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Discovery in Labor Arbitration

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The mere statement of the topic, discovery in labor arbitration, suggests a paradox. Is not the essence of the arbitration process an effort to avoid the procedural complexities that make litigation comparatively slow and costly? More than forty years ago, Learned Hand admonished a litigant distressed with the procedural failings of an arbitration proceeding:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.[1]

Today there is uncertainty about the appropriateness of discovery in labor arbitration[2] and confusion about the author-

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1. American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944). More recently, an extensive review of discovery law omitted discussion of discovery in arbitration: "Discovery is expensive and time-consuming, and is thus inconsistent with the desires of parties who refer their disputes to arbitrators rather than to formal judicial tribunals." *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 943 (1961).

2. Some arbitrators have held that their power to rule on procedural questions permits them to order disclosure of information, Pennsalt Chem. Corp., 1960 Summary Lab. Arb. Awards (Am. Arb. A.) No. 16-15 (Aug. 10, 1959) (Kahn, Arb.), *cited in* O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 138 (2d ed. 1983), while others have disagreed, Ralston Purina Co., 82 Lab. Arb. (BNA) 983, 984 (1984) (Ellmann, Arb.) ("I do not think . . . that I have a roving commission as an arbitrator to do the work which Congress has committed to the NLRB."). While some arbitrators have sanctioned employers for failing to provide prehearing disclosure, Wells Aluminum Corp., 86 Lab. Arb. (BNA) 983, 987 (1986) (Wies, Arb.) (evidence excluded because deliberately withheld), courts have sometimes refused to enforce an arbitrator's award on the ground that imposition of a sanction for nondisclosure exceeded the arbitrator's authority, Buckeye Cellulose Corp. v. District 65, Div. 19, UAW, 689 F.2d 629, 630-33 (6th Cir. 1982) (arbitrator re-

ity of the arbitrator and the courts to order arbitral discovery.[3] The National Labor Relations Board (NLRB), the only institution that the United States Supreme Court has clearly recognized as having the authority to monitor arbitral discovery, moves too slowly to satisfy the needs of the arbitration process for expeditious resolution of disputes.[4] This Article seeks to clarify the law of arbitral discovery.[5] It begins by addressing whether, as a matter of policy, discovery ought to be available in labor arbitration. Part I of the Article argues that the functions discovery serves in litigation could also enhance resolution of labor disputes. Part II examines the legal and institutional capacity of the NLRB, the courts, and the arbitrator to monitor the arbitral discovery process and argues that the arbitrator's role should be preeminent. Part III suggests an appropriate coordination of responsibilities between the three institutions, and Part IV recommends procedures for handling disputes over information disclosure that arise in labor arbitration.

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duced employee's discharge to reinstatement without back pay because employer failed to disclose witness's name before hearing).

3. *See infra* notes 85-229 and accompanying text. The Supreme Court has observed that in arbitration the "rights and procedures common to civil trials, such as discovery . . . are often severely limited or unavailable." Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974).

4. *See infra* notes 75-84 and accompanying text.

5. For previous discussions of the arbitral discovery issue, see O. FAIRWEATHER, *supra* note 2, at 137-50; R. FLEMING, THE LABOR ARBITRATION PROCESS 62-64 (1965); M. HILL, JR. & A. SINICROPI, EVIDENCE IN ARBITRATION 278-304 (2d ed. 1987); Bedikian, *Use of Subpoenas in Labor Arbitration: Statutory Interpretations and Perspectives*, 1979 DET. C.L. REV. 575; Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, *in* ARBITRATION 1985: LAW AND PRACTICE, 38TH PROC. ANN. MEETING NAT'L ACAD. ARB. 201 (W. Gershenfeld ed. 1986); Heinz, Lowry & Torzewski, *The Subpoena Power of Labor Arbitrators*, 1979 UTAH L. REV. 29; Jones, *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. PA. L. REV. 830 (1968); Jones, *Blind Man's Buff and the* NOW*-Problems of Apocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes*, 116 U. PA. L. REV. 571 (1968) [hereinafter Jones, *Blind Man's Buff*]; Jones, *The Labor Board, the Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose*, 116 U. PA. L. REV. 1185 (1968) [hereinafter Jones, *The Labor Board*]; Comment, *Pre-Hearing Procedures in Labor Arbitration: A Proposal for Reform*, 43 U. PITT. L. REV. 1109 (1982) [hereinafter Comment, *Pre-Hearing Procedures*]; Comment, *Fear and Loathing in Labor Arbitration: How Can There Possibly Be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?*, 20 WILLAMETTE L. REV. 535 (1984).

I. ISSUES OF POLICY

Judge Hand was surely correct when he suggested that if the purpose of arbitration is to avoid the cost and delay of the judicial process, it is senseless to encumber arbitration with all the formalities of a court. It is only appropriate, however, to apply such a truism to labor arbitration if the assumption regarding the purpose for arbitration also applies. Because arbitration exists as a creature of contract, its rationale is likely to vary depending on the intent of the contracting parties. Even in the commercial setting, avoidance of judicial formalities may not be the primary reason for resort to arbitration.[6] In the labor setting, avoiding judicial procedures is even less likely to be the motivating factor. As the Supreme Court commented in dismissing the relevance of the commercial analogy to labor arbitration, "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."[7]

Even if part of the reason for resort to arbitration in the labor context is a desire to avoid the courts, there is no evidence that judicial resolution was rejected because of court procedures such as discovery. History, for example, suggests that the selection of arbitration may have been motivated by labor's "lingering distrust of courts" stemming from judicial responses to the early days of the American labor movement.[8] The Supreme Court itself has acknowledged that the parties to a collective bargaining agreement may prefer arbitration over judicial enforcement, not because of dislike of any particular characteristics of the courts, but rather because they simply prefer an arbitrator to a judge.[9] The Court has suggested that

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6. Commercial parties may, for example, include arbitration provisions primarily to achieve uniformity in contract enforcement through use of arbitrators with special expertise. Reynolds, *Discovery in Arbitration*, 18 FORUM 144, 144 (1982).

7. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Although the Court is correct in noting that in the absence of an arbitration provision labor disputes could be resolved by disruptive economic weapons, the Court is oversimplifying the matter by suggesting that litigation might not also be used to settle a contractual labor–management controversy.

8. A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 705 (10th ed. 1986); *see also* Boys Mkts. v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970) ("In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions . . . .").

9. Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 253 (1977).

labor and management would rather employ an arbitrator because they have a more direct role in selection of the decision maker and because the arbitrator can be expected to have special experience and expertise in labor relations.[10]

If discovery cannot so easily be rejected as incompatible with the *raison d'etre* of labor arbitration, the question of whether discovery is appropriate in labor arbitration needs further exploration.[11] This analysis must first define the nature of the labor arbitration process and the functions of discovery in litigation to assess whether discovery would further the resolution of labor contract disputes.

Almost all contracts between unions and employers provide that unresolved disputes between the parties regarding the interpretation or application of the collective bargaining agreement will be referred to arbitration.[12] Unless otherwise limited by the contract, any topic implicitly or explicitly addressed in the agreement can be the subject of arbitration.[13] The largest single category of arbitration cases is employee discipline, but arbitrators address a broad range of issues such as wages and fringe benefits, subcontracting, plant closures, and work assignments.[14]

Typically, arbitration is the final step in a multistep grievance procedure. Such contractual grievance procedures commonly have four steps.[15] Grievance procedures usually commence when a union representative or an aggrieved employee presents the grievance to a low-level management repre-

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10. *Id.*

11. To say that the institution of labor arbitration was not created simply to provide inexpensive and expeditious resolution of disputes is not to say that limiting costs and delays are not objectives in labor arbitration. *See infra* notes 70-74 and accompanying text.

12. *Basic Patterns: Grievances and Arbitration*, 2 Collective Bargaining Negot. & Cont. (BNA) 51:5 (1986). The Bureau of National Affairs (BNA) maintains a data base of 3000 current collective bargaining agreements. From these, a sample of 400 agreements was selected to represent a cross section of industries, unions, numbers of employees covered, and geographical areas. *Id.* at 32:21. The BNA found that 99% of the contracts in the sample contained arbitration provisions. *Id.* at 51:5.

13. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

14. 38 FED. MEDIATION & CONCILIATION SERV. ANN. REP. Table 8, at 38-39 (1985).

15. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:1.

sentative, such as an immediate supervisor.[16] Contracts often specify a limited amount of time, usually less than a month, in which to submit a grievance.[17] Some require a prompt response by management to the presentation of the grievance.[18] At the second and third steps of a typical grievance procedure, union representatives of increasing rank (steward, officer, business agent) meet with management representatives of increasing rank (mid-level supervisor, industrial relations director, plant manager).[19] Most cases are either resolved consensually or abandoned at one of these first steps.[20] Cases remaining unresolved may be submitted for arbitration, usually at the instance of either party.[21]

Contracts generally specify the method by which an arbitrator will be selected to consider the grievance. Parties may select arbitrators on an ad hoc basis, either from a list supplied by an impartial agency or simply by agreement. Alternatively, parties may use a permanent arbitrator or panel of arbitrators for the duration of the contract.[22] Labor arbitrators are usually lawyers or professors from fields such as law, management, or industrial relations.[23] The arbitrator's fee is normally borne equally by the parties.[24]

The degree of formality of the hearing varies considerably depending on the preferences of the parties and the arbitrator.[25] Evidence is obtained by direct and cross-examination of

16. *Id.* at 51:2.
17. *Id.*
18. *Id.*
19. *Id.* at 51:3.
20. *See* NLRB v. Acme Indus. Co., 385 U.S. 432, 438 (1967).
21. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:5.
22. *Id.* at 51:6. Forty-nine percent of the contracts that specify a method of arbitrator selection use an impartial agency for appointment. *Id.* The agency used may be the Federal Mediation and Conciliation Service (FMCS), the American Arbitration Association, or a state mediation agency. *Id.* The FMCS, for example, supplies the parties with a list of names of seven arbitrators, and usually the parties alternately strike names from the list until one remains. 29 C.F.R. § 1404.12(a), .13(b)(1) (1987).
23. A. COX, D. BOK & R. GORMAN, *supra* note 8, at 705. There are also some full-time professional arbitrators. *Id.*
24. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:7. In 93% of provisions addressing the expense of arbitration, the fee is shared equally by the parties. In 4% of the expense clauses, the arbitrator's fee is paid by the losing party. *Id.*
25. The author has arbitrated cases in which both parties were represented by counsel, in which the record was taken by a court reporter, in which attorneys' presentations of evidence conformed to courtroom standards, and in which formal written briefs were submitted after the hearing. The author has

witnesses and by the submission of documents. The arbitrator's decision, called an award, is usually rendered in writing within a couple of months.[26] To ascertain whether discovery would further or interfere with this arbitration process, it is necessary to look at the functions of discovery.[27] The policies underlying litigation discovery may also support arbitral discovery.

Discovery in litigation is generally recognized as serving three purposes. It is used to preserve relevant information that might otherwise be unavailable at trial.[28] Discovery is also designed to narrow and clarify the issues in controversy.[29] Finally, discovery permits ascertaining what testimony and other information is available regarding the disputed issues.[30] All three functions could enhance the process of resolving disputes over the interpretation or application of a collective bargaining agreement.

The function of preserving relevant information could aid in resolving labor disputes, although it is likely to be of less importance in arbitration than in litigation. Labor contract disputes are less likely to have the relevant information geographically dispersed,[31] and the relative expedition of the grievance and arbitration process makes it less likely that witnesses will become unavailable during the proceedings.[32] Nev-

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also heard cases in which a rank-and-file employee presented the union's case and in which the "hearing" was more like a roundtable discussion.

26. 38 FED. MEDIATION & CONCILIATION SERV. ANN. REP. Table 5, at 36 (1985). In fiscal 1985 the median number of days between the hearing and the rendering of an award was 45.0. *Id.* In the BNA's data base, 38% of contracts require that arbitration awards be rendered within a specified time period, usually 30 days. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:7.

27. For a series of examples of types of cases in which discovery would assist the arbitration process, see Jones, *Blind Man's Buff*, *supra* note 5, at 588-608.

28. J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 665 (4th ed. 1985) [hereinafter J. COUND]; F. JAMES & J. HAZARD, CIVIL PROCEDURE 227 (3d ed. 1985). This function was recognized even before the initial adoption of the Federal Rules of Civil Procedure in 1938. *Id.*

29. Hickman v. Taylor, 329 U.S. 495, 501 (1947); J. COUND, *supra* note 28, at 666; F. JAMES & J. HAZARD, *supra* note 28, at 228.

30. *Hickman*, 329 U.S. at 501; J. COUND *supra* note 28, at 665; F. JAMES & J. HAZARD, *supra* note 28, at 227.

31. In nearly all arbitration cases, the relevant witnesses and documents will be located in the employer's facility or that of the local union.

