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USE OF SUBPOENAS IN LABOR ARBITRATION: STATUTORY INTERPRETATIONS AND PERSPECTIVES

Mary A. Bedikian†

INTRODUCTION

The expansive and pervasive use of labor arbitration as a means of effectively countering industrial strife has generated some procedural problems which need to be addressed.¹ One of many such problems is the utilization of formal discovery devices in the arbitral forum, namely the subpoena.

This Article will analyze the interface between the Federal Arbitration Act (United States Arbitration Act), the Uniform Arbitration Act, and the Michigan arbitration statute, in order to determine whether certain formal discovery procedures are, in fact, within the ambit of arbitral authority, and if so, to what extent. Germane to this analysis is whether the basis underlying the request to invoke the formal procedures is evidentiary in nature, or strictly for discovery purposes, as is typically perceived.

Additionally, a distinction will be drawn between common law arbitration and statutory arbitration, with the latter providing the gravamen for much of the development of procedural and substantive law in the area of labor arbitration. It will be shown that the arbitrator who hears a labor dispute pursuant to common law prin-

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1. The increase of labor arbitration cases processed, as reported by the American Arbitration Association, Federal Mediation and Conciliation Service and the Michigan Employment Relations Commission, stems, in part, from increased union vulnerability to damage suits for failing to represent employees fairly, and greater reliance upon a more expedient grievance resolution system.

ciples has less discretion to exercise relative to invoking formal discovery procedures. Principally, this is because the parameters of common law arbitral authority are derived essentially from the terms of the submission agreement, and the applicability of external laws becomes ostensibly limited.

Finally, a discussion will be had pertaining to the relative merits of whether labor arbitrators should actively, on their own initiative or at the request of a party, engage in the exercise of formal discovery procedures. An explanation of the prevailing schools of thought will be proffered. Support for their existence will include the opinions of distinguished labor arbitrators whose views have heretofore not been publicly expressed. In addition, having recognized the increasing number of collective relationships, both in the public and private sectors, the potential for generating increased arbitral involvement in discovery requests, an assessment will be made as to expected future arbitral conduct.

I. COMPULSORY PROCESS UNDER COMMON LAW ARBITRATION

A distinction can be made between common law arbitration and modern statutory arbitration as it relates to the use of discovery procedures within the arbitral forum. The mere existence of an arbitration statute does not guarantee the most efficient and expeditious use of arbitration for the settlement of collective bargaining disputes, if the law does not embody or mandate features of modern arbitration practice. The arbitration statute which is well grounded in common law vestiges does not recognize the validity of future dispute resolution and thereby reduces the element of certainty which is otherwise attached to third-party resolution.²

2. Those states which have modern arbitration statutes include: Alaska, ALASKA STAT. §§ 09.43.010 to .180 (1973); Arizona, ARIZ. REV. STAT. §§ 12-1501 to 1518 (Supp. 1957-1979); Arkansas, ARK. STAT. ANN. §§ 34-511 to 532 (Supp. 1979); California, CAL. CIV. PROC. CODE §§ 1280-95 (West 1972 & Supp. 1979); Connecticut, CONN. GEN. STAT. ANN. §§ 52-408 to 424 (West 1960); Delaware, DEL. CODE tit. 10, §§ 5701-5725 (1975); Florida, FLA. STAT. ANN. §§ 682.01-.22 (West Supp. 1979); Georgia, GA. CODE ANN. §§ 7-201 to 224 (1973); Hawaii, HAW. REV. STAT. §§ 658-1 to 15 (1976); Idaho, IDAHO CODE §§ 7-901 to 922 (1979); Illinois, ILL. REV. STAT. ch. 10, §§ 19-30, 101-123 (1975 & Supp. 1979); Indiana, IND. CODE ANN. §§ 34-4-1-1 to 2-22 (Burns 1973); Kansas, KAN. STAT. §§ 5-201 to 422 (1975); Louisiana, LA. REV. STAT. ANN. §§ 9-4201 to 4236 (West 1951 & Supp. 1951-1979); Maine, ME. REV. STAT. tit. 14, §§ 5927-5949 (1980); Maryland, MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 234 (1974); Massachusetts, MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West Supp. 1979); Michigan, MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (1976 & Supp. 1979); Minnesota, MINN. STAT. ANN. §§

