effort, continued service by the arbitrator in the case without the informed consent of the discharged employee constitutes a lending of approval or consent to such a collusive attempt in violation of Paragraph 26, also constitutes a failure to uphold the dignity and integrity of the office in violation of Paragraph 18, and is inconsistent with the essential personal qualifications of honesty and integrity referred to in Paragraphs 11 and 12 [of the Code].

126. Id.
127. Id.
A unilateral effort by the Union to induce an arbitrator to sustain a discharge constitutes an attempt, albeit not a collusive attempt, to use arbitration for an improper purpose. A failure by the arbitrator to seek to discern such an effort by the Union, or continued service by the arbitrator without the informed consent of the discharged employee in a case where the arbitrator discerns such a Union effort, is not violative of Paragraph 26, but does constitute a failure to uphold the dignity and integrity of the office in violation of Paragraph 18, and is inconsistent with the essential personal qualifications of honesty and integrity referred to in Paragraphs 11 and 12.128

The Opinion recognizes that the remarks of the union representative may require interpretation by the arbitrator. In the following paragraphs the Opinion recognizes this possibility and states what the arbitrator should do about it:

Remarks like those made by the Union representative to the arbitrator in the instant case may or may not reflect an effort by the Union to induce the arbitrator to sustain the discharge. The arbitrator has a duty to make an honest judgment, based upon his experience and his knowledge of the facts and circumstances, as to whether they do reflect such an effort by the Union. If in his judgment they do reflect such an effort by the Union, he should not continue to serve without the informed consent of the discharged employee. It is noted that the arbitrator has the option of withdrawal without disclosure and without giving a specific reason, and that he might find this course to be the one least likely to harm the discharged employee and the collective bargaining relationship.

In addition to making a judgment as to whether the Union representative's remarks reflect an effort by the Union to induce the arbitrator to sustain the discharge, the arbitrator must also make a judgment as to whether he can effectively disregard the remarks in weighing the evidence and arriving at a decision in the case. If he sincerely believes that he can disregard them and do full justice to the parties and to the discharged employee, the fact that they were made does not in and of itself require his withdrawal. If he does not sincerely believe that he can disregard the remarks and judge honestly and fairly on the evidence properly before him, the Code requirements of "honesty" and

128. *Id.*
"integrity" necessitate his withdrawal.\(^\text{129}\)

The Opinion may be viewed as significant not only for what it does say but also for what it does not say. The Opinion goes beyond the facts of the case when it says that "[t]he basic conclusions stated herein are equally applicable to both ad hoc and permanent arbitrators."\(^\text{130}\) On the other hand, the Opinion seems to be carefully restricted, in terms of type of case, to a discharge case. In the statement of general subject matter at the outset of the Opinion, and in the statement of facts, the issues and the essence of the reasoning refer to a discharge case. It is interesting to note that there seems to be a conscious effort in the Opinion not to go beyond the obligations of the arbitrator in a discharge case. Perhaps in recognition of the varying views among arbitrators as to what duties, if any, an arbitrator may have when the grievance is applicable to all employees in the bargaining unit, the Opinion seems to have left this question open. In the latter type of case some different considerations would be involved. For example, would the arbitrator, in order to continue to serve as an arbitrator, have to obtain the informed consent from every employee in the bargaining unit? On this type of issue the applicable rules are still evolving.

This section of the article has been largely devoted to a discussion of the arbitrator’s duty of disclosure of suggestions for an "informed award." Also relevant to this discussion is the union’s duty of fair representation. Should a union be deemed to have violated its duty, which under \textit{Vaca v. Sipes}\(^\text{131}\) requires proof of union conduct that was "arbitrary, discriminatory, or in bad faith,"\(^\text{132}\) any time that a union representative makes suggestions to a neutral arbitrator that may be more in line with the employer's view of the case than the union’s view of the case? It is doubtful that an unqualified answer of "yes" to this broad and sweeping question would be valid. It seems that many of the distinctions discussed in connection with the arbitrator’s professional responsibilities are also relevant to the question of the union’s duty of fair representation. This includes a possible distinction between a discharge case, or

\(^{129}\) Id.