32. Even for those grievances whose resolution requires use of every step of a contractual grievance procedure, the average elapsed time from filing of the grievance to rendering of the award by an arbitrator is often a matter of months. The average time from grievance filing to award has, however, been

ertheless, when unavailability of critical information is threatened by circumstances, fact finding in arbitration would be enhanced by the availability of a mechanism to ensure preservation of that information.

The second and third functions, narrowing the issues and ascertaining the facts relevant to them before a hearing on the merits, further the litigation process in at least two respects. When each party learns more about the other's case, the chances for settlement are increased. Even if settlement does not occur, the subsequent trial can become more efficient.[33] In arbitration, there is a corresponding interest in prehearing settlement and tribunal efficiency. Arbitration is the final step in a process by which the parties attempt to resolve their own disputes. The Supreme Court views the grievance procedure as "part of the continuous collective bargaining process."[34] The Court also recognizes that "if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened."[35] The parties to a collectively bargained arbitration agreement, probably even to a greater extent than parties in litigation, desire inexpensive and

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rising quickly. In 1980 the average case took 224.72 days. 38 FED. MEDIATION & CONCILIATION SERV. ANN. REP. Table 5, at 36 (1985). By fiscal 1985 the average time had jumped to 377.08 days. *Id.*

33. Although not generally articulated as a fundamental purpose of discovery in litigation, in practice, discovery also enhances the investigatory abilities of the parties. A party is permitted to commence a lawsuit on the basis of a preliminary factual inquiry. FED. R. CIV. P. 11; FED. R. CIV. P. 11 advisory committee's note (1983). Discovery may allow a party thereafter to obtain from its opponent information in support of its own case, the precise nature of which was unknown at the outset of the litigation. This function of discovery would also promote resolution of labor contract disputes. For example, suppose a union suspects that an employer has shifted work covered by a collective bargaining agreement to a nonunion company which is, in essence, the same employing entity (a "double-breasted operation"). *See* Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67, 67-70. If discovery were available in arbitration, a union could submit a grievance alleging breach of contract in the shift of bargaining unit work to the nonunion company and then use discovery to obtain, through interrogatories or production of documents, information about the nature of the nonunion employer. See, for example, Walter N. Yoder & Sons v. NLRB, 754 F.2d 531, 535 (4th Cir. 1985), in which the court enforced such a discovery order, saying that a union is entitled to information which will aid investigation of contract grievances when the union has established a reasonable basis to suspect such violations have occurred.

34. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

35. NLRB v. Acme Indus. Co., 385 U.S. 432, 438 (1967).

efficient hearings.[36]

Although the benefits that discovery affords the judicial system would also foster the resolution of labor contract grievances,[37] litigation discovery has not been an unmitigated benefit.[38] Studies of the judicial process have identified problems of excessive discovery and resistance to reasonable discovery requests.[39] For several reasons, recognition of these problems in litigation should not preclude arbitral discovery. First, some evidence indicates discovery abuse in litigation is not as widespread as popularly believed.[40] Moreover, the types of cases in which abuses most commonly arise bear little resemblance to the world of labor arbitration. Discovery abuses are much more likely to occur in large cases than in small cases.[41] Because nearly all labor arbitration cases fall into the small case category, labor arbitration cases would likely produce less discovery abuse than civil litigation. Additional evidence indicates

36. *See* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 305-06 (1985). Professor Kanowitz does suggest, however, that much of the cost reduction enjoyed in arbitration as compared to judicial proceedings results from the general nonuse of discovery devices in arbitration. *Id.* The FMCS, the agency charged by Congress with the responsibility of promoting the resolution of labor grievances through arbitration, regularly monitors the length and cost of arbitration proceedings. 28 FED. MEDIATION & CONCILIATION SERV. ANN. REP. Table 3, at 35; Table 5, at 36 (1985).

37. It is likely, however, that if discovery were to be freely available in labor arbitration, its use would be far less extensive than in litigation. *See infra* notes 231-33 and accompanying text.

38. The Advisory Committee for the 1983 amendments to the Federal Rules of Civil Procedure noted that use of discovery tools as tactical weapons has resulted in "excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake." FED. R. CIV. P. 26 advisory committee's note (1983).

39. *See* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 870-71; Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 478.

40. *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 35 (District Court Study Series, 1978) [hereinafter JUDICIAL CONTROLS] ("The data do suggest, however, that discovery abuse, to the extent it exists, does not permeate the vast majority of federal filings. In half the filings, there is no discovery—abusive or otherwise."); Schroeder & Frank, *supra* note 39, at 476.

41. Professor Wayne D. Brazil, in a survey of Chicago litigators, divided attorneys into subgroups depending on the size of their cases. One subgroup had a median case size of $1,000,000 or more; the other subgroup had a median case size of $25,000 or less. Attorneys in the small case subgroup were substantially less likely than their large case counterparts to report unhappiness with the discovery system or to have experienced abuses such as overdiscovery or harassment. Brazil, *supra* note 39, at 869-72.

that the extent of discovery is positively correlated with certain subject matters, with larger numbers of parties, and with the presence of counterclaims and crossclaims.[42] Labor cases are not among the case subject matters that generate substantial discovery.[43] In addition, labor cases rarely involve multiple parties, crossclaims, or counterclaims. Labor contract enforcement almost invariably involves only two parties—the employer and the union. Crossclaims and counterclaims do not occur in labor grievance arbitration.

There is yet another reason why judicial experience with discovery abuse ought not lead to the rejection outright of discovery in labor arbitration. The federal courts' response to perceived abuses has not been to impose any general restrictions upon availability of discovery mechanisms. Instead, recent changes in the federal rules have been directed toward giving judges more discretion to limit unreasonable discovery requests; requiring attorneys to certify that their discovery requests are not unreasonable and not interposed to harass or cause unnecessary delay or expense; and granting judges the authority to sanction attorneys who violate the certification provision.[44] The lesson to be drawn from the experience of the federal courts is not that the practice of discovery is unwise, but rather that any discovery system must permit the intervention of a neutral decision maker to control potential abuses.

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42. *See* JUDICIAL CONTROLS, *supra* note 40, at 40. This Federal Judicial Center study looked at approximately 3000 cases in six United States district courts. *Id.* at xi.

43. *See id.* Table 16, at 42. Of the 182 labor cases included in the study, 48.9% had no discovery at all, and 31.3% had one or two discovery events. *Id.* Only 1% of the labor cases (2 of 182 cases) were in the high discovery category in which more than 10 discovery events occurred. *Id.* The Federal Judicial Center study, by looking at litigated labor cases, may underrepresent the extent to which discovery might be used if freely available in arbitration. Although the study does not explain the nature of the labor cases evaluated, many of them probably involved judicial review of arbitration or actions to compel arbitration. In actions to enforce arbitration awards, the arbitration process would have already developed an extensive factual record, and there would be little need for discovery once the case reached federal court. Actions to compel arbitration can usually be resolved by contract interpretation and would generally not require development of a factual record through discovery. *See* AT & T Technologies v. Communication Workers, 475 U.S. 643, 650 (1986); R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 561-63 (1976).

44. FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26 advisory committee's note (1983).

II. ISSUES OF LEGAL AND INSTITUTIONAL COMPETENCE

The preceding discussion suggests discovery has a place in labor arbitration, but any discovery process must empower a neutral authority to control possible problems of excessive discovery or unreasonable refusals to comply with discovery requests. In the labor setting, there are three possible sources of that neutral intervention: the NLRB, the courts, and the arbitrator. This section explores whether these institutions possess adequate legal authority and institutional competence to supervise arbitral discovery.

A. THE NATIONAL LABOR RELATIONS BOARD

Of the three institutions, the NLRB has the clearest source of legal authority to supervise discovery in labor arbitration. In the National Labor Relations Act (NLRA), Congress authorized the NLRB to prevent the commission of unfair labor practices.[45] The NLRA makes it an unfair labor practice for either a union or an employer to "refuse to bargain collectively" once a union has been properly selected as the employees' collective bargaining representative.[46] The statute further defines the obligation to bargain collectively as requiring bargaining "in good faith."[47]

The NLRB, with the approval of the Supreme Court, has found that the duty to bargain in good faith requires an employer "to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[48] Although the Supreme Court has never ruled on the issue, the NLRB and lower courts have also held that a union has a corresponding duty to provide information needed by an employer to fulfill its responsibilities as a participant in the collective bargaining relationship.[49]

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45. § 10(a), 29 U.S.C. § 160(a) (1982).

46. *Id.* § 8(a)(5), (b)(3), 29 U.S.C. § 158(a)(5), (b)(3).

47. *Id.* § 8(d), 29 U.S.C. § 158(d) ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .").

48. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979) (citations omitted).

49. *See* Local 13, Detroit Newspaper Printing & Graphic Communications

The Supreme Court has clearly held that the employer's duty to provide information extends beyond the period of contract negotiation and applies as well to labor–management relations during the term of a collective bargaining agreement.[50] In *NLRB v. Acme Industrial Co.*,[51] the union requested from the employer information about machinery that had been removed from the plant.[52] The union sought the information to determine whether to file a grievance under provisions of the labor agreement.[53] The agreement prohibited certain subcontracting and gave transfer rights to employees who might be laid off as a result of removal of equipment.[54] The NLRB found that the employer violated its duty to bargain in good faith when it refused to provide the requested information.[55] The Supreme Court unanimously agreed, stressing that the Board should employ a discovery-type standard in determining what information had to be produced.[56] This standard was to be a more liberal standard of relevance than would be appropriate in a trial.[57] The Court did not view the Board's role in supervising arbitral discovery as usurping the arbitrator's authority. Rather, the Board would be assisting the arbitration process by permitting the union to sift out the nonmeritorious claims that could overburden the system.[58]

The Supreme Court has also recognized the duty to disclose information at a later stage of the grievance process, when the union has already filed a grievance and is preparing for arbitration. In *Detroit Edison Co. v. NLRB*,[59] the union sought information about employee aptitude tests in preparation for arbitration of a grievance challenging the employer's failure to promote several employees.[60] When the employer declined to provide the information, the union not only filed an unfair labor practice charge against the employer, but also asked the ar-

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Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979); International Bhd. of Teamsters Local 851 (Northern Air Freight), 283 N.L.R.B. No. 145, at 6-7, 125 L.R.R.M. (BNA) 1094, 1094 (1987).

50. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).
51. 385 U.S. 432 (1967).
52. *Id.* at 434.
53. *Id.*
54. *Id.* at 433-34.
55. *Id.* at 435.
56. *Id.* at 437.
57. *Id.* at 437 & n. 6.
58. *Id.* at 438.
59. 440 U.S. 301 (1979).
60. *Id.* at 307-08.

bitrator to order the company to furnish the materials.[61] The arbitrator advised the parties that he was without authority to compel production of the information,[62] but the Board found an unfair labor practice and ordered the employer to turn over copies of the test and answer sheets.[63] All members of the Supreme Court assumed that the duty to furnish relevant information extended to material needed to prepare for an arbitral hearing. The Court divided, however, on the issue of whether the employer's claims that the validity of the test and the privacy of employees would be threatened, respectively, by direct disclosure to the union of the actual test questions and the release of employees' scores without their permission.[64] The majority of the Court held that although it was the responsibility of the NLRB in the first instance to determine what type of disclosure would satisfy the statutory duty, courts were not to serve as a "passive conduit" in reviewing Board disclosure orders.[65] Specifically, the Court held that the Board had abused its discretion in not giving adequate protection to the company's interests in test secrecy and the employees' interests in the confidentiality of test scores.[66]

Even before these Supreme Court rulings on information disclosure, the NLRB began to develop a law of arbitral discovery. Through adjudication of numerous cases, the NLRB has developed a comprehensive body of standards defining the circumstances in which parties to arbitration must disclose information to one another. For example, the Board has placed a burden on both unions and employers to furnish all relevant and necessary information upon request.[67] Board cases have also resolved what sort of information is to be considered presumptively relevant, the proof necessary to establish relevance in the absence of a presumption, the timing and form of infor-

61. *Id.* at 308.

62. *Id.* In the award the arbitrator stated that he had informed the parties of his belief that he lacked authority to order disclosure of the information, but he invited them to produce case citations to the contrary. Petition for Writ of Certiorari at 67a, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (No. 77-968). The parties did not do so. *Id.*

63. 440 U.S. at 310.

64. *See id.* at 316-17, 320 (opinion of Stewart, J., joined by C.J. Burger, JJ. Blackmun, Powell, and Rehnquist); *id.* at 320 (Stewart, J., concurring in part & dissenting in part); *id.* at 325, 329 (White, J., dissenting, joined by JJ. Brennan and Marshall).

65. *Id.* at 316.

66. *Id.* at 316-17, 320.