The distinction between common law and statutory arbitration also includes the composition and election of the arbitral board, the conduct of the hearing, and matters relating to enforcement and implementation of the award. In common law arbitration these procedures are, by and large, governed by judge-made common law rules.³ While statutory arbitration prescribes formalities, and requires a written submission of the dispute in controversy, at common law it has been held that even an oral agreement and a subsequently rendered oral award are adequate.⁴

Common law arbitration had its genesis prior to the rapid unionization of America as a means of resolving existing controversies. The concept of common law arbitration has been construed as follows:

[W]hen the courts have no written law [constitution or statute] on which to base its decision in a particular controversy, it decides the case on the basis of custom and general principles of right and wrong. These decisions create precedents or rules, which are applied to similar future controversies. The body of law created in this fashion is spoken of as the common law.⁵

Elkouri and Elkouri in their book, *How Arbitration Works*, provide a general summary of what common law arbitration entails:

Common law arbitration rests upon the voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement

572.08-.30 (West Supp. 1980); Nevada, NEV. REV. STAT. §§ 38.015-.205 (1973); New Hampshire, N.H. REV. STAT. ANN. §§ 542.1-.10 (1974); New Jersey, N.J. STAT. ANN. §§ 2A:24-1 to 11 (West 1952); New Mexico, N.M. STAT. ANN. §§ 44-7-1 to 22 (1978); New York, N.Y. CIV. PRAC. LAW §§ 7501-7514 (Consol. 1963); North Carolina, N.C. GEN. STAT. §§ 1.567.1-.20 (Supp. 1979); Ohio, OHIO REV. CODE ANN. §§ 2711.01-.24 (Page 1954 & Supp. 1979); Oklahoma, OKLA. STAT. ANN. tit. 15, §§ 801-818 (West Supp. 1979); Oregon, OR. REV. STAT. §§ 33.210-.340 (1977); Rhode Island, R.I. GEN. LAWS §§ 10-3-1 to 20 (1970); South Carolina, S.C. CODE §§ 15-48-10 to 240 (Supp. 1979); South Dakota, S.D. COMPILED LAWS ANN. §§ 21-25A-1 to 38 (1978); Texas, TEX. CIV. CODE ANN. tit. 10, §§ 224-249 (Vernon 1973 & Supp. 1979); Utah, UTAH CODE ANN. §§ 78-31-1 to 22 (1977); Virginia, VA. CODE §§ 8.01-577 to 581 (1977); Washington, WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961); Wisconsin, WIS. STAT. ANN. §§ 298.01-.18 (West 1958); Wyoming, WYO. STAT. §§ 1-36-101 to 119 (1977).

3. See Sturges & Reckson, *Common Law and Statutory Arbitration: Problems Arising From Their Coexistence*, 46 MINN. L. REV. 819 (1962). See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 36 (3rd ed. 1973).

4. Common law arbitration requires certain submissions and awards to be in writing to comply with the Statutes of Frauds. *Walden v. McKinnon*, 157 Ala. 291, 47 So. 874 (1908); *Cutler v. Cutler*, 169 N.C. 482, 86 S.E. 301 (1915). See W. STURGES, *COMMERCIAL ARBITRATION AND AWARDS* §§ 69-75 (1930).

5. S. KAGEL, *ANATOMY OF A LABOR ARBITRATION* 139 (1961).

may be oral and may be revoked at any time before the rendering of the award The arbitrators have no power to subpoena witnesses or records and need not conform to legal rules of hearing procedure other than to give the parties an opportunity to present all competent evidence⁶

It should be noted that the existence of common law often is viewed as supplementing rather than supplanting existing statutory law.⁷ While discussing the impact of a common law arbitration statute, the Supreme Court of Indiana noted:

The statute in no manner affects submissions which were valid at common law. It is an affirmative statute without negative words, and in no respect are its provisions of such a nature that they cannot have effect consistently with the validity of parol submissions. Such submissions were valid at common law, and as there is nothing in the statute which expressly, or by necessary implication, changes the law as it previously existed upon that subject, they are still valid. The statute is merely cumulative.⁸

Further support for this position is found in numerous judicial opinions. In 1898, in referencing an arbitration statute then in effect, the Colorado courts stated with equal cogency:

We think that the sole object of the Code provisions as to arbitration and awards was to obviate the necessity of bringing a suit to enforce the award. They provided that, if a certain prescribed method was pursued in the submission of controversies in arbitration, the award in writing might be filed in the office of the clerk of the district court of the county wherein the matter was pending and judgment be entered thereon. The act did not undertake either in terms or by implication to abolish common-law arbitrations. Both forms of procedure may exist as neither conflicts with the other.⁹

Although the view of most courts is that arbitration statutes do not displace or foreclose the activation of common law machinery, opinions to this posture have surfaced.¹⁰

6. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 36; see also U.S. DEP'T OF LABOR, LABOR ARBITRATION UNDER STATE STATUTES 3 (M. Ziskind ed. 1943).