\(^{130}\) Id.


\(^{132}\) Id. at 190.
other case involving very personal individual rights, and a case involving an interpretation of the collective bargaining agreement which would be equally applicable to everybody in the bargaining unit.

One final question concerning damages should be considered. Even if the arbitrator has not disclosed suggestions made to him for an informed award and even if the union is found to have violated its duty of fair representation in a discharge case by making suggestions, what are the damages to the individual if the evidence shows that the employer had just cause to discharge the individual? Probably not very substantial. In addition, it must be remembered that, in order to recover damages from the employer, the individual must prove not only the union’s breach of duty of fair representation, but also the lack of just cause for the discharge by the employer under the terms of the collective bargaining agreement.133 Thus, the individual has a “hard row to hoe” in these types of cases.

VI. CLAIM THAT AN EMPLOYEE IS ENTITLED TO BE REPRESENTED BY PERSONAL COUNSEL, AS WELL AS BY THE UNION, AT THE ARBITRATION HEARING

Although no claim is made in most cases that an individual grievant is legally entitled to be represented at the arbitration hearing by private counsel of his own choosing as well as by the union, many veteran arbitrators have been faced with such a claim. When the claim does arise, most arbitrators try to mediate the problem so that no formal ruling needs to be made by the arbitrator on this issue.134 An attempt is often made by the arbitrator to get the union and the employer to agree to allow some degree of participation by grievant’s private counsel.135

Two examples may be cited. In one discharge case I was the first person to arrive at the hotel hearing room. When a second person arrived, I asked him whether he was with the union

133. Id. at 197.
134. See McKelvey, supra note 1, at 52.
135. Kotin, Comment, PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 44 (B. Dennis & G. Somers eds. 1974). For an earlier view supporting the claim of the individual for independent counsel, see Wirtz, supra note 1, at 25.
or the company. When he replied "neither," I thought he was in the wrong room. He then told me that he was counsel for the grievant's family, that he was not a labor lawyer, and that he was present at the request of the grievant's family. When union and company representatives arrived, they objected to the presence of the grievant's lawyer. In mediation efforts I suggested that the union and the company would be in a stronger legal position, in the event that the grievant attempted to litigate before a court or the NLRB in relationship to my award, if the parties allowed the grievant's attorney to participate in the arbitration hearing. The parties reluctantly agreed. However, they could not agree on where the private counsel should sit since neither party wanted to have grievant's private counsel as part of its team. Finally, it was agreed that he would sit at the far end of the union's side of the table. At the end of the testimony of each of the witnesses, private counsel simply asked a couple of routine questions.

In another case, company and union counsel agreed, with my approval, that grievant's private counsel could submit questions to union counsel who would decide whether to address these questions to the witnesses. That technique is, in general, successful, but problems can arise when the union counsel refuses to ask questions submitted to him by grievant's private counsel.

When the parties object to participation in the arbitration hearing by private counsel for the individual, some arbitrators rule that the private counsel may sit in the room and observe the hearing, but that he may not participate in the hearing. Professor Clyde Summers has stated that his "view is that the individual should be treated as a full party to the proceedings, with the right to submit evidence, cross-examine witnesses, and present argument," and that the employee should be allowed to participate with his own lawyer. Some union attorneys agree with this view, and do not object to such full participation by the individual through his own attorney at the arbitration hearing.

136. A claim of lack of due process by an individual employee may arise not only where the grievance is denied, but also where a grievant is not granted the full relief that he is seeking.
137. Summers, supra note 33, at 154.
138. Id. at 154-55.
139. See, e.g., Asher, Comment, PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL...
The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes briefly recognizes the issue, but takes no position on what ruling the arbitrator should make, when it states: "Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by grievant." 140

For clarity of analysis it is wise to consider this issue from the perspective of four different situations: (1) where the union and company have no objection to participation by grievant’s private counsel; (2) where the union does not object, but the company objects to participation by grievant’s private counsel; (3) where the union objects, but the company does not object to participation by grievant’s private counsel; and (4) where both the union and the company object to participation by grievant’s private counsel.