67. *See* 1 THE DEVELOPING LABOR LAW 612-14 (C. Morris 2d ed. 1983).

mation disclosure, and the availablility of defenses to disclosure, such as burdensomeness, employee privacy interests, and the protection of trade secrets.[68] The Board has also directed that, when an employer raises defenses to the production of information, the parties should attempt to negotiate an accommodation between themselves before asking the Board to balance the competing interests of labor and management.[69] The Board's substantive standards for the resolution of arbitral information disputes appear to have worked well in practice to respect the interests of both parties and to promote the smooth functioning of their relationships.

In short, the NLRB possesses clear statutory authority to compel discovery in arbitration and has already developed a comprehensive body of case law governing the scope of permissible discovery. Those characteristics seem to suggest that the NLRB is ideally suited to be the neutral decision maker available to monitor arbitral discovery. The structure and operation of the agency, however, preclude the NLRB from effectively undertaking that role. The NLRB's critical flaw is an inability to resolve arbitral discovery disputes within a reasonable period of time.

Expeditious resolution of disputes is especially needed in the labor setting. The Supreme Court has identified the "relatively rapid disposition of labor disputes" as "one of the leading federal policies" in labor law.[70] Because arbitration is the means for defining critical contract terms which affect the entire relationship between the company and the union, life under the existing contract and negotiation of subsequent agreements would be impossible without prompt and final resolution of grievances.[71] Collective bargaining agreements and

68. *See* French, *Arbitral Discovery Guidelines for Employers*, 50 UMKC L. REV. 141 (1982); White & Meyer, *Employer Obligation to Provide Information*, 35 LAB. L.J. 643 (1984).

69. Oil, Chem. & Atomic Workers Local 6-418 v. NLRB, 711 F.2d 348, 362 (D.C. Cir. 1983); *see also infra* note 236.

70. *See* United Parcel Serv. v. Mitchell, 451 U.S. 56, 63 (1981) (citing UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 707 (1966)); *see also* Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 168-69 (1983) (applying shorter federal statute of limitations to bar employees' duty of fair representation action against union); UAW v. Hoosier Cardinal Corp., 383 U.S. at 707 (applying shorter of two state limitations periods to union's suit for terminated employee's vacation pay).

71. *See Mitchell*, 451 U.S. at 63-64. Professor Edgar A. Jones, Jr., in a thorough review of the problem of arbitral discovery during the term of a collective bargaining agreement, put it even more strongly: "Time is then crucial; often it is everything." Jones, *The Labor Board*, *supra* note 5, at 1188-89.

the law governing arbitration affirm this need for expedition by providing short time periods for action at various stages of the arbitration process. Contracts commonly limit the time in which a union may file a grievance, the time in which an employer may respond, and the time within which an arbitrator must issue an award.[72] The Supreme Court has insisted on the use of brief statutes of limitations when parties challenge arbitration awards[73] or bring actions claiming a union's breach of the duty of fair representation in grievance handling.[74]

The NLRB is institutionally incapable of prompt resolution of discovery disputes in arbitration. Under the NLRA, the Board does not have the power to make its orders legally binding.[75] The internal procedure leading to issuance of an order requires an investigation by the agency's regional office, a hearing before an administrative law judge, and a decision by the NLRB's five-member Board.[76] While a significant proportion of unfair labor practice cases are settled before an order is issued,[77] an employer or union that desires to take advantage of all the statute's procedural protections could avoid issuance of a legally binding order for several years until the NLRB obtained enforcement from a federal court of appeals.[78]

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72. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:7, :81-:83; *see also supra* notes 17-18 and accompanying text.

73. *See Hoosier Cardinal*, 383 U.S. at 707. The Supreme Court in *Mitchell*, 451 U.S. at 63-64, in adopting a 90-day limitations period for an action against an employer, implicitly considered the state's 90-day period for vacation of arbitration awards appropriate for the labor context.

74. Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 169-72 (1983) (adopting six-month limitations period for hybrid duty-of-fair-representation actions in which both employer and union are defendants); *see also Mitchell*, 451 U.S. at 64 (applying 90-day state limitations period for actions to vacate arbitration award in action by employee against employer).

75. National Labor Relations Act, § 10(e), 29 U.S.C. § 160(e) (1982). The NLRA requires the Board to petition a federal appeals court for enforcement of orders in unfair labor practice proceedings. *Id.*

76. 48 NLRB ANN. REP. 5-6 (1983).

77. *Id.* at 6. It is also true that most grievances settle before arbitration, and most civil lawsuits are settled before trial. The test of an institution's efficiency in handling disputes should be its promptness in resolving cases in which one of the parties intends to make maximum use of available opportunities for delay.

78. Theoretically, the NLRB could obtain more rapid relief in an information disclosure case by seeking temporary relief in a federal district court prior to the decisions of the administrative law judge and the Board. Section 10(j) of the NLRA empowers the Board to seek such relief whenever it has issued an unfair labor practice complaint and authorizes the district courts to grant "such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j) (1982). In practice, however, the Board considers it appropriate

Not only are delays lengthy,[79] but also recent data suggests that delays have increased substantially, particularly at the agency level. A 1986 report of the NLRB, although not confined to information disclosure matters, found extraordinary delays in agency processing of unfair labor practice cases.[80] This report to a House appropriations subcommittee found that in fiscal 1985, the median elapsed time from the filing of a charge to the Board's decision was 661 days.[81] The median time from Board decision to court of appeals decision was an additional 383 days.[82] Assuming that the median time for processing of all unfair labor practice cases is a reasonable approximation of the processing time for information disclosure cases,[83] a party seeking assistance from the NLRB for arbitral

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to seek § 10(j) relief in only the most egregious cases of unfair labor practices. For example, in fiscal 1983 the Board issued complaints in 6477 unfair labor practice cases, but it sought interim relief under § 10(j) in only 39 cases. 48 NLRB ANN. REP. Table 3A, at 168; Table 20, at 220 (1983). Under this high standard, the Board would never seek injunctive relief in cases involving refusals to disclose information. Moreover, § 10(j) proceedings have been unable to produce prompt relief. The federal courts have been hesitant to consider injunctive relief until the Board has already completed its fact-finding process, including the rendering of a decision by an administrative law judge. Therefore, even in cases in which an employer has committed numerous serious unfair labor practices, the "interim relief" is not likely to be available until many months after the aggrieved party first submitted its charge to the NLRB. *See, e.g.*, Eisenberg v. Honeycomb Plastics Corp., 125 L.R.R.M. (BNA) 3257 (D.N.J. Jan. 9, 1987) (eight months); Kaynard v. MMIC, Inc., 734 F.2d 950 (2d Cir. 1984) (twelve months).

79. Two studies confirm the extent of these delays. In an article reviewing NLRB enforcement of arbitral discovery, Professor Edgar A. Jones, Jr., catalogued 49 NLRB decisions involving information disclosure that arose between 1941 and 1964. Jones, *The Labor Board, supra* note 5, at 1244-59. Within this sample a median of 5 months elapsed before completion of the regional investigation, 11 months before issuance of the administrative law judge's decision, 16 months before issuance of the NLRB's decision, and 29 months until the decision of the court of appeals. *Id.* at 1256 (NLRB personnel who today bear title of administrative law judges called trial examiners during period of Jones's study). Jones found that one-half of the decisions by the NLRB were reviewed by the courts of appeals. The elapsed time until issuance of the court of appeals decision ranged from 17 to 50 months. Six of the cases went on to a decision by the Supreme Court, either on the merits or denying a petition for review, by which time a median of 44 months had elapsed. *Id.* at 1256, 1259.

80. *Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1987: Hearings Before the Subcomm. on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Comm. on Appropriations*, 99th Cong., 2d Sess., pt. 7, at 560 (1986).

81. *Id.*

82. *Id.*

83. There is no reason to believe that the NLRB makes any special effort

discovery would have to wait more than thirty-four months before issuance of a court order directing compliance with the information request. And, once the information was received, the party would still not have resolved the underlying grievance which gave rise to the request for information. A collective bargaining relationship cannot tolerate uncertainty about the meaning of terms of the agreement for such a long period. During that time, the agreement must be applied to other circumstances and a subsequent agreement negotiated.[84]

B. THE COURTS

State or federal courts could provide the neutral decision maker necessary to oversee discovery in labor arbitration, but only if some source of law grants them the authority to decide arbitral discovery disputes. Although employers and unions have the right under the NLRA to obtain from one another information necessary to the processing of grievances,[85] the Act provides no private cause of action that would permit the parties directly to effectuate those rights through litigation. If a right to arbitral discovery is to be directly enforceable in the courts, therefore, it must be derived from some other source.[86] Among the possible sources of such authority are the labor contract, the Federal Rules of Civil Procedure (or state procedural provisions), and federal common law.

Collective bargaining agreements, which commonly outline the procedures to be used for grievance resolution and arbitration,[87] could explicitly grant each party the right to obtain information needed by the other in preparing grievances for

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to expedite its decision making in information disclosure cases. In a recent case, the NLRB ordered an employer to provide several categories of information to a union, including information needed for handling grievances. The Board issued its decision nearly six years after the union filed its complaint with the Board. New York Post Corp., 283 N.L.R.B. No. 60, at 3, 124 L.R.R.M. (BNA) 1377, 1378 (1987) (complaint issued April, 1981; Board decision March 31, 1987).

84. Ninety-five percent of collective bargaining agreements have a duration of three years or fewer. *Basic Patterns: Amendment and Duration*, 2 Collective Bargaining Negot. & Cont. (BNA) 36:2 (1986).

85. *See supra* notes 50-66 and accompanying text.

86. Even in the absence of any authority for the courts directly to compel arbitral discovery, courts have a role in enforcing discovery initially ordered by an arbitrator because they have the power to enforce arbitration awards. *See infra* notes 202-10 and accompanying text.

87. *See supra* notes 15-21 and accompanying text.

arbitration.[88] Although such contractual provisions could create a substantive right to information disclosure, it does not appear that courts would be in a position directly to enforce the contractual right.

In section 301 of the Labor-Management Relations Act, Congress granted the federal courts jurisdiction over actions for breach of collective bargaining agreements.[89] The Supreme Court has held that Congress intended by this grant of jurisdiction to direct the courts to fashion federal common law to govern the enforcement of labor contracts.[90] The Court has also held that although section 301 does not preclude state courts from hearing actions for breach of collective bargaining agreements,[91] it does require that any such cases be decided according to the federal common law.[92]

Among the principles of federal common law is a rule that courts are not to decide the merits of any contract claim which is arguably governed by the arbitration provision of a collective bargaining agreement.[93] As the Supreme Court has said:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.[94]

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88. For example, a contract between the General Telephone Company of Florida and the Electrical Workers provides:

> Any written documentation in possession of the Company which influences its decision on any matter in dispute, shall also be made available to the Local Union. Any written documentation in possession of the Union which influences its decision on any matter in dispute shall also be made available to the Company.

2 Collective Bargaining Negot. & Cont. (BNA) 51:43 (1985).

89. Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a) (1982), provides:

> 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 organizations, 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.

90. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

91. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 512 (1962).

92. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

93. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960).

94. *American Mfg. Co.*, 363 U.S. at 567-68. The Supreme Court has also said, "[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did

If a labor contract provides for arbitral discovery and also includes a provision for arbitration of all disputes arising from the agreement, state and federal courts would be precluded from considering the merits of any dispute between the parties regarding their contractual obligation to produce information.[95] Thus, the existence of an explicit contractual provision governing arbitral discovery will not permit judicial monitoring of information disclosure disputes.

While the parties would not normally contract to vest courts with direct authority to compel arbitral discovery, it may be that courts already possess such authority, derived from their generally applicable rules of civil procedure.[96] Such procedural rules are the second source of law that could provide courts with the authority to supervise discovery. The Federal Rules of Civil Procedure authorize parties in litigation in federal courts to use an extensive array of discovery devices[97] and specify a broad scope of material that is subject to discovery.[98] The Rules also grant courts authority to compel compliance with reasonable discovery requests[99] and to protect parties from unreasonable requests.[100] One might argue that parties to a col-

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agree to give the arbitrator power to make the award he made." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

95. Of course, contracting parties could ensure direct judicial enforcement of a contractual information clause by explicitly excluding disputes under that clause from coverage of the arbitration provisions. But parties would be unlikely to want to do so in light of the greater delay and expense which would result from using the courts, rather than an arbitrator, to enforce the contract.

96. This analysis will focus on the Federal Rules of Civil Procedure as a possible source of judicially directed discovery in arbitration, but much of the same discussion would govern equally the question of whether state procedural rules could permit state courts to direct arbitral discovery. The application of state procedural rules to permit arbitral discovery as part of an action to compel arbitration could be precluded either because of the language or interpretation of the state procedural rule itself, or because federal labor law would preclude application in a state court of a state rule which conflicted with federal labor policy. *See Lucas Flour Co.*, 369 U.S. at 103.

97. "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." FED. R. CIV. P. 26(a).