7. See Sturges & Reckson, *supra* note 3, at 826; see also M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 3.02 (1968).

8. Miller v. Goodwine, 29 Ind. 46, 47 (1867).

9. McClelland v. Hammond, 12 Colo. App. 82, 84-85, 54 P. 538, 539 (1898) (emphasis added).

10. One such minority view was advanced by the Washington Supreme Court in Dickie Mfg. Co. v. Sound Constr. & Eng. Co., 92 Wash. 316, 159 P. 129 (1916). The court stated: "[i]n the face of so complete an act as ours we are clear, and find this proper occasion to say,

Subpoena power of an arbitrator in a common law proceeding, where the arbitral authority is primarily derived from the four corners of the submission agreement, is limited at best. Aided only by a dearth of common law cases, courts which have propounded a juristic philosophy in this regard have held that an arbitrator's authority in such procedural matters is either unduly restrictive or virtually non-existent. In *Tobey v. County of Bristol*,¹¹ the court noted:

arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum iudicium.¹²

The exception appears in those instances where arbitration is under the rule of the court, and where authority of the court and its officials is available to enforce subpoenas or orders of the arbitrators.¹³

Judge-made law requires the arbitrator to afford the parties an ample and fair opportunity to present the evidentiary material, but does not concomitantly establish a separate power to subpoena witnesses or require the production of pertinent records and materials to aid in the resolution of the controversy. It follows, given the constraints which prevail in a common law setting, that an arbitrator could only exercise this latter prerogative if such authority was granted by both parties and not revoked prior to its exercise, or where a state has codified the common law so as to authorize the arbitrator to issue subpoenas.

that common law arbitration does not exist in this state and that the plain purpose of our legislation was to clear much unsettled practice by codifying arbitration." *Id.* at 318, 159 P. at 131.

11. 23 F. Cas. 1313 (C.C.D. Mass. 1845) (Case No. 14,065).

12. *Id.* at 1321 (emphasis added).

13. See *Paine v. Kentucky Ref. Co.*, 159 Ky. 270, 167 S.W. 375 (1914). The Kentucky Court of Appeals spoke to the collateral issue of arbitral compensation where services were rendered pursuant to a common law arbitration agreement. The court held that such an arbitration agreement, silent as to compensation, permitted arbitrators, under the theory of implied contract, to recover reasonable compensation for services requested and rendered. *Id.* at 282-83, 167 S.W. at 378-80.

II. COMPULSORY PROCESS IN MODERN STATUTORY LABOR ARBITRATION

A. Judicial Origins and Development of Federal Procedural Law in Labor Arbitration

Modern statutory labor arbitration percolated into the industrial mainstream in the late 1920's and 1930's as a response to the rapid unionization of major industries. The first such arbitration statute was enacted by the New York Legislature.¹⁴ Clearly distinguishable from earlier statutes, it encouraged the resolution of future controversies, in addition to existing controversies.¹⁵

Subsequent to the passage of the New York arbitration statute, Congress enacted the United States Arbitration Act in order to provide a statutory mechanism for enforcing agreements to arbitrate labor disputes arising in industries affecting interstate commerce.¹⁶ Jurisdictional criteria and statutory bases upon which intercession of such disputes were established. It was the intent of Congress, vis-a-vis the Act, to allow minimal judicial intercession, to preclude ultra vires arbitral conduct where a valid agreement to arbitrate did not exist, and to establish parameters for the scope of judicial review.¹⁷

Dispute initially existed as to whether the Act applied to collective bargaining agreements. Section 1 of the Act specifically provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of

14. Albeit the New York law was enacted in 1920 prior to a more formidable displacement of common law arbitration, the statute clearly embraced not only agreements of submission of existing controversies but agreements to arbitrate grievances arising in the future. Both classifications included elements of irrevocability and judicial enforceability, thereby passing into disuse common law revocation by notice. The original New York arbitration statute was enacted as N.Y. Laws 1920, ch. 925, art. 83 §§ 1410-31; the current version is located at N.Y. CIV. PRAC. LAW §§ 7501-7514 (Consol. 1963).