When neither party objects to participation by grievant’s private counsel at the arbitration hearing, the procedure usually does not present any serious problem for the arbitrator. Nevertheless, some problems may occur. One problem arises when there is a conflict over the degree and form of participation by private counsel. Another problem arises when grievant’s private counsel argues for a different interpretation of the collective bargaining agreement from that advanced by the union.

If only the employer objects to participation by grievant’s private counsel and if the union is willing to accept grievant’s private counsel as part of the union’s representation of the grievant, the issue may be resolved rather easily under the law. This is so because the National Labor Relations Act grants to the union the authority to designate its representatives without

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140. CODE § 40. According to the views of Arbitrator Charles F. Ipavec, the arbitrator "should accede to the wishes of the parties" and exclude the grievant’s personal attorney if both parties feel that the personal attorney should be excluded. See Role of Grievant’s Personal Attorney, supra note 139, at 567.
interference by the employer. Some union counsel welcome participation by grievant’s attorney, as shown by the following view: “My own practice as union counsel is to welcome the participation of a grievant’s attorney at the earliest possible stage of the grievance procedure and to seek the attorney’s assistance in the investigation of the facts, analysis of the contract, research for helpful precedent, and even arbitrator selection.”

If the union objects, but the employer does not object to participation by grievant’s private counsel, a ruling by an arbitrator that the grievant’s private counsel may participate in the arbitration hearing may be viewed as an improper interference with the “exclusive representative” status of the union under the National Labor Relations Act. Pursuant to this view the following position has been taken by a union lawyer:

[T]he union should be permitted to serve as the exclusive

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Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) . . . of this title.


Section 8(a)(1) provides in part: “(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [section 7] of this title.” 29 U.S.C. § 158(a)(1) (emphasis added). See also Jeltsch v. United Parcel Service, 128 L.R.R.M. 2502 (BNA) (S.D.N.Y. 1988). In Jeltsch, the court held that the union and the company were the sole parties to the arbitration proceeding which upheld the discharge of the grievant, and that New York law did not require the union to provide legal counsel for its members who are at an arbitration hearing. Id. at 2507.

142. Webster, supra note 139, at 323. Under the general topic of “Whose Hearing Is It Anyway?,” at the Continuing Education Conference of the National Academy of Arbitrators in Milwaukee, Wisconsin, October 28–30, 1988, Arbitrator Joseph F. Gentile noted that, even where neither party objects to the presence of the grievant’s private attorney, he attempts to specify the role of the grievant’s private attorney in such a way as to prevent “a three-ring circus.”

143. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)(1982). Section 9(a) provides in pertinent part: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to . . . conditions of employment. . . . Id. (emphasis added).
representative to the exclusion of any other employee representative, such as the grievant's private counsel, even if it increases its exposure to potential litigation over the adequacy of its representation. The arbitrator's judgment as to the union's wisdom in exercising this [statutory] privilege is irrelevant, except perhaps in his mediative role. 144

When both the union and the employer object to participation of grievant's private counsel in the arbitration hearing, the union and the employer can still control the situation even if the arbitrator rules that grievant's private counsel may participate in the hearing. This is illustrated by the following report of a union lawyer:

A recent case comes to mind in which an arbitrator overruled the joint objection of counsel for the union and the employer to the participation of a grievant's "private counsel" in a discharge hearing. Thereupon counsel for the union and the employer requested a brief recess and, upon their return, thanked the arbitrator for his efforts and requested that he bill them for his services to that point. They thereafter selected another arbitrator to hear the matter who ordered the grievant's "private counsel" excluded from the hearing. 145

Subsequent to the drafting of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes in 1974 and to the 1976 Supreme Court decision in Hines with its reference to anticipation that "the contractual machinery would operate within some minimum levels of integrity," 146 the clear trend of the law has been to deny the validity of an employee's claim to representation by personal counsel, as well as by the union, at an arbitration hearing. Although the Supreme Court has not ruled on this issue, several rulings of lower courts have denied that an individual has such a right.