98. The Federal Rules permit discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED. R. CIV. P. 26(b)(1). Material, to be discoverable, need not be itself admissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

99. FED. R. CIV. P. 37. Rule 37 also permits the court to sanction parties for failure to comply with its discovery orders. *Id.*

100. FED. R. CIV. P. 26(b)(1), 26(c).

lective bargaining agreement should be able to obtain discovery for all aspects of labor arbitration simply by bringing an action in federal district court to compel arbitration.[101] Two arguments, however, suggest the invalidity of this analysis. The first is that the Federal Rules of Civil Procedure, by their own terms, seem to preclude use of the discovery provisions in aid of arbitration. Furthermore, even if the Federal Rules do not by their terms preclude discovery, national labor policy favors interpreting the Rules to prevent use of federal court discovery devices in this setting.

The Federal Rules specify that its provisions govern "all suits of a civil nature . . . with the exceptions stated in Rule 81."[102] The only section of Rule 81 arguably applicable to federal actions to compel arbitration in collective bargaining disputes is Rule 81(a)(3). This Rule states that, in actions under the United States Arbitration Act,[103] "these rules apply only to the extent that matters of procedure are not provided for in those statutes."[104]

A provision of the United States Arbitration Act governing stays of judicial action pending arbitration could be interpreted to preclude federal courts from issuing orders regarding arbitral discovery under the rules of procedure. Section 3 of the Arbitration Act directs a court, upon being satisfied that the issue involved in litigation is governed by a contractual arbitration provision, to "stay the trial of the action until such arbitration has been had."[105] This section arguably denies the right to discovery under the Federal Rules once the court determines that arbitration is appropriate. Because the Arbitration Act speaks narrowly in directing the court to "stay the trial," however, it could also be argued that the Act does not even address the question of the court's power over such pretrial matters as discovery. Most courts that have considered the

101. The federal court would have jurisdiction of the action to compel arbitration. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960).

102. FED. R. CIV. P. 1.

103. 9 U.S.C. §§ 1-208 (1982).

104. FED. R. CIV. P. 81(a)(3). This Rule also applies to actions under a specific provision of the Railway Labor Act. The language regarding the Railway Labor Act has no bearing on the power of federal courts to control discovery before, or concurrent with, arbitration because the specific section of the Act to which the Rule refers deals with postarbitration litigation to enforce arbitration awards. *See* 45 U.S.C. § 159 (1982).

105. 9 U.S.C. § 3 (1982). Section 3 also requires as a prerequisite to issuance of a stay an application of one of the parties. *Id.*

exclusion of Rule 81(a)(3) have determined that the Arbitration Act prohibits parties from proceeding with discovery under the Federal Rules after arbitration has been ordered. According to these courts, court-directed discovery results in duplicative proceedings, interferes with the objectives of expedition and limiting costs, and interferes with the role of the arbitrator.[106] Some courts, which have adopted the general rule precluding court-supervised discovery in such cases, have nevertheless permitted discovery when it was limited to the issue of arbitrability itself[107] or when unusual circumstances threatened the permanent loss of information.[108]

The debate over the meaning of the Arbitration Act to the issue of discovery in labor arbitration has little significance if the Arbitration Act does not govern arbitration under collective bargaining agreements. For many years federal courts have divided on whether Congress intended to exclude labor–management contracts from coverage under the Arbitration Act.[109] According to its terms, the Act does not apply to "contracts of employment of . . . workers engaged in foreign or in-

106. *See* H.K. Porter Co. v. Local 37, United Steelworkers, 400 F.2d 691, 695-96 (4th Cir. 1968); Thompson v. Zavin, 607 F. Supp. 780, 783-84 (C.D. Cal. 1984); Recognition Equip. v. NCR Corp., 532 F. Supp. 271, 275 (N.D. Tex. 1981); Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 568 (S.D. Miss. 1976); Econo-Car Int'l v. Antilles Car Rentals, 61 F.R.D. 8, 10 (D.V.I. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974); Local 1746, Int'l Ass'n of Machinists & Aerospace Workers v. Pratt & Whitney, 329 F. Supp. 283, 286-87 (D. Conn. 1971); International Union of Elec. Workers v. Westinghouse Elec. Corp., 48 F.R.D. 298, 300 (S.D.N.Y. 1969); Penn Tanker Co. v. C.H.Z. Rolimplex, Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961); Commerical Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 363 (S.D.N.Y. 1957); Pennsylvania Greyhound Lines v. Amalgamated Ass'n of State, Elec., Ry. & Motor Coach Employees, Div. 1063, 98 F. Supp. 789, 791-92 (W.D. Pa. 1951), *rev'd on other grounds*, 193 F.2d 327 (3d Cir. 1952); *see also* 7 J. MOORE, J. LUCAS & K. SINCLAIR, JR., MOORE'S FEDERAL PRACTICE ¶ 81.05[7] (2d ed. 1987) [hereinafter MOORE'S FEDERAL PRACTICE] (discovery generally denied if subject matter of arbitration). *Contra* Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973) (discovery allowable in manner not delaying arbitration); International Ass'n of Heat & Frost Insulators Local 66 v. Leona Lee Corp., 434 F.2d 192, 194 (5th Cir. 1970) (per curiam) (allowing federal discovery procedures).

107. *See, e.g., International Union of Elec. Workers*, 48 F.R.D. at 301 (union action to compel arbitration).

108. *See, e.g.*, Vespe Contracting Co. v. Anvan Corp., 399 F. Supp. 516, 522 (E.D. Pa. 1975) (disputed work about to disappear behind wall coverings); Ferro Union Corp. v. S.S. Ionic Coast, 43 F.R.D. 11, 13-14 (S.D. Tex. 1967) (evidence and witnesses on foreign flag ship about to leave port).

109. For an extensive discussion of the issue and the earlier relevant case law, see American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 469-73 (11th Cir. 1987).

terstate commerce."[110] The dispute over the applicability of the Arbitration Act to proceedings arising under collective bargaining agreements has apparently been resolved in a recent Supreme Court decision, *United Paperworkers International Union v. Misco, Inc.*[111] In a footnote the Supreme Court stated that the Arbitration Act does not apply directly to labor arbitration cases.[112]

If collective bargaining disputes are not within the coverage of the Arbitration Act, the exclusion of Rule 81(a)(3) does not apply to labor arbitration. The Federal Rules thus govern pretrial procedure in actions to compel arbitration. The issue is then raised of whether, in such an action, the Federal Rules would permit discovery relating not only to the issue of arbitrability, but also to the merits of the underlying grievance.

Because the scope of discovery allowed under the Rules is broad, one might argue that a court should permit a party to discover information relevant to the substantive issue to be decided by the arbitrator. The Rules permit discovery of information "relevant to the subject matter involved in the pending action."[113] This language is considered to encompass material beyond just the pending issues.[114] Applying this standard in an action to compel arbitration, discovery related to the merits of the grievance would be permitted unless a court held that the discovery request sought information not merely beyond the issues raised in the litigation, but beyond the "subject matter" of the court action.

Defining what is beyond the subject matter of the action to compel arbitration will determine whether discovery related to the merits of a grievance should be permitted. In making this decision, a court must balance the broad discovery policies of the Federal Rules against the policies in support of arbitration generally, and of labor arbitration in particular. As noted earlier, in deciding cases that posed a conflict between the federal discovery rules and the Arbitration Act, courts generally have

110. 9 U.S.C. § 1 (1982).

111. 108 S. Ct. 364 (1987).

112. *Id.* at 372 n.9. The Court did indicate, however, that the law developed under the Arbitration Act profitably may be regarded as a model for federal common law governing the enforcement of collective bargaining agreements. *Id.* The concerns that motivated the courts' decisions to refrain from supervising arbitral discovery in cases under the Arbitration Act also suggest that courts should refrain from directing discovery in collective bargaining disputes subject to arbitration.

113. FED. R. CIV. P. 26(b)(1).

114. 4 MOORE'S FEDERAL PRACTICE, *supra* note 106, at ¶ 26.56[1].

foreclosed court-directed discovery on the merits of the matter to be arbitrated on the grounds that court involvement might duplicate or interfere with the arbitrator's role or might undermine the policy of arbitration to provide inexpensive and expeditious procedures.[115] While these grounds apply as well to labor arbitration, the policy of expedition should be given even greater weight in the labor context. The Supreme Court has identified the speedy resolution of labor disputes as a central value in federal labor policy.[116] Although the Rules favor broad discovery, that policy should be discounted in this context. That policy can be fulfilled by discovery conducted at the direction of the labor arbitrator.[117] Thus, a court should not construe the Federal Rules' "subject matter" language to permit discovery regarding the merits of a grievance in an action to compel arbitration.[118]

The third source of law that could provide courts with the authority to supervise discovery is federal common law. The preceding analysis regarding the ability of the courts to enforce a contractual information provision or to apply its discovery rules to the substance of an arbitrable grievance goes far toward answering the question of whether federal common law ought to provide independent authority for a state or federal court to direct arbitral discovery. When the Supreme Court held in *Textile Workers Union v. Lincoln Mills*[119] that suits to enforce collective bargaining agreements were to be governed by federal common law, it also provided some guidance on how the content of that law was to be determined. The Court said that it was to be "fashion[ed] from the policy of our national labor laws,"[120] and continued:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express

115. *See supra* notes 106-08 and accompanying text.

116. *See supra* notes 70-74 and accompanying text.

117. *See infra* notes 188-98 and accompanying text.

118. It should be acknowledged, however, that in some cases it may be difficult to disentangle information relating to arbitrability from information related to the underlying merits of the grievance. *See* AT & T Technologies v. Communication Workers, 475 U.S. 643, 651-52 (1986) (holding issue of arbitrability was for court to decide even though court of appeals had held that resolving arbitrability issue would entangle court in interpreting substantive provisions of contract). *But see id.* at 652-56 (Brennan, J., dissenting) (suggesting that issue before Court was more narrow and did not require consideration of substantive provisions of contract).

119. 353 U.S. 448 (1957).

120. *Id.* at 456.

> statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[121]

If courts are to look to the NLRA[122] as one source of the federal common law, and if there is a right to arbitral discovery under the NLRA,[123] it might be argued that courts should provide and supervise arbitral discovery. But simply because the NLRA creates a substantive right to discovery does not mean that it is consistent with federal labor policy to vest the enforcement of that right in the judicial branch. The Supreme Court demonstrated some sensitivity toward that general question in *Lincoln Mills* by noting that both the substantive rights and the fashioning of remedies must be consistent with labor policy.[124] Provision of a judicial remedy for violation of NLRA requirements for arbitral discovery would be inconsistent with federal labor policy in two respects. It would interfere not only with the role of the arbitrator and the arbitration process, but also with the enforcement responsibilities of the NLRB itself. The Supreme Court has repeatedly cautioned courts that Congress vested initial enforcement of the NLRA not in the courts, but in the NLRB.[125] Moreover, it would be inconsistent with the federal policy of expeditious resolution of labor disputes to place responsibility for enforcement of obligations to disclose information in the judicial system which, like the NLRB, is unable promptly to resolve information disputes.[126]

In summary, the courts have no legal authority derived from contract, procedural rules, or federal common law, to provide direct supervision for arbitral discovery. In addition, the courts have the same institutional incapacity as the NLRB to supply expeditious resolution of discovery disputes.

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121. *Id.* at 457.

122. 29 U.S.C. §§ 151-169 (1982). The Act is part of the Labor–Management Relations Act, 29 U.S.C. §§ 141-197 (1982).

123. *See supra* notes 50-66 and accompanying text.

124. *See supra* notes 119-21 and accompanying text.

125. Leedom v. Kyne, 358 U.S. 184, 187 (1958); American Fed'n of Labor v. NLRB, 308 U.S. 401, 411 (1940).

126. A study of more than 500 cases handled by 54 judges in six federal judicial districts found that in cases handled by judges who exercised strong control, discovery averaged 176 days for cases in which discovery was completed and 253 days for cases in which the entire case had been completed. For judges using limited or no controls over discovery, the average time for discovery was 334 days in cases with discovery concluded and 505 days for completed cases. JUDICIAL CONTROLS, *supra* note 40, at 52-54.

C. THE ARBITRATOR

The arbitrator is the final candidate for performing the necessary role of monitoring the discovery process in labor arbitration. To undertake this assignment, the arbitrator must possess both the legal authority to issue discovery orders and the structural capacity to render prompt decisions.

Of the two necessary capacities, the arbitrator's ability expeditiously to resolve discovery disputes is most easily demonstrated. Unlike the NLRB and the courts, the arbitrator has the institutional capacity to issue discovery orders with the promptness necessary to avoid delay of the arbitration process and interference with the parties' ongoing relationship. The most recent report on the issuance of arbitrators' awards found that the average elapsed time between an arbitration hearing and an award was forty-five days.[127] Because the forty-five day period was needed for the rendering of written decisions after complete hearings on the merits, arbitrators would be able to issue awards in discovery disputes even more expeditiously. The quantity of evidence and argument to be considered would be much less, and extensive written awards would not be necessary. In discovery cases, arbitrators should be able to make immediate oral decisions at the time of the hearing, documented later by a brief written order.[128]

The arbitration forum can provide expeditious resolution of discovery disputes not only because of the speed of its initial proceeding, but also because of the unusual finality of its decision making. Courts are precluded from reviewing the merits

127. 38 FED. MEDIATION & CONCILIATION SERV. ANN. REP. Table 5, at 36 (1985).