15. See Sturges & Reckson, *supra* note 3, at 822. According to the authors, general arbitration statutes with various modifications of the New York statute, were enacted in Nevada (1925), North Carolina (1927), and Utah (1927). These general statutes, as initially emerged in draft form, recognized agreements of submission on existing disputes. A new draft, adopted in 1955 and approved by the National Conference of Commissioners on Uniform Laws, extended recognition to include arbitration of future controversies and claims. Sturges & Reckson, *supra* note 3, at 822 n.9. See also M. DOMKE, *supra* note 7, at § 4.01.

16. 9 U.S.C. §§ 1-14 (1977).

17. See M. DOMKE, *supra* note 7 at § 4.03.

workers engaged in foreign or interstate commerce."¹⁸ A split of authority occurred as a consequence of Justice Frankfurter's dissent in the landmark case of *Textile Workers Union of America v. Lincoln Mills of Alabama*,¹⁹ in which he argued that the majority's decision to enforce labor arbitration agreements was reached by primary reliance upon section 301 of the Labor Management Relations Act,²⁰ and not the United States Arbitration Act, thus constituting a silent rejection of the applicability of the United States Arbitration Act.²¹ Neither Frankfurter's dissent nor the current trend of federal court decisions support the position that the Court per se impliedly rejected the applicability of the United States Arbitration Act to collective bargaining agreements; rather the Court's utilization and reliance upon the non-statutory body of federal substantive law, lacking in section 301, was sufficient to reach the desired goal of enforcing the arbitration provision.²²

Further enlightenment on this issue was provided in *Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150*.²³ In that case, the employer asserted that the collective bargaining agreement was a contract of employment within the meaning of section 1 of the Act, and ergo, the arbitration provisions were inapplicable. The court held that facts concerning the merits of a particular controversy must be found by the arbitrator,²⁴ the exclusion, on the other hand, specifically related to workers engaged in interstate or foreign commerce.²⁵

18. 9 U.S.C. § 1 (1976).

19. 353 U.S. 448 (1957).

20. 29 U.S.C. §§ 141-188 (1976).

21. 353 U.S. at 460-84 (Frankfurter, J., dissenting).

22. See Rushfield, *Federal Discovery in Aid of Labor Arbitration*, 459 Ar. IV-3 at 2 (1976) (unpublished article in the Library of the American Arbitration Association (AAA)).

23. 351 F.2d 576 (7th Cir. 1965).

24. *Id.* at 579-80.

25. See *Tenney Engine Inc. v. United Elec. Radio & Mach. Workers of Amer. Local 437*, 207 F.2d 450 (1953). The interpretation that contracts of employment of persons engaged in interstate commerce excluded arbitration systems of collective bargaining agreements was given continued force and effect in *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 596, n.2 (3rd Cir. 1968), and *International Ass'n of Machinists and Aerospace Workers v. General Electric Co.*, 406 F.2d 1046, 1049-50 (2nd Cir. 1969). Section 2 of the Act states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing contro-

The utilization of the United States Arbitration Act in a "collective" milieu has received further recognition by the federal judiciary.²⁶ Most recently, in *Local Lodge 1746, International Association of Machinists and Aerospace Workers v. Pratt & Whitney Division of United Aircraft Corporation*,²⁷ a United States District Court in Connecticut held that pursuant to the court's concurrent enforcement jurisdiction regarding arbitration proceedings, it was cloaked with sufficient power to order the production of disputed documents for *in camera* inspection by the arbitrator.²⁸

The United States Arbitration Act permits parties to collective bargaining agreements to rely upon the Act to predicate suits to compel arbitration. When section 301 of the Labor Management Relations Act came into existence, confusion reigned within the lower federal courts as to which of the two acts conferred jurisdiction.²⁹ In *Lincoln Mills*, the Supreme Court held that section 301

versy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Narrow construction of this language has resulted in the proposition that the United States Arbitration Act applies to collective bargaining agreements and to suits upon such agreements so long as the affected employees are not engaged in the transportation industries.

26. See Heinsz, Lowry, & Torzewski, *The Subpoena Power of Labor Arbitrators*, 1979 UTAH L. REV. 29, 44.

27. 329 F. Supp. 283 (D. Conn. 1971).