In Blake v. USM Corp. and UAW, 147 the plaintiff, an individual employee, sought an injunction to prevent the union and the company from arbitrating her grievance without her being represented by counsel of her own choice. The nature of her grievance is not identified in the case. Apparently, the UAW, the union involved in the case, objected to the grievant's re-

144. Webster, supra note 139, at 322.
145. Id. at 322 n.4.
146. Hines, 424 U.S. at 571.
quest to have private counsel represent her. The company clearly objected to the request. Both the union and the company were defendants in the case. Grievant's petition was denied by the Federal District Court of New Hampshire. 148

To support her request, the employee relied on the proviso to section 9(a) of the N.L.R.A.149 and on Rule 20 of the American Arbitration Association150 (AAA) since Step 4 of the grievance procedure as set forth in the collective bargaining agreement called for arbitration in accordance with the Voluntary Labor Arbitration Rules of the AAA. Rule 20 provided (and still provides in the late 1980s): "Representation by Counsel: Any party may be represented at the hearing by counsel or by other authorized representative."151

The federal district court in Blake quotes a decision of the Sixth Circuit Court of Appeals which states: "We hold that ... the National Labor Relations Act [does not] require an employer to meet with any representative of an employee other than the exclusive bargaining representative in order to settle an employee grievance."152 In Malone,153 the case discussed in Blake, an employee argued that he was entitled to have his own attorney, instead of union representation, in proceedings involving the termination of his employment. In response, the court held that the employee does not have the right to compel his employer to meet with him to adjust his grievance. Thus the employee's attorney does not have such a right.154

The federal district court in Blake also stated that the employee misapprehended her rights under the collective bargaining agreement and under the AAA Rules. The court noted that, under the contract, arbitration could only be requested by the union, and stated the following:

The law is clear that, if the employer objects to an employee being represented by an attorney of his or her choice, such employee cannot be so represented. The em-

148. Id. at 2510.
149. Id. at 2509. See 29 U.S.C. § 159(a). See also Emporium Capwell, 420 U.S. 50, 65 (1975) (section 9(a) interpreted by the United States Supreme Court).
151. Id.
152. Blake, 94 L.R.R.M. at 2509 (quoting Malone v. United States Postal Service, 526 F.2d 1099, 1106 (6th Cir. 1975)).
154. Id. at 1107.
ployer has the right to decide to deal only with the Union in an arbitration proceeding. The parties to such proceeding are the Union and the employer. An employee is not a party to such an arbitration proceeding and, therefore, Rule 20 . . . does not apply to the plaintiff.

The plaintiff has also complained that the Union had not given her adequate representation. Until the arbitration proceeding had been completed, such a complaint was obviously premature. 155

In the similar case of Laney v. Ford Motor Co., 156 plaintiffs alleged that their employer and the UAW were conspiring to deprive them of their rights under the applicable collective bargaining agreement. They argued that the court should grant an injunction to restrain the company from conducting further disciplinary proceedings against them unless plaintiffs were represented by independently retained counsel. The court, however, denied the injunction. It held that an employee is not entitled to independently retained counsel at a disciplinary hearing or at a grievance proceeding because the "union remains his exclusive [bargaining] representative throughout the disciplinary and grievance hearings regardless of whether it is fulfilling its duty of fair representation. . . ." 157 The court stated that "[t]his result is dictated by Section 9(a) [of the NLRA] and the terms of the Collective Bargaining Agreement. . . ." 158

In the relatively recent case of Castelli v. Douglas Aircraft Co., 159 the Ninth Circuit Court of Appeals made the observation that "no court has adopted the rule that employees are entitled to independently retained counsel in arbitration proceedings, or that the exclusion of such counsel from arbitration violates the duty of fair representation." 160 In that case grievant was discharged for alleged gambling on the company’s premises. His defense was that he was only selling gold jewelry to his fellow employees. The union appealed his griev-