128. The 45-day period for issuance of an award does not represent the entire time necessary for resolution of grievances. Time is also expended in selecting an arbitrator and scheduling a hearing. The FMCS reported that in fiscal year 1985, the parties took an average of 96.77 days to select an arbitrator and that 120.56 days elapsed between appointment of the arbitrator and the date of the hearing. *Id.* No additional time would be lost for arbitrator selection if the parties are using an arbitrator to resolve discovery disputes. The same arbitrator selected to consider the merits could decide the discovery question. The elapsed time between appointment and hearing date could be shortened in discovery disputes. Because less time would be needed for a hearing on the discovery issue than on the merits of a grievance, time for such hearings should be more easily found in the schedules of arbitrators and advocates. Discovery hearings, which would probably take less than an hour, could even be handled by telephone conference call when expedition is especially important.

of an arbitration award.[129] An arbitrator's determinations of the facts, interpretations of the contract, and remedial conclusions are entirely insulated from judicial attack. Decisions of the NLRB and of the trial courts do not have such finality. Decisions of the NLRB with respect to matters of fact can be overturned if they are not "supported by substantial evidence on the record considered as a whole."[130] The NLRB's legal conclusions can be rejected by courts if they are inconsistent with the language or tenor of the NLRA.[131] Even with respect to remedial determinations of the Board, the Supreme Court has emphasized that a court should not serve as a "passive conduit" in enforcing the Board's orders.[132] In following these standards of review, the courts of appeals have declined to enforce a substantial proportion of NLRB orders.[133] Factual findings of trial courts commonly may be overturned if the appellate court finds that they are "clearly erroneous."[134] Determinations of law by trial courts are subject to plenary appellate review.[135] Therefore, decisions of an arbitrator with respect to discovery issues are final much earlier in time than would be comparable determinations of either the NLRB or the courts. This finality, coupled with the speed with which arbitrators render their decisions, makes the arbitrator alone capable of resolving information disputes sufficiently fast to prevent interference with the collective bargaining relationship.

The arbitrator's legal authority to supervise the discovery process is, however, less clear. The possible sources of legal authority are the collective bargaining agreement, state arbitration laws, the United States Arbitration Act, and federal common law.

If the parties included in their agreement a provision granting one another access to information relevant to potential or pending grievances and also provided for the arbitration of any disputes involving the interpretation or application of their agreement, the arbitrator would have authority to resolve any

129. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

130. National Labor Relations Act, § 10(e), 29 U.S.C. § 160(e) (1982).

131. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

132. Detroit Edison Co. v. NLRB, 440 U.S. 301, 316 (1979).

133. In fiscal 1983, 70.1% of the Board's orders were affirmed in full. 48 NLRB ANN. REP. Table 19A, at 219 (1983). Between 1979 and 1982, only 64.6% of the Board's orders were affirmed in full. *Id.*

134. FED. R. CIV. P. 52(a); *see also* F. JAMES & G. HAZARD, *supra* note 28, at 668.

135. F. JAMES & G. HAZARD *supra* note 28, at 668.

disputes over the provision of information.[136] A collective bargaining agreement could also specify directly the authority of the arbitrator to compel discovery.[137] The parties could achieve the same result by incorporating by reference a code of arbitration procedures that provided an opportunity for exchange of information under the direction of the arbitrator.[138] Even if the parties initially did not include a provision in their agreement calling for exchange of grievance information, nothing would bar the parties from negotiating an addendum to their agreement to cover information disclosure so that the policing of such a clause would be vested in the arbitrator.[139] By including specific discovery rights within a contract, however, the parties risk restricting the broader discovery rights that they might otherwise have had under some source of generally applicable law.[140]

State arbitration statutes are another possible source of legal authority for the arbitrator to monitor discovery. The most common state arbitration statutes are modeled after the Uniform Arbitration Act.[141] Although the Act has been

136. *See supra* notes 87-95 and accompanying text.

137. The Supreme Court stated in United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 371 (1987), that parties to collective bargaining agreements are "free to set the procedural rules for arbitrators to follow if they choose."

138. *See* AM. ARB. ASS'N, VOLUNTARY LABOR ARBITRATION RULES § 28, *reprinted in Rules of American Arbitration Association*, 1 Collective Bargaining Negot. & Cont. (BNA) 17:61-:66 (1987) ("The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. An Arbitrator authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party."). In some states the provisions of the Uniform Arbitration Act, which authorize arbitrators to order production of information, *see infra* notes 141-43 and accompanying text, are made applicable to collective bargaining agreements only if the agreement so provides. *See, e.g.*, ALASKA STAT. § 09.43.010 (1987); N.C. GEN. STAT. § 1-567.2(b)(2) (1987).

139. Although the NLRA does not require the parties to negotiate during the term of a contract any matter "contained in" an agreement, 29 U.S.C. § 158(d) (1982), the parties may mutually agree to such negotiations. For the peculiar interpretation of the phrase "contained in," see Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1217-20 (1951).

140. With respect to waiver by contract of discovery rights derived from arbitration statutes and procedural rules, see O. FAIRWEATHER, *supra* note 2, at 140. With respect to rights derived from the NLRA, the NLRB has held that rights to information may be waived by the terms of a collective bargaining agreement, but only if the language of waiver is clear and unmistakable. Clinchfield Coal Co., 275 N.L.R.B. 1384 (1985).

141. UNIF. ARBITRATION ACT, 7 U.L.A. 5 (1955).

adopted in thirty-one states,[142] several of the states explicitly exclude collective bargaining agreements from its coverage or make its provisions applicable to collective bargaining agreements only if the contract so provides.[143]

The Uniform Act gives arbitrators the authority to issue subpoenas "for the attendance of witnesses and for the production of books, records, documents and other evidence."[144] It also allows arbitrators to permit a deposition to be taken, for use as evidence, of a witness who "cannot be subpoenaed or is unable to attend the hearing."[145] Some state variations from the Uniform Act give arbitrators either more[146] or less[147] authority to direct exchanges of information between the parties.

The provisions of the Uniform Act fail to give arbitrators any genuine discovery authority, even in those states where it has been adopted and where it is applicable to collective bargaining agreements. The power of the arbitrator under the Uniform Act is directed solely at the production of evidence at the hearing. It does not include authority to require any prehearing discovery. Depositions, for example, are only allowed to be taken "for use as evidence."[148] Subpoenas, as well, are only authorized for evidentiary purposes.[149] In addition, the Uniform Act grants no authority to the arbitrator to employ such discovery devices as interrogatories, inspection of premises, or requests for admission.

A sampling of the laws of states whose arbitration acts are not modeled after the Uniform Arbitration Act reveals an inconsistent patchwork of provisions regarding the discovery au-

142. 7 U.L.A. 1 (1985 & Supp. 1987).

143. UNIF. ARBITRATION ACT § 1 & annot., 7 U.L.A. 6-8 (1985 & Supp. 1987); *see also supra* note 138.

144. 7 U.L.A. 114 (1955). Section 7(a) of the Uniform Arbitration Act provides in relevant part, "The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence." *Id.*

145. *Id.* § 114(b). "On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing." *Id.*

146. In the District of Columbia, arbitrators are explicitly authorized to permit exchange of written interrogatories and prehearing documents. D.C. CODE ANN. § 16-4307(b) (1981).

147. In Indiana an arbitrator may not order parties to a labor-management agreement to provide financial records or information pertaining to a party's financial condition. IND. CODE ANN. § 34-4-2-8(a) (Burns 1986).

148. UNIF. ARBITRATION ACT § 7(b), 7 U.L.A. 114 (1955).

149. *Id.*

thority of arbitrators in cases arising under collective bargaining agreements. Some states explicitly exclude labor arbitration from the coverage of their arbitration acts.[150] Other state acts clearly cover labor arbitration but make no provision for any information disclosure to be conducted under the direction of the arbitrator.[151] Elsewhere, parties to labor arbitration have some limited access to prehearing information but no general right to discovery.[152]

This review of state arbitration laws, both those derived from the Uniform Arbitration Act and those enacted independently, shows that in most states labor arbitrators have absolutely no authority to order prehearing discovery. In only a few jurisdictions do arbitrators have even limited power to regulate any exchange of information. No state grants arbitrators in labor cases the power to offer the full variety of potential discovery devices.

Beyond the substantive inadequacy of state statutory provisions for arbitral discovery, resort to state law presents an even more fundamental problem. Because federal common law controls enforcement of collective bargaining agreements, state law can never by its own force govern arbitral discovery. In describing the relationship between state law and federal common law in *Lincoln Mills*, the Supreme Court said:

> Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[153]

The question then is whether the variety of state arbitration laws—some granting limited discovery, some restricting discovery, and some not even addressing the question—should be absorbed as federal law or whether such absorption is incompatible with the purposes of section 301.

The incorporation of state arbitration laws to control dis-

150. *See, e.g.*, LA. REV. STAT. ANN. § 9:4216 (West 1983); MICH. COMP. LAWS § 600.5001(3) (1968).

151. *See, e.g.*, MASS. ANN. LAWS ch. 150C (Law. Co-op. 1976); N.Y. CIV. PRAC. L. & R. § 7505 (McKinney 1980).

152. Under a California arbitration law of general applicability covering labor cases, parties have the right to demand the names of witnesses expected to testify and the identity of documents to be introduced 15 days before the hearing. The documents must be made available to the other side for inspection and copying before the hearing. CAL. CIV. PROC. CODE § 1282.2.(a)(2)(A) (West 1982).

153. 353 U.S. 448, 457 (1957) (citations omitted).

covery in labor arbitration is inconsistent with federal law under section 301 in two important respects. The extraordinary diversity of state statutory provisions means that absorption would preclude any national uniformity. In addition, absorption of state laws that fail to provide any right to discovery, or which limit that right, would directly conflict with the arbitral disclosure policies of federal labor law.

The Supreme Court has said that one of Congress's fundamental purposes in enacting section 301 was to ensure the application of uniform law.[154] But if uniformity in all matters was mandated by federal law, there would be no occasion at all for incorporation of state law. The Supreme Court has not gone that far. To determine whether federal law mandates uniformity here, the articulated test is whether the application of diverse state laws to arbitral discovery issues would "threaten the smooth functioning" of the "private settlement of disputes" or "frustrate in any important way" any critical labor policy objective.[155] For example, in *UAW v. Hoosier Cardinal Corp.*,[156] the Supreme Court rejected the need for nationally uniform statutes of limitations for breach of collective bargaining agreements.[157] Uniformity was not necessary because limitations periods did not affect grievance resolution.[158] Their impact arose only after such processes were completed.[159] The same observation clearly cannot be made of arbitral discovery. The question of what information is available during the grievance resolution process directly affects what grievances are brought, which grievances are resolved before arbitration, what evidence

154. Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) ("More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'" (quoting Pennsylvania Ry. Co. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919)).

155. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966). The Court said in *Hoosier Cardinal*, "The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." *Id.*

156. 383 U.S. 696 (1966).

157. *Id.* at 704-05.

158. *Id.* at 702.

159. *Id.* The Court concluded, in addressing the limitation issue, "Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy." *Id. But see* Del Costello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), in which the Supreme Court held that a desire for uniformity, among other considerations, warranted adoption of a uniform federal limitations period for hybrid actions that claimed both breach of a collective bargaining agreement and violation of a union's duty of fair representation.

may be available for presentation at an arbitration hearing, and ultimately how arbitration cases are resolved on the merits. If state laws that precluded or limited arbitral discovery were absorbed, the smooth functioning of the private settlement process would be threatened. The need for national uniformity is therefore demonstrated under the first prong of the the Supreme Court's standard.[160]

The second test of the necessity of uniformity is whether diversity would frustrate in any important way the achievement of any significant goal of labor policy. This test suggests disparate results can be tolerated if the differences are insignificant or the issues trivial, but that when an important federal policy is at stake, Congress would not have intended to leave the effectuation of that policy to the discretion of state courts and legislatures. In the case of arbitral discovery, the disparities between state laws are substantial and reflect the full range of possible responses to the issue of arbitral information disclosure. Thus, this second test for uniformity merges with the broader standard that state law must be compatible with federal labor policy to be absorbed as federal law.