28. *Id.* at 286.

29. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (1977), authorizes suits in federal court for violation of collective agreements in industries affecting interstate commerce without respect to amount or diversity of citizenship. The applicable section of the Act reads:

(a) 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.

29 U.S.C. § 185(a). Looking to the legislative history of section 301, it should be noted that both the House and the Senate expressed concern about the failure to abide by a collective bargaining agreement. This concern manifested itself originally in the form of designating such contractual violations as a basis for filing an unfair labor charge with the National Labor Relations Board. This feature was subsequently excluded from the law. The House Conference Report states "[o]nce parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 6 (1947), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 546 (1948).

authorized the federal courts to fashion a body of law for the enforcement of collective bargaining agreement provisions for arbitration.³⁰ The court further identified section 301 as the primary source of substantive law; state law could be resorted to only if deemed to be compatible with the intent and purpose of section 301.³¹ In the event state law applied, it would not constitute an independent source of private rights.

Nurtured by a congressional policy favoring the enforcement of agreements to arbitrate disputes arising within industries affecting commerce, the United States Arbitration Act was relegated to serving a supplemental role in the development of both procedural and substantive law. The Act was not displaced by the emerging federal law being developed pursuant to section 301; but rather deemed compatible with section 301, and to that extent, considered a procedural source in arbitral jurisprudence.

B. Enactment of the United States Arbitration Act

The United States Arbitration Act was enacted in 1925 in response to increased unionization within the private sector.³² An additional force that prompted its passage was an increased refusal on the part of employers and labor organizations in industries affecting commerce, to abide by the terms of agreements to arbitrate labor disputes or to honor awards issued thereunder. The Act applies to arbitrations concerning transactions of enterprises engaged in, or affecting interstate commerce, and any maritime transactions.³³ Section 7 of the Act speaks to the area of discovery and provides a grant of authority to the arbitrator to issue a subpoena, non-compliance of which could culminate in contempt.³⁴

30. 353 U.S. 448, 456 (1957).

31. *Id.* at 457.

32. Originally enacted as Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883. The current version is found at 9 U.S.C. §§ 1-14 (1976).

33. 9 U.S.C. § 1.

34. Section 7 of the Act provides in pertinent 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 Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them . . . and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any

Whether this provision for discovery becomes operative, turns upon the existence of a judicial proceeding collateral to the arbitration proceeding to enforce the arbitration agreement. Examples of such proceedings include matters which involve a stay of an action brought on an arbitrability issue,³⁵ confirmation of an arbitral award,³⁶ and compelling the parties to arbitration.³⁷ Courts have unanimously held that a collateral judicial proceeding for the enforcement of an agreement to arbitrate, or for the enforcement of an arbitral award, or vacatur thereof, falls under the rubric of the United States Arbitration Act, and ergo, Rule 81(a)(3)³⁸ of the Federal Rules of Civil Procedure becomes applicable. The operative part of the federal rule provides that in proceedings relating to arbitration, the Federal Rules of Civil Procedure "apply only to the extent that matters of procedure are not provided for in those statutes."³⁹

person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

35. *Id.* at § 3.

36. *Id.* at § 9.

37. *Id.* at § 4. See Rushfield, *supra* note 22, at 5.

38. *Great Scott Supermarkets, Inc. v. Local 337, International Bhd. of Teamsters*, 363 F. Supp. 1351 (E.D. Mich. 1973); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957).

39. FED. R. Civ. P. 81(a)(3) provides in pertinent part that:

In proceedings under title 9, U.S.C., relating to arbitration, or . . . relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute . . . or by rules of the district court or by order of the court in the proceedings.

Once applicability is determined, Rule 45(a) designates procedure as follows:

Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

Rule 45(b) provides:

The Federal Rules of Civil Procedure do not become operative, however, if the United States Arbitration Act is found to be inapplicable to the specific judicial proceeding. For example, in *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*,⁴⁰ the respondent's answering statement to the demand for arbitration contained a notice to take the depositions of five of the petitioner's employees in Louisiana.⁴¹ The court subsequently granted the petitioner's motion to vacate the notice on the basis that Rule 81(a)(3) applied only to "proceedings" under the Act, which were in connection with a stay for an action brought on an issue with reference to arbitration, or confirmation or vacatur of an arbitral award.⁴² In addition the court noted, by its agreement to arbitrate rather than litigate disputes, that respondent elected voluntarily to avail himself of the procedures unique and peculiar to the arbitration forum.⁴³