157. Id. at 2005-06 (emphasis added).
158. Id. at 2005.
159. Castelli v. Douglas Aircraft Co., 752 F.2d 1480 (9th Cir. 1985).
160. Id. at 1483. Accord Valentin v. United States Postal Service, 787 F.2d. 748, 751 (1st Cir. 1986) (court refused to vacate the arbitration award on the ground that Arbitrator Arnold Zack ruled that the grievant could not be represented by his personal attorney in arbitration).
anc to arbitration, whereupon he asked the union to appoint
an attorney to represent him or to allow him to retain his own
counsel for the arbitration hearing. After the union denied
both requests, the Business Representative of the union repre-
sented the grievant at the arbitration hearing. Following the
issuance of the arbitration award which held that the employer
had just cause to discharge the grievant, the employee filed
suit in federal district court. He claimed that the union
breached its duty of fair representation by refusing to permit
him to have an attorney at the arbitration hearing. Among the
grievant’s complaints were allegations that the union’s Busi-
ness Representative spent only one and one-half hours in
preparation for the arbitration hearing, that he failed to con-
tact key witnesses and that his cross-examination of company
witnesses was inadequate. Nevertheless, holding that the
union had not breached its duty of fair representation, the
court found that there was nothing in the applicable collective
bargaining agreement which would entitle the grievant to
counsel at the arbitration hearing. The court noted in accord-
ance with the conclusion which it reached: "Decisions in other
circuits hold that it is for the union to decide the circum-
stances under which an attorney will be supplied to a
grievant."161

Thus, it must be concluded that claims that an arbitrator
should treat an individual as a full party to arbitration proceed-
ings and that the arbitrator should allow an individual to be
represented by an attorney of his own choosing have very little
support in the developing law despite some scholarly writings
and recommendations to the contrary.162 A more common

161. Id.
162. See Summers, supra note 33, at 155. See also Hotel and Restaurant Employees
and Bartenders Int’l Union v. Michelson’s Food Services, Inc., 545 F.2d 1248 (9th
Cir. 1976). Michelson’s Food Services involved a complex and confusing set of proce-
dural questions. In that case the grievant appeared at the arbitration hearing with his
private counsel, who accused the union of conspiring with the employer to deny the
grievant and others compensation due them. This counsel suggested that the union
be joined as a defendant with the employer in the arbitration proceeding, and that
the arbitrator be empowered to award compensatory and punitive damages to the
grievant. The union then stated that it was willing to have the grievant and the griev-
ant’s private counsel handle the grievant’s case in arbitration. Other procedural
problems included grievant’s refusal to agree to be bound by the arbitrator’s deci-
sion. In an interim arbitration award consisting of five parts, Arbitrator Ted Jones
ruled, in part, that the grievant would be designated as a "party" to the arbitration
proceeding. This part of the interim award was held by the Ninth Circuit to be within
view is summarized in the following excerpt from an opinion of Betty Murphy, former chairman of the NLRB: "Even where the union proceeds to arbitration on an employee’s grievance, the aggrieved employee is but an outsider—a third party—to such proceeding, having no standing to participate as a party, to have counsel different from union counsel, to examine witnesses, or to submit evidence."  

VII. CLAIM THAT AN ARBITRATION HEARING IS NOT A PRIVATE PROCEEDING AND THAT INDIVIDUAL GRIEVANTS HAVE THE RIGHT TO HAVE "OUTSIDERS" PRESENT

Is a labor arbitration hearing a private proceeding between the union and the employer, thus permitting the parties to insist on privacy and confidentiality? Professor Clyde Summers says that the answer is “no.” He takes the view that other persons have a right to be present at the hearing because of obligations the arbitrator owes to individual employees to make sure that the individual’s rights are fully heard and fully adjudicated. He is not impressed with the argument that the dispute is only between the union and the employer. Nor is he persuaded by the argument that the grievant is not a party to the collective bargaining agreement which contains the arbitration provisions, and thus is not permitted to bring outsiders into the hearing. Nevertheless, his views are contrary to those of most arbitrators. There is no Supreme Court decision on point to answer the question as to whose views should prevail.