State denial or limitation of arbitral discovery is inconsistent with two policies of federal labor law under section 301. The Supreme Court has affirmed that the NLRA requires that parties to a collective bargaining agreement are obligated to provide to one another information relevant and necessary to their responsibilities as collective bargaining partners.[161] This obligation includes information needed for the investigation of possible grievances[162] and the presentation of grievances in arbitration.[163] Reliance upon state statutes that preclude or restrict access to such information in the arbitration process

160. While not controlling in the labor law context, a recent decision of the Supreme Court is suggestive of the result the Court might reach if faced with the question of whether arbitral discovery rights need uniformity. In Perry v. Thomas, 107 S. Ct. 2520 (1987), the Court held that the federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), preempted state law that sought to protect the right of employees to pursue wage claims in litigation. *Id.* at 2526. *Perry* indicates a judicial insistence upon nationally uniform law even when the underlying right is created by state law (rather than federal law in the collective bargaining context); when the right is substantive (rather than the arguably procedural issue involved in arbitral discovery); and even when the standard for rejecting state law is derived from federal preemption law (rather than the less strict "compatibility" standard under § 301).

161. NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967). For a further discussion of *Acme*, see *supra* notes 50-58 and accompanying text.

162. 385 U.S. at 435-36.

163. Detroit Edison Co. v. NLRB, 440 U.S. 301, 316 (1979).

directly conflicts with federal policy. Furthermore, the Supreme Court has recognized expedition in the resolution of labor disputes as a leading federal policy under section 301.[164] If the parties are unable because of state law to call upon the assistance of the arbitrator in obtaining the information to which they are entitled under the NLRA, the federal policy in favor of speedy disposition necessarily will be frustrated.[165]

A third possible source of authority for labor arbitrators to compel production of information is the United States Arbitration Act.[166] For many years, both courts and commentators had viewed the Act as providing such authority.[167] It is now clear, however, that the Arbitration Act cannot serve as a direct source of authority in labor cases. As discussed earlier, the Supreme Court held in *Misco* that the Act does not apply to collective bargaining agreements.[168] Even so, the Court considered the Act relevant to the issue of what standard courts should use in deciding whether to overturn an arbitrator's award when an arbitrator had refused to consider proferred evidence.[169] According to the Court, the Act's section 10 standard for setting aside awards for refusal to consider evidence[170] could be used as guidance in fashioning the federal common law rule for such cases.[171] The Court, applying the Arbitration Act's standard as common law, and citing its own decision interpreting that standard,[172] held that an arbitrator's refusal to consider evidence was reversible error only when the refusal was "in bad faith or so gross as to amount to affirmative misconduct."[173]

In light of *Misco*, it is necessary to examine the Arbitration

164. *See supra* notes 70-74 and accompanying text.

165. *See supra* notes 127-35 and accompanying text.

166. 9 U.S.C. §§ 1-208 (1982).

167. Great Scott Supermarkets v. Local 337, Int'l Bhd. of Teamsters, 363 F. Supp. 1351, 1355 (E.D. Mich. 1973); Local Lodge 1746, Int'l Ass'n of Machinists v. Pratt & Whitney, 329 F. Supp. 283, 286-87 (D. Conn. 1971); O. FAIRWEATHER, *supra* note 2, at 145-46; M. HILL, JR. & A. SINICROPI, *supra* note 5, at 286-87.

168. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 n.9 (1987); *see supra* notes 110-12 and accompanying text.

169. 108 S. Ct. at 372.

170. 9 U.S.C. § 10(c) (1982) (order to vacate award may be issued "[w]here the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy").

171. *See Misco*, 108 S. Ct. at 372 n.9.

172. The Court cited Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 (1968), a case in which the Court vacated an arbitration award under § 10 of the Arbitration Act. *See Misco*, 108 S. Ct. at 372.

173. *Misco*, 108 S. Ct. at 372.

Act to ascertain whether the Act's treatment of discovery is an appropriate model for inclusion in the federal common law governing enforcement of collective bargaining agreements. No explicit language of the Act grants arbitrators authority to direct prehearing discovery. The only reference in the Act to the arbitrator's role in the disclosure of information is section 7, which empowers arbitrators to summon witnesses or documents for evidentiary purposes.[174] Because this language grants limited authority to arbitrators, some courts have assumed that the statute precludes the parties' rights to arbitral discovery.[175] Others have concluded that arbitrators do have the power to order prehearing discovery.[176]

Although *Misco* held that section 10 of the Arbitration Act could provide useful guidance to courts attempting to develop a federal common law standard for vacation of arbitration awards, section 7 cannot similarly be borrowed for the federal common law regarding arbitral discovery. Unlike section 10, which provides detailed standards and a well-developed body of case law applications,[177] section 7 does not even directly address the question of arbitral discovery. The case law developed under it is sparse and conflicting.[178] Section 10 was an appropriate candidate for adoption as federal common law in the labor setting because its strict standard for vacation of arbitration awards was consistent with previously articulated and equally strict standards for vacating the awards of labor arbitrators.[179]

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174. Section 7 provides in relevant part:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

9 U.S.C. § 7 (1982).

175. Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980); Great Scott Supermarkets v. Local 337, Int'l Bhd. of Teamsters, 363 F. Supp. 1351, 1354-55 (E.D. Mich. 1973); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957).

176. Groenevald Co. v. M.V. Nopal Explorer (*In re* Koala Shipping & Trading Inc.), 587 F. Supp. 140, 142-43 (S.D.N.Y. 1984) (arbitrator had authority to order production of documents and taking of depositions); Recognition Equip. v. NCR Corp., 532 F. Supp. 271, 273-75 (N.D. Tex. 1981) (court declines to direct discovery to avoid conflict with arbitrator's power to control discovery under 9 U.S.C. § 7).

177. *See* cases annotated under 9 U.S.C.A. § 10 (West 1970 & Supp. 1987).

178. *See* cases annotated under 9 U.S.C.A. § 7 (West 1970 & Supp. 1987).

179. *See* W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 764-66 (1983); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598-99 (1960).

Section 7, on the other hand, by not affirmatively affording discovery powers to arbitrators, is inconsistent with the federal common law principle of assuring parties access to information for grievance processing and promoting expeditious resolution of labor disputes.[180]

Federal common law is the final source that could empower labor arbitrators to oversee discovery. Courts are to develop the federal common law to govern enforcement of collective bargaining agreements from whatever sources may be available so as to effectuate "the policy of our national labor laws."[181] Various policies recognized as sources of that federal common law are consistent with recognizing a right to arbitral discovery and vesting the authority to direct such discovery in the hands of the arbitrator. As discussed earlier, these policies include the right of parties to information disclosure necessary to grievance handling[182] and the need for expeditious resolution of labor disputes.[183]

Another articulated principle of federal common law, the rule that procedural questions in arbitration are for the arbitrator to resolve, even more directly demonstrates the arbitrator's power to control the discovery process. In *John Wiley & Sons v. Livingston*,[184] the employer argued that the question of whether contractual preconditions to arbitration had been met was for the court, and not the arbitrator, to decide. The Supreme Court disagreed. The Court observed that the resolution of procedural issues often depends upon how one answers questions bearing on the merits of substantive issues.[185] The Court expressed concern that leaving such procedural issues to be resolved by a court would result in duplication of effort and intolerable cost and delay in the resolution of disputes.[186] The Court concluded, "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[187]

The Supreme Court broadened the scope of disputes that

180. *See supra* notes 50-74 and accompanying text.
181. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957); *see supra* notes 119-21 and accompanying text.
182. *See supra* notes 50-69 and accompanying text.
183. *See supra* notes 70-74 and accompanying text.
184. 376 U.S. 543, 547 (1964).
185. *Id.* at 557.
186. *Id.* at 557-58.
187. *Id.* at 557.

were to be resolved by the arbitrator in *International Union of Operating Engineers Local 150 v. Flair Builders*.[188] In *Flair* the employer argued that the question of whether arbitration was barred by laches because of the union's dilatory pursuit of its grievance was extrinsic to the contract and an issue for the court to decide.[189] The Supreme Court disagreed, holding that *Wiley*'s reference of procedural questions to the arbitrator governed even when the procedural question was neither derived from the contract nor intertwined with the merits of the grievance.[190] The Court relied upon the broad arbitration clause in the contract, under which the parties agreed to arbitrate "any difference" between them, to make the laches issue arbitrable.[191]

The Supreme Court again affirmed the breadth of its *Wiley* holding in *Misco*.[192] The collective bargaining agreement in *Misco* precluded consideration of hearsay evidence in arbitration but provided no other contractual standards for the arbitrator's determination of evidentiary matters. The arbitrator ruled that he should not consider evidence not relied upon by the employer in ordering the employee's discharge, particularly when neither the union nor the employee had been notified that the employer would attempt to rely on the after-discovered evidence.[193] Although the contract had no language addressing arbitral evidentiary standards apart from the hearsay exclusion, the Court found that the arbitrator's evidentiary ruling was "in effect . . . a construction of what the contract required when deciding discharge cases."[194] The Court considered it entirely appropriate for the arbitrator to have relied on the practice of other arbitrators in making this determination and concluded that his decision making was consistent with the holding of *Wiley* that procedural questions are for the arbitrator to resolve.[195]

The Supreme Court's holdings in *Wiley*, *Flair*, and *Misco* have clear implications for the capacity of the arbitrator to supervise the discovery process. Even in the absence of explicit contractual language granting an arbitrator authority to direct

188. 406 U.S. 487 (1972).
189. *Id.* at 490.
190. *Id.* at 491-92.
191. *Id.*
192. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987).
193. *Id.* at 371.
194. *Id.*
195. *Id.*

arbitral discovery, arbitrators have such authority as a matter of federal common law.

Wiley's holding that procedural questions are for the arbitrator to resolve should be read to encompass discovery issues. Discovery questions are traditionally considered to be matters of procedure. The Court's rationale for the rule also shows that discovery should be included within its holding. The *Wiley* Court reasoned that procedural questions are interrelated with the merits of a dispute and that arbitral authority would avoid duplication of effort and promote efficient and inexpensive procedures. Discovery issues often are intertwined with the merits of the dispute. An arbitrator needs to understand the nature of the underlying dispute to limit the scope of discovery. The appropriate sanctions for nondisclosure may well include adverse evidentiary assumptions against the nondisclosing party with respect to the merits. Vesting control of discovery in the arbitrator, rather than the courts, avoids duplicative procedures. The arbitrator is demonstrably better suited than either the NLRB or the courts expeditiously and inexpensively to resolve discovery disputes.

Flair also supports the notion of arbitral discovery by adding that even when the procedural question may be noncontractual and not intertwined with the merits, it may nevertheless be appropriate for the arbitrator to decide. *Flair* is significant to arbitral discovery because explicit contractual language regarding discovery is unusual in collective bargaining agreements. Furthermore, although discovery issues are frequently intertwined with the merits, they need not necessarily be. *Flair*'s relevance to the issue of arbitral discovery may, however, be limited by its dependence upon the broad arbitration clause that existed in that case.

The recent *Misco* decision diminishes the significance of *Flair*'s dependence on broad arbitrability language to support arbitrator authority over discovery. While the arbitration clause in *Flair* covered all disputes, the parallel provision in *Misco* applied only to disputes "aris[ing] from the interpretation or application of the . . . agreement."[196] In *Misco* nothing in the contract addressed exclusion of after-discovered evidence. The Supreme Court still considered this question to be "in effect" a matter of contract interpretation because it bore on what the contract expected in deciding discharge cases.[197] Reading *Flair*

196. *Id.* at 367.
197. *Id.* at 371; *see supra* text accompanying note 194.

and *Misco* together, the Court would likely conclude that if the arbitration clause includes "all disputes" between the parties, it puts discovery issues in the hands of the arbitrator. Even if the contract only makes disputes "aris[ing] from the interpretation or application of the agreement" arbitrable, discovery still should be arbitrable. Deciding what information the parties must produce in the arbitration process can also be viewed, as in *Misco*, as a construction of the substantive terms of the contract.

Misco is also useful to analysis of the arbitrator's power over discovery in two other respects. The specific holding that evidentiary issues are procedural matters for the arbitrator suggests a similar treatment of discovery questions. This is due to the interrelationship between discovery and evidence. In addition, even though the Court indicated that for legal purposes the evidentiary issue could be considered contractually based, on a practical level the Court made clear that the arbitrator should be free to rely on the manner in which other arbitrators handle similar evidentiary issues.[198] Arbitrators will therefore be in a better position to effectuate the discovery powers granted to them. They will be able to obtain assistance from decided arbitration cases and will not be dependent upon the contract's unyielding silence on the discovery issue.

Following the Supreme Court's directive that federal common law is to be derived from the principles of national labor law, three such principles—the need for mutual information disclosure in grievance processing, the demand for expeditious resolution of labor disputes, and the insistence on procedural questions in arbitration being left to the arbitrator—empower labor arbitrators with the discretion to monitor discovery within the grievance process. Two questions remain. How much discretion does the arbitrator retain to direct arbitral discovery in light of the power of the NLRB to compel information disclosure under the NLRA and the power of the courts to decline enforcement of arbitration awards? And, how ought arbitrators exercise the discretion they retain?