In *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*⁴⁴ the court dismissed an action for a preliminary injunction restraining an arbitration proceeding where discovery had been sought pursuant to Rule 81(a)(3). The court held that Rule 81(a)(3) relates only to specific proceedings brought under the United States Arbitration Act. Relying upon *Commercial Solvents*, the court observed that the discovery rules provided by the Federal Rules of Civil Procedure are not available to parties in pursuit of their remedy, vis-a-vis arbitration.⁴⁵

Although it appears that the Federal Rules of Civil Procedure would not become operative where parties have agreed in advance or have stipulated to resolve their grievance in the arbitral forum as opposed to court, it is not clear whether courts would be less

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

40. 20 F.R.D. 359 (S.D.N.Y. 1957).

41. *Id.* at 360.

42. *Id.* at 361.

43. *Id.*

44. 25 F.R.D. 9 (E.D. Pa. 1960).

45. *Id.* at 11.

likely to intercede on an enforcement petition where the arbitrator has exercised subpoena power pursuant to the United States Arbitration Act. There is, however, some case law which supports such exercise of authority by an arbitrator. In *Local Lodge 1746, International Association of Machinists v. United Aircraft Corp.*, the federal district court ordered an employer to produce an investigatory file for an *in camera* inspection by the arbitrator.⁴⁶ The subpoena was served pursuant to state law, and the court held that it would act *sua sponte* to require the employer to produce the investigatory files since it possesses the concurrent authority under the United States Arbitration Act "to enforce procedures attendant upon orderly consummation of the arbitration hearing."⁴⁷ While the court indicated that the arbitrator had the right to secure all documents and to determine their relevance, the court intimated that the subpoena should have been issued pursuant to the United States Arbitration Act in the first instance.

It can be argued that the federal policy favoring labor arbitration is furthered by the utilization of discovery procedures. The discovery procedures afforded by the Federal Rules of Civil Procedure would result in a more expedient disposition of frivolous claims and decrease the necessity of adjournment to overcome the element of surprise. In discharge or discipline grievances, there is often the need to examine the grievant's work record or the work records of other employees who were not subject to the same penalty. To provide a full and fair hearing on the merits, the arbitrator must be permitted to require the production of records and documents germane to the issues in dispute. This policy consideration has been adopted by one federal court which relied exclusively on the policy favoring labor arbitration to uphold an order of discovery, under the Federal Rules of Civil Procedure.⁴⁸

C. The Uniform Arbitration Act

Section 1 of the Uniform Arbitration Act⁴⁹ establishes the pa-

46. 329 F. Supp. 283, 286 (D. Conn. 1971). See also *Great Scott Supermarkets, Inc. v. Local 337, International Bhd. of Teamsters*, 363 F. Supp. 1351; ABA SUBCOMM. ON LABOR ARBITRATION PROCEDURES 14 (Feb. 16, 1979).

47. 329 F. Supp. at 286.

48. *Asbestos Workers, Local 66 v. Leona Lee Corp.*, 76 L.R.R.M. 2026 (5th Cir. 1970).

49. The Act was adopted by the National Conference of the Commissioners of Uniform State Laws in 1955 and amended in 1956. It was approved by the House of Delegates of the

rameters of the arbitration to include any existing controversy or controversy thereafter arising between the parties. Such an agreement is deemed to be valid and irrevocable, except upon such grounds as exist at law or equity for the revocation of the contract. The Act applies to arbitration between employers and employees or between their respective representatives.⁵⁰

Section 7 of the Act provides arbitrators with the power to issue "subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence"⁵¹ and permits depositions to be taken under certain circumstances. Inasmuch as no absolute uniformity exists between this statute and other modern state arbitration statutes, it is sufficient to say that the Act has served as a precursor for state legislatures considering the implementation of a modern arbitration statute.⁵²

D. Labor Arbitration in Michigan

The Michigan arbitration statute⁵³ is closely patterned after the Uniform Arbitration Act with the major exception, exclusion of la-

American Bar Association in 1955 and 1956. States which have enacted the Uniform Arbitration Act, in whole or in part, include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming. For the corresponding statutory citations for these states, see note 2 *supra*.

50. UNIFORM ARBITRATION ACT § 1.

51. Section 7 of the Act provides in pertinent part:

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases.