Should the grievant have the right to have his friends who may be local politicians, leaders of community organizations for minority groups, etc. attend the arbitration hearing? Many

the power of the arbitrator in these unusual circumstances. The court also observed that, as a party, the grievant could participate in person and by counsel at the arbitration hearing, and that the arbitration award would bind the grievant even if he refused to participate in the arbitration hearing (in the absence of fraud or a breach of the union’s duty of fair representation). Id. at 1254–55. However, the value of a ruling by an arbitrator that the grievant is a “party” to the arbitration proceeding has been questioned, and the use of this technique, even in this case, has been criticized. See Webster, supra note 139, at 323. It is also interesting to note that, in the more recent decision in Castelli, the Ninth Circuit does not even mention the Michelson case. Castelli, 752 F.2d 1480.

163. General American Transp. Corp., 228 NLRB at 813 (Murphy, Chairman, concurring).

164. Summers, supra note 33, at 148.
arbitrators believe that the parties (the union and the employer) are entitled to privacy, and that they have the right to exclude "outsiders" from an arbitration hearing because privacy and confidentiality are among the advantages claimed for arbitration over a proceeding in court.\textsuperscript{165} Thus, arbitrators have excluded friends of a grievant, leaders of such organizations as the NAACP, even the wife of the grievant (in a case where the wife was the president of a union other than the union involved in arbitration) and newspaper reporters from arbitration proceedings where one or both of the parties objected to their presence. There is also a strong institutional sense in the American Arbitration Association that privacy is one of the desirable features of labor arbitration.

Such a view is supported by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Section 2C of this Code, which is entitled "Privacy of Arbitration,"\textsuperscript{166} provides in relevant part that:

1. All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.\textsuperscript{167a} Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits [such attendance]. . ."\textsuperscript{168}

e. Applicable laws, regulations or practices of the parties may permit or even require exceptions to the above noted principles of privacy.\textsuperscript{169}

\begin{itemize}
\item \textsuperscript{165} See Code §§ 39, 40 & 47.
\item \textsuperscript{166} Code §§ 39–47.
\item \textsuperscript{167} Code § 39.
\item \textsuperscript{168} Code § 40 (emphasis added).
\item \textsuperscript{169} Code § 47. In accordance with the views provided in the Code is the following statement from Sacks and Kurlantzick, supra note 35: "Arbitration provides a private resolution of the labor-management dispute, free from media coverage or public attendance." Id. at n.37. On the other hand, Rule 22 of the American Arbitration Association, which gives the arbitrator more discretion than the privacy section of the Code, provides that:

Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall have the power to require the retirement of any witness . . . during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

In light of these provisions of the Code, how should Arbitrator Ted Jones have ruled on the admission of "outsiders" to the arbitration hearing in the following case, reported in a book on "Arbitration Practice"? The case involved a claim of racial discrimination, and Arbitrator Jones had to apply a collective bargaining agreement to the claim in light of a consent decree. Just after the parties were seated in a large hearing room, about nine persons, who were leaders of the black community, walked into the room. These persons had worked in support of the consent decree, and wanted to observe the arbitration hearing. One of the persons was a state senator, several persons were members of the state Fair Employment Practice Committee and several others were lawyers. The union representatives became very upset about the appearance of these "outsiders." Stating that they "would not stay with the 'outsiders' present," the union representatives walked out. Although the union representatives continued to be upset at the presence of the "outsiders," Arbitrator Jones ruled that the "outsiders" could remain in the room. Arbitrator Jones does not disclose whether the union representatives returned to the hearing room, but he does say that he felt the outsiders "had to be there in that case." The Arbitrator stressed the fact that the outsiders had come to "support the grievant, and he wanted them present."

It seems clear that the outsiders were not representatives of the union or the employer, and that they were not invited to the arbitration hearing by the union or the employer. Although Arbitrator Jones refers to the problem and states that he "tried to work it out," he does not report any agreement by the parties that the outsiders could attend the hearing. Nor does he report any law, regulation or practice of the parties which would require or permit the attendance of the outsiders at the hearing.

If the union did not agree to their attendance and remained out of the hearing room due to the ruling of the arbitrator that

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171. Id.