III. ISSUES OF INSTITUTIONAL COORDINATION

Although arbitrators have the power to supervise discovery in labor arbitration, the vesting of such power in the arbitrator does not deprive the other institutions of their traditional role

198. 108 S. Ct. at 371 n.8.

in the regulation of labor–management relations. The arbitrator's discretion to resolve such matters as the procedures for, or the permissible scope of, discovery is necessarily limited by the courts and the NLRB. Under federal common law, courts may refuse to enforce arbitral awards. Under the NLRA, the NLRB may refuse to defer to arbitrators' decisions.

Both the courts and the Board, however, will give the collective bargaining agreement itself preemptory authority to define the limits of the arbitrator's power in discovery. Under the federal common law employed by the courts, the terms of the agreement create and may limit the arbitrator's powers.[199] Thus, if the parties include in their agreement specific terms addressing the scope of information subject to discovery and the procedures to be followed for disclosure, the courts will insist that the arbitrator abide by those terms. Similarly, although the NLRB has recognized statutory rights to arbitral discovery,[200] the Board will nevertheless permit the parties to waive such rights by clear and unmistakable contractual language.[201]

Although contractual provisions addressing discovery will control when they exist, it is relatively unusual for an agreement to include such language. It will therefore be left to the arbitrator to develop the procedures and principles to govern discovery. The arbitrator's discretion will, however, be limited by the court's willingness to enforce arbitral awards and the Board's willingness to defer to them. The issue which must be addressed, therefore, is how the court's enforcement authority and the Board's deferral policies will interrelate with the discovery powers of the arbitrator.

On the issue of judicial control, the Supreme Court has articulated two different standards for enforcement of collective bargaining agreements.[202] It is unclear if one or both would be

199. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.").

200. *See supra* notes 45-69 and accompanying text.

201. Clinchfield Coal Co., 275 N.L.R.B. 1384, 1384-85 (1985).

202. One might argue that the Supreme Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), indicates that arbitrators are to be given even more deference in making procedural decisions than that afforded

applied to limit the discretion of an arbitrator in directing discovery. The first principle is that courts enforce an arbitrator's decision only if it is derived from the collective bargaining agreement.[203] The second standard, first applied by the Supreme Court in *Misco*, provides that when an arbitrator's decision is challenged on the basis of a procedural error, the award will not be set aside unless the arbitrator's conduct was "in bad faith or so gross as to amount to affirmative misconduct."[204]

The traditional standard of faithfulness to the agreement was described by the Supreme Court in *Enterprise Wheel*:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[205]

The *Enterprise Wheel* test for legitimacy of an arbitrator's decision is obviously applicable in assessing the merits of the award, such as whether an employee's discharge was for just cause or whether an employer's subcontracting violated contractual restrictions. Its relevance to reviewing an arbitrator's procedural rulings, such as those regarding discovery, is less clear.

Language used by the Supreme Court in *Misco* could be read as suggesting that the *Enterprise Wheel* standard is appropriate for evaluating an arbitrator's procedural rulings. At issue in *Misco* was an arbitrator's refusal to consider evidence discovered after the employee's discharge. Although the collective bargaining agreement did not refer to the admissibility of

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to them for decisions on the merits under *Enterprise Wheel*, 363 U.S. at 597. In *Wiley* the Court said, "'[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557. The notion that *Wiley* might establish a test for enforcement arguably is also supported by the Supreme Court's reference to this language in *Wiley* in its discussion of judicial review of an arbitrator's procedural ruling in *Misco*, 108 S. Ct. at 372. But *Wiley*'s language that procedural questions should be "left to the arbitrator" should not be read so broadly. *Wiley* addressed only the question of whether the arbitrator, in the first instance, should decide the procedural question. The case was not concerned with the question of what courts should do if, in a subsequent enforcement proceeding, a party challenged an arbitrator's procedural ruling. The essence of the Court's analysis in *Wiley* was to equate, rather than to differentiate, procedural questions and those going to the merits.

203. *Enterprise Wheel*, 363 U.S. at 597.

204. 108 S. Ct. at 372.

205. 363 U.S. at 597.

such evidence, the Court nevertheless described the decision of the arbitrator as "in effect . . . a construction of what the contract required when deciding discharge cases: an arbitrator was to look only at the evidence before the employer at the time of the discharge."[206] The Court's strained effort to describe the arbitrator's decision as an issue of contract interpretation seems to have been based on an assumption that *Enterprise Wheel* permits enforcement of a procedural ruling only if it draws its "essence" from the agreement.

Even if *Misco* is read as having adopted the *Enterprise Wheel* standard for procedural questions, the Court's willingness to be satisfied with a legal fiction of contractual interpretation demonstrates that, in the absence of contrary contractual language, *Enterprise Wheel* places no practical limits upon the arbitrator's discretion in fashioning discovery standards and procedures. Information disclosure, like evidence, can be viewed as a contractual requirement derived from the substantive provisions. Further, despite the apparent necessity of finding that the arbitrator's decision was derived from the contract, the arbitrator is not in fact limited to looking at contract language as the source for procedural rules. The Supreme Court noted in *Misco* that it was entirely appropriate for the arbitrator to have relied on decisions of other arbitrators in determining admissibility of evidence.[207] The *Enterprise Wheel* Court insisted on a contractual source but acknowledged that an arbitrator could properly look to labor law for help in determining the intent of the agreement.[208] The arbitrator is therefore free to obtain guidance in developing principles and procedures for discovery from the decisions of other arbitrators and from information disclosure law under the NLRA.

The second standard for review places somewhat greater judicial control over an arbitrator's procedural rulings, but even this control is still largely insignificant. The Court in *Misco* thought it appropriate to absorb as federal common law the language of section 10(c) of the United States Arbitration Act. This section permits courts to vacate arbitration awards when the "arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy."[209]

206. 108 S. Ct. at 371.

207. *Id.*

208. 363 U.S. at 597-98.

209. 9 U.S.C. § 10(c) (1982); 108 S. Ct. at 372. Section 10(c) also permits vacation of awards for other misconduct including unreasonable refusal to post-

The *Misco* opinion went further and interpreted the misconduct standard to require not merely error, but error that was either "in bad faith or so gross as to amount to affirmative misconduct."[210] Assuming the misconduct standard is to be applied to review of procedural decision making generally, labor arbitrators have an extraordinary amount of discretion under federal common law to design the discovery process.

While federal common law grants arbitrators this broad discretion, the NLRB has the authority under the NLRA not only to preclude arbitrators from effectively considering discovery matters, but also to render wholly ineffective those discovery decisions that arbitrators have made. Because the refusal to provide information that might assist one of the parties during the grievance process is an unfair labor practice,[211] the NLRB has concurrent authority, along with the arbitrator, to regulate arbitral discovery. The NLRA itself makes clear that the Board has jurisdiction to adjudicate an unfair labor practice despite the existence of a collective bargaining agreement purportedly regulating the same conduct.[212] And, if the Board resolves a dispute in an unfair labor practice proceeding in which a conflicting decision has already been rendered in arbitration, the Board's decision will prevail.[213]

Although the Board possesses the authority completely to ignore arbitration, the Board in selected cases has withheld its own decisional authority and deferred to the arbitration process and its outcomes.[214] The Board's deferral policy today includes both prospective and retrospective deferral. In prospective deferral, the Board declines to commence consideration of an unfair labor practice while a grievance arbitration on the same issue proceeds.[215] In retrospective deferral, the Board declines to consider, as an unfair labor practice, conduct that has already been the subject of an arbitration award.[216] Although the

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pone the hearing or "any other misbehavior by which the rights of any party have been prejudiced."

210. 108 S. Ct. at 372.

211. *See supra* notes 48-69 and accompanying text.

212. § 10(a), 29 U.S.C. § 160(a) (1982) ("This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.").

213. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964).

214. The Board has stated that its positive attitude toward deferral, at least with respect to prospective deferral, dates back to 1943. United Technologies Corp., 268 N.L.R.B. 557, 558 (1984).

215. *Id.* at 559; Collyer Insulated Wire, 192 N.L.R.B. 837, 840-43 (1971).

216. Olin Corp., 268 N.L.R.B. 573, 574 (1984).

nature of the issues for which the Board permits prospective deferral and the nature of the awards to which the Board allows retrospective deferral have been altered from time to time, the Board has never applied either deferral doctrine universally. For example, between 1977 and 1984, the Board declined to defer prospectively in cases involving interference with employees' rights to engage in collective or concerted activities or concerning discrimination because of union participation. Currently the Board defers prospectively in such cases.[217]

Although the Board in 1984 considerably broadened the categories of cases to which it would prospectively defer, including those involving the most fundamental rights of employees, it retained its previous policy of refusing to defer in matters concerning requests for information to be used in the grievance process. For example, in *General Dynamics Corp.*,[218] the union requested that the employer furnish it with a copy of a study to assist in processing grievances regarding subcontracting. The NLRB dismissed the employer's suggestion that the union's request should be deferred to arbitration.[219] The Board said that deferral was inappropriate in such a case because the disclosure issue was merely preliminary to the substantive subcontracting question.[220] The Board continued:

> In these circumstances, we find no merit in encumbering the process of resolving the pending subcontracting grievances with the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievance regarding the information request. Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration.[221]

This rationale for nondeferral in grievance information cases is not persuasive. It would hardly "encumber" the arbitration process to permit the arbitrator to evaluate whether the requested study would assist the union in its subcontracting grievance. If the subcontracting case proceeds to arbitration without the study being made available, the NLRB may later hold that the employer should have furnished it. The union would have been forced unnecessarily to go forward without needed information and would likely be entitled to have an arbitrator reconsider the subcontracting case. The Board claims

217. United Technologies Corp., 268 N.L.R.B. at 559.
218. 268 N.L.R.B. 1432 (1984).
219. *Id.* at 1433.
220. *Id.* at 1432 n.2.
221. *Id.*

that it is seeking to avoid the delays of a "two-tiered arbitration process," yet there is no reason to believe that the arbitrator could not have resolved the information and subcontracting issues in a single proceeding. Instead, the Board forces the parties into what is unquestionably a two-tiered procedure in which the information issue is decided by the Board and the subcontracting issue is determined by the arbitrator. Moreover, the Board's decision is inconsistent with various aspects of national labor policy. This duplicative procedure hardly contributes to the expeditious resolution of disputes. In addition to the multiplicity of proceedings required by the Board's nondeferral here, the Board is demonstrably much slower than the arbitrator in resolving the information dispute alone.[222] In *General Dynamics* itself, the Board issued its decision twenty months after the union requested the information and submitted its unfair labor practice charge.[223] The Board has continued to apply its *General Dynamics* nondeferral policy in subsequent cases despite employer arguments that arbitration is more expeditious than the Board's proceedings and that the arbitrator is better suited to determining what is relevant and necessary to processing a grievance.[224]

The Board should use the discretion it possesses under the NLRA to abandon the *General Dynamics* nondeferral doctrine. In the absence of Board action, federal courts should be free to hold that it is an abuse of the Board's discretion to decline to defer prospectively in grievable information disclosure cases.[225]

In the absence of the Board's reversal of *General Dynam-*

222. *See supra* notes 75-84, 127-35 and accompanying text. The Board's refusal to defer prospectively on arbitral information issues further threatens to interfere with the speedy resolution of labor disputes because information disputes may well arise, not only before arbitration commences, but also while it is in process. The informality of the arbitration process and the intensive attempts to settle a grievance which frequently occur just before an arbitration hearing commences often result in the representatives of labor and management devoting only limited efforts to the preparation of their arbitration case. Without substantial advance preparation, the parties may not discover until the time of the hearing that they require additional information from the other side.

223. 268 N.L.R.B at 1432-34.

224. United States Postal Service, 276 N.L.R.B. 1282, 1284-85 (1985) ("blind adherence" to federal policy favoring arbitration does not serve policy of enhancing collective bargaining); *see also* Clinchfield Coal Co., 275 N.L.R.B. 1384, 1384 (1985) (declining to defer information requests to arbitration process); United Technologies Corp., 274 N.L.R.B. 504, 504 (1985) (allegations involving refusal to supply requested grievance information not deferrable).

225. In other contexts courts of appeals have concluded that arbitrary or irrational refusals by the NLRB to defer to arbitrator's determinations will be

ics or the courts' rejection of it, the Board's nondeferral policy in information disclosure cases can most easily be avoided if the party seeking the information pursues its rights before the arbitrator and not before the Board.[226] The party may fear that efforts to negotiate release of the information, and pursuit of the grievance procedure should negotiations fail, might take more time than the six months allowed under the NLRA for submission of an unfair labor practice charge.[227] If so, the party could submit the charge but request the NLRB to defer resolution of the charge pending arbitration.[228]

While the Board's refusal to defer prospectively in information cases interferes with the role of the arbitrator, the Board's retrospective deferral policy has a proper place in the resolution of disputes about information relevant to grievance handling. Under the retrospective deferral policy, the Board will not consider the merits of a dispute already decided by an arbitrator if certain conditions are met. These requirements are that the parties agreed to be bound by the results of the arbitration process, the proceedings were fair and regular, the outcome was "not clearly repugnant to the purposes and policies of the Act," and the arbitrator considered the unfair labor practice issue.[229] The Board's retrospective deferral standards afford the arbitrator considerable discretion but nevertheless can serve as a safeguard in circumstances in which an arbitra-

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rejected as an abuse of the Board's discretion. *See, e.g.*, NLRB v. Aces Mechanical Corp., 837 F.2d 570 (2d Cir. 1988).