(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.

52. An interesting comment can be made in regard to the Uniform Arbitration Act enacted in the State of New York. Pursuant to this statute, arbitrators and attorneys of record maintain the power to issue a subpoena. Prior to the revisions of the Civil Practice Act, replaced by the Civil Practice Law and Rules in 1963, an arbitrator in a common law proceeding was specifically authorized to issue subpoenas. See Page, *Subpoena Practice in Arbitration*, N.Y.L.J., Dec. 6, 1976 at 1, col. 1.

53. MICH. COMP. LAWS ANN. §§ 600.5001-5035 (1976 & Supp. 1979).

bor arbitration by collective contract.⁵⁴ A split of authority exists as to the specific application to be accorded the labor arbitration exclusion.

In *Stadel v. Granger Brothers, Inc.*,⁵⁵ the Michigan Court of Appeals held that a contract regulating the relationship between a contractor and builder, which contained a provision for arbitration to settle controversies thereafter arising, was intended to encompass arbitration of employer-employee disputes.⁵⁶ The court struck down the defendant's argument that the arbitration agreement was not enforceable because it was not an instrument separate from the main contract, as mandated by the statutory arbitration provision.⁵⁷ The court distinguished contracts between employers and employees, and contracts applying to the construction industry (although the latter would subject controversies arising out of the relationship, including those which sound in tort, to arbitration). The policy consideration undergirding the decision of the court was to facilitate and foster the "prompt adjustment and settlement of claims."⁵⁸

Statutory collective contracts, however, vary substantially from contracts negotiated exclusively between a single *employee* and a single *employer*. It has been asserted that the employment relationship in a collective setting does not establish the employee as a direct beneficiary.⁵⁹ Instead, the affected employees become third-

54. Section 600.5001(3) of the Michigan statute states: "[t]he provisions of this chapter shall not apply to collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment."

55. 4 Mich. App. 250, 144 N.W.2d 609 (1960).

56. *Id.* at 255, 144 N.W.2d at 610-11.

57. *Id.* at 259-60, 144 N.W.2d at 613.

58. *Id.* at 255-56, 144 N.W.2d at 611. The policy favoring arbitration where a dispute has a colorable basis to proceed in the forum is firmly established in Michigan. If the arbitration clause includes the asserted dispute, courts resolve any doubts regarding arbitrability in favor of arbitration. See *Kaleva-Norman-Dickson School Dist. No. 6 v. Kaleva-Norman Dickson School Teachers' Ass'n*, 393 Mich. 583, 227 N.W.2d 500 (1975); *Campbell v. Community Service Ins. Co.*, 73 Mich. App. 416, 251 N.W.2d 609 (1977); *Chippewa Valley Schools v. Hill*, 62 Mich. App. 116, 62 N.W.2d 208, *appeal denied*, 395 Mich. 806 (1975). Reference need not be made to a specific arbitration statute for an arbitration clause to be enforceable. The United States Court of Appeals for the Seventh Circuit in assessing the propriety of an injunction in the absence of a reference to a specific arbitration statute, determined that section 2 of the United States Arbitration Act was sufficiently broad to encompass a contract evidencing a transaction involving commerce. See *Galt v. Libbey-Owens Ford Glass Co.*, 376 F.2d 711, 713 (7th Cir. 1967).

59. See Lenhoff, *The Present Status of Collective Contracts in the American Legal Sys-*

party beneficiaries, and the rights and duties created by the employment relationship concern only the contracting parties: the union, and the employer. It is the collectively negotiated contract which is specifically exempt from the statutory arbitration mechanism in Michigan. However, this type of contract which contains a clause for arbitration arguably supports, via reliance upon other statutes and powers, requests for formal discovery.

The Michigan arbitration statute is supplemented by Rule 769 of the General Court Rules which provides that: "[o]n 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."⁶⁰ The initial amendatory provision of the arbitration statute provided for witnesses to be compelled to appear by subpoena issued by any justice of the peace. The promulgation of the General Court Rule failed to shed light as to the scope of the subpoena power but instead, has successfully obfuscated the issue inasmuch as the applicable rules do not give the arbitrator explicit subpoena power in any type of arbitration proceeding enforceable under the statute. What the rule does provide is a grant of authority to an arbitrator to describe the manner in which a deposition may be taken, when the person to be deposed is unable to attend the hearing. Thus