172. Id.

173. Id.

174. Id.
the outsiders could attend the hearing and if the arbitrator held for the employer on the racial discrimination claim on the basis of the *ex parte* presentation of the employer, one may wonder whether a court would vacate the award on the ground that the arbitrator had failed to give the union a fair hearing in light of the privacy provisions of the Code of Professional Responsibility.\(^{175}\) It should be noted that the Code does not state that outsiders may be present if the grievant invited them or that community leaders are entitled to attend a labor arbitration hearing if they wish to support the grievant. Additional questions, to which there are no answers, are also suggested by this problem. One such question is whether a court would hold that the refusal of a union to represent a grievant at an arbitration hearing after the arbitrator, rightly or wrongfully, had ruled against the union on attendance of outsiders, constituted a breach of the union’s duty of fair representation. Another question is whether an arbitrator’s ruling permitting attendance of outsiders against the wishes of a company (where the union has not invited the outsiders to attend the hearing) should be deemed to be a violation of the Code of Professional Responsibility\(^{176}\) and a violation of due process so that the arbitration award, if against the company, should be vacated for lack of due process.

A claim that is related to individual rights, but is different from a claim that a grievant’s supporters are entitled to be present at the arbitration hearing, is a claim by an individual employee who is in a different bargaining unit at the same company that he should be allowed to attend the arbitration hearing. Should it make any difference if the employee who is not a member of the bargaining unit involved in arbitration is a grievance committee representative of another bargaining unit? Should it make a difference if employees who are grievance committee representatives of several unions representing several other bargaining units at the same company show a legitimate interest in the arbitration hearing?

An illustration of this problem arose in one case before this author in a western mining state when counsel for two unions that were involved in arbitration with an employer requested a ruling that all representatives of other unions, who were em-

\(^{175}\) *Code* §§ 39–47.
\(^{176}\) *Id.* at § 40.
ployees of the same company, and who were, in fact, sitting in the back of the hearing room, must leave the room. These other unions were not parties to the cases before me, but they had an interest in the cases pending before me because all of these unions (those which were parties and those which were not) had formed a loose coordinating committee while dealing with the company over a job classification program. The reason why the two unions wanted to have the representatives of the other unions excluded from the hearing room was that these unions had refused to pay for part of the heavy costs of having me travel from the East to the West to spend about a week in conducting hearings on complex job classification cases in the mining industry. The employer took a neutral position on the issue of the presence of these other representatives on company property where the hearing was being held because the company had to deal with these unions.

Since the two unions who were parties stated that they were willing to have a representative of any “outsider” union stay if that union would agree to pay part of the costs, I asked each person in the back of the room to stand, give his name and the name of his union, and state whether that union would join in the cases and pay part of the costs. Each “outsider” union representative complied with my request and stated that his union would not pay any of the costs of the proceeding. One large miner, a representative of the Machinists’ Union whom I knew from prior cases, said: “Hey, Doc, what do you plan to do if you order us to leave and we don’t leave?” I responded that “I assumed that some day a procedural question might arise where I would want to call a recess to think about it, and it seemed that such a time had arrived.”

I then ruled that the arbitration proceeding was a private proceeding, that the parties were entitled to privacy, that the representatives of the “outsider” unions were not entitled to be present, that they should leave, and that I was calling a recess. Several of the “outsider” union representatives left immediately, and in a few minutes several more grumbled about not staying where they were not wanted and left. The parties (the two unions and the employer) agreed that I should not make any attempt to start the hearing until all of the “outsiders” had left.

After about forty-five minutes, only “Joe,” the Machinists’ representative, remained. I asked the two unions that were
parties whether they would object if Joe sat in the hallway by the hearing room doorway which had no door and which was close to the location where the witnesses, the court reporter and I sat in the hearing room. The unions that were parties accepted this idea because the principle that Joe could not be in the hearing room would be maintained. I told Joe that I could offer him a better seat than he had in the back of the room, and that he would be able to hear better if he sat in the hallway near the location where the witnesses testified. He accepted the idea, and he sat there for several days during the hearings.

Two observations are in order concerning this illustration. The first is that this example is illustrative of a practice of many arbitrators to try to accommodate the desires of those who are present in the hearing room. The second is that this example is illustrative of the practice of most arbitrators to observe and comply with the "privacy" provisions of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.