226. The NLRB does not investigate unfair labor practices on its own initiative but only responds to those charges submitted to it. 48 NLRB ANN. REP. 3 (1983).

227. *See* NLRA § 10(b), 29 U.S.C. § 160(b) (1982).

228. Under the authority of Dubo Mfg. Corp., 142 N.L.R.B. 431, 433 (1963), the NLRB will, at the request of the charging party, defer a charge pending arbitration even if the case is one on which the Board ordinarily would not defer prospectively. GEN. COUNSEL, NLRB, ADVICE MEMO. 77-58, REGIONAL OFFICE HANDLING OF COLLYER ISSUES 320, 322 (Labor Relations Yearbook, 1977); *see also* GEN. COUNSEL, NLRB, ADVICE MEMO. 79-36 (May 14, 1979) (refining *Dubo* deferral policy).

229. Olin Corp., 268 N.L.R.B. 573, 574 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). Under this test an award is not considered "clearly repugnant" even if it is not totally consistent with Board precedent so long as it is not "palpably wrong," that is, "not susceptible to an interpretation consistent with the Act." *Olin*, 268 N.L.R.B. at 574. The arbitrator will be held to have considered the issue if the contractual issue is factually parallel to the unfair labor practice and the arbitrator was presented generally with the facts relevant to resolution of the unfair labor practice issue. *Id.* Under *Olin* the burden of demonstrating that an award does not meet the deferral requirements is on the party seeking to have the Board reject deferral. *Id.*

tor has rendered a ruling regarding discovery which wholly disregards the statutory policies regarding information disclosure. Under *Enterprise Wheel* and *Misco*, courts have no power to refuse to enforce an award simply because it is wrong, or even grievously wrong. Thus, it is important that the NLRB retain the power to undo an arbitral decision which is "clearly repugnant" to the information disclosure policies of the NLRA. Permitting the Board to retain this limited power of reversal is not likely to impede the expeditious final resolution of the dispute. It is unlikely parties would frivolously pursue an unfair labor practice charge following arbitration in light of the Board's very high standard for granting relief.

In summary, the three institutions which play a part in the resolution of collective bargaining disputes—the Board, the courts, and the arbitrator—must coordinate their functions to permit the information disclosure process to work properly. The arbitrator should have the primary responsibility for directing the discovery process. Courts should overturn an arbitrator's award only if it manifests an infidelty to the arbitrator's obligations under the contract or if it is the result of bad faith or affirmative misconduct. The NLRB should prospectively defer to the arbitrator's resolution of information disclosure issues. If called upon to review an award which has been rendered, the Board should be free to reject a ruling that is clearly repugnant to the disclosure policies of the NLRA.

IV. ISSUES OF DISCRETION

To suggest that the labor arbitrator has the legal authority to direct, and broad discretion to design, the discovery process is not to say that labor arbitration ought to be transformed into a discovery system that resembles litigation under the Federal Rules of Civil Procedure.[230] Over many years the practice of labor arbitration has evolved into a system that is reasonably inexpensive, informal, and efficient. The introduction of discovery into that system ought not result in a significant modification of those characteristics.

Affirming the arbitrator's authority to direct discovery should not affect the vast majority of grievance arbitration cases in which neither party would be likely to seek the arbi-

230. For a contrary view, see Comment, *Pre-Hearing Procedures*, *supra* note 5, at app., which includes a complete proposed code of discovery for labor arbitration modeled after the Federal Rules of Civil Procedure.

trator's assistance in gaining access to information.[231] Because the parties to labor arbitration, the employer and the union, have a long-standing relationship and a substantial body of shared experience, much of the information known by one party will commonly be known by the other as well. Unlike litigation, the parties in an arbitration proceeding would never be strangers to one another. The union would also have ready access to information known by employees within the company. Labor contracts, for example, often provide union representatives access to the employer's plant to investigate grievances.[232] Moreover, the steps in the grievance procedure that precede arbitration are essentially a series of required settlement conferences. It is likely that each party, in an effort to get the other side to settle the grievance, will come forward with information supporting its position.[233]

It is therefore unlikely that arbitrators will be frequently called upon to participate in the information disclosure process. When called upon, however, arbitrators should be full participants in that process. They should not take the position, as several noted arbitrators have done in the past, that signing of subpoenas is a ministerial, nondiscretionary obligation.[234] Because arbitration is better suited than the other institutions to resolving information disputes expeditiously, arbitrators should not defer to the NLRB or to the courts, even though the NLRB

231. One experienced arbitrator reported that in thousands of cases over the years he had had perhaps a dozen requests for subpoenas, but that he had always been able to talk the parties out of it without issuing a formal ruling. William E. Simkin, Comments at Workshop of National Academy of Arbitrators Meeting in Washington, D.C. (May 1982), *in* ARBITRATION 1982: CONDUCT OF THE HEARING, 35TH PROC. ANN. MEETING NAT'L ACAD. ARB. 152 (J. Stern & B. Dennis eds. 1983) [hereinafter ARBITRATION 1982].

232. *Basic Patterns: Grievances and Arbitration*, *supra* note 12, at 51:41.

233. Of course, an employer or union engaged in prearbitration grievance steps has no incentive to come forward with information damaging to its case.

234. Jonathan Dworkin, David Feller & Benjamin Wolf, Comments at Workshop of National Academy of Arbitrators Meeting in Washington, D.C. (May 1982), *in* ARBITRATION 1982, *supra* note 231, at 150-51; Comment of Harry H. Platt, *in* Bedikian, *supra* note 5, at 594-95. In a survey of its membership undertaken by the National Academy of Arbitrators, experienced labor arbitrators were asked whether they would issue a subpoena for a witness when they had no information regarding the substantive nature of the case. The survey found that a majority of the arbitrators would issue the subpoena without qualification or concern about its enforceability. NAT'L ACAD. ARB., THE CHRONICLE (Apr. 1981). The study observed, "The following comment is typical of the responses of many members of this group: 'I issue any subpoena that is requested.'" *Id.*

has power to prevent unfair labor practices and courts have power to enforce subpoenas.

When a union or employer requests the arbitrator to direct the other party to provide information, the arbitrator's initial response should be to insist that the parties attempt to resolve the dispute consensually through negotiations. This response is consistent with the view of the Supreme Court that the grievance procedure is an extension of the collective bargaining process.[235] Furthermore, this response is compatible with the holding of the NLRB that the parties should attempt to resolve information disputes through negotiations before seeking the Board's determination.[236]

If the parties' negotiations fail to reach a settlement of the information dispute, the arbitrator should convene a brief and informal pre-arbitration meeting to hear the arguments on both sides. When possible, the arbitrator should issue a ruling orally at the time of the meeting and document the decision shortly thereafter in a brief written order.[237] If circumstances make it too expensive or inefficient to convene the meeting in person, a telephone conference call may be satisfactory. It may sometimes be appropriate for the arbitrator to have material submitted for *in camera* inspection to assess relevance or to excise information protected by a legitimate defense to disclosure.

In resolving the information dispute, the arbitrator is bound by any contractual provisions that may exist addressing information disclosure. In the absence of such provisions, the

235. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

236. General Dynamics Corp., 268 N.L.R.B. 1432, 1433 (1984); Minnesota Mining & Mfg. Co., 261 N.L.R.B. 27, 32 (1982), *enforced*, Oil, Chem. & Atomic Workers Local 6-418 v. NLRB, 711 F.2d 348, 362 (D.C. Cir. 1983). The Board directs the parties to negotiate an accommodation when information is found to be relevant but the other party has some legitimate interest in nondisclosure. *Id.*

237. If the discovery issue that the arbitrator addressed was a novel issue, or if the arbitrator's analysis of the issue would be helpful to other arbitrators, arbitrators should be encouraged to submit their decisions for publication. Published decisions would be especially useful to arbitrators deciding subsequent discovery issues in light of the Supreme Court's finding in *Misco* that the awards of other arbitrators may be relied upon in making procedural rulings. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 (1987). See the discussion of *Misco*, *supra* notes 192-95 and accompanying text. For such awards to be accessible to arbitrators, however, they must also be properly indexed. The index to the Commerce Clearing House publication, *Labor Arbitration Awards*, for example, currently contains no subject entry that would enable an arbitrator to locate previous discovery decisions.

arbitrator should principally rely upon the information disclosure doctrines developed by the NLRB. This body of law offers direction on the scope of discoverable material and the appropriate defenses to disclosure.[238] The arbitrator could also seek guidance from the decisions of other arbitrators on similar questions. With respect to the scope of the duty to disclose information, the arbitrator should be careful to apply the broad "discovery-type" standard of relevance rather than the narrower test of whether information would be admissible at a hearing.[239]

It is not expected that the parties to collective bargaining agreements would regularly seek to use the broad range of discovery devices offered under the Federal Rules of Civil Procedure.[240] In most cases in which the arbitrator's assistance is sought, the party likely will be seeking only production of documents or the issuance of a subpoena to permit a witness to testify at the hearing. Arbitrators should be reluctant to order any discovery procedure, such as depositions or interrogatories, that would be costly or that would make it necessary for the parties to obtain counsel. In unusually important or complex cases, however, or when loss of vital evidence is otherwise threatened, even these procedures ought to be available.

Arbitrators should decline, in the absence of explicit contractual authority, to issue the sorts of harsh sanctions for noncompliance with discovery orders available to federal district judges.[241] There is no precedent in the sources of federal common law for imposition of such sanctions. Arbitrators should be free, however, to implement traditional arbitral remedies for nondisclosure, including that of drawing an adverse inference from a party's failure to provide information within its control.[242]

Parties may seek to quash subpoenas issued by arbitrators

238. *See supra* notes 67-69 and accompanying text.

239. NLRB v. Acme Indus. Co., 385 U.S. 432, 437 (1967). For example, the view Arbitrator Laurence Seibel expresses, that he would have to be "convinced that what they are seeking would be relevant evidence, material evidence, probative evidence," is inconsistent with that standard. Laurence Seibel, Comments at Workshop of National Academy of Arbitrators Meeting in Washington, D.C. (May 1982), *in* ARBITRATION 1982, *supra* note 231, at 150.

240. *See supra* note 97.

241. *See* FED. R. CIV. P. 37.

242. *See* M. HILL, JR. & A. SINICROPI, *supra* note 5, at 278-79. Or, when information that was ordered earlier to be disclosed is presented initially at the hearing, the arbitrator might grant a continuance to permit the opposing party time to respond.

or otherwise seek to overturn the arbitrator's interim discovery orders. The courts in which such actions may be filed need to recognize that their enforcement proceedings are governed by federal common law, not by state arbitration acts[243] or the United States Arbitration Act.[244] Under federal common law, procedural questions are for the arbitrator to decide in the first instance.[245] Thus, the court may provide limited review of the arbitrator's action but is not empowered to offer de novo consideration. Any judicial review of arbitrators' discovery decisions must be consistent with federal common law doctrines that substantially narrow the court's power to overturn arbitrators' procedural determinations.[246] Courts must also take care to retain these high standards for nonenforcement in order to deter regular interlocutory resort to the courts, which could seriously undermine the federal policy in favor of expeditious final resolution of labor–management controversies. On the other hand, if a party seeks judicial enforcement of an arbitral discovery order, a court should promptly enforce the order if it complies with the federal common law standards for enforcement of arbitration awards.

V. CONCLUSION

The favorable effects of discovery on the litigation process are desirable in labor arbitration. To minimize potential discovery abuses, however, a neutral decision maker must be available to monitor the information disclosure requests of labor and management. The NLRB possesses the legal authority to perform this role, but it is institutionally incapable of providing the prompt resolution of disputes that the process requires. The judicial system has neither the legal authority nor the institutional competence to decide arbitral discovery disputes in the first instance. Labor arbitrators, however, are empowered by federal common law to direct the discovery process. They also have the institutional capacity to provide the expeditious resolution necessary for collective bargaining relationships to function properly. Once the authority initially to determine discovery disputes is vested in the arbitrator, both the NLRB and the courts should have only a limited role in reviewing

243. *See supra* notes 141-53 and accompanying text.
244. *See supra* notes 166-73 and accompanying text.
245. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964); *see also supra* notes 184-87 and accompanying text.
246. *See supra* notes 169-73 and accompanying text.

those decisions. The arbitrator's discretion to fashion the appropriate procedures and standards for arbitral discovery should be exercised in a manner consistent with federal common law and the tradition of labor arbitration as an inexpensive, informal, and expeditious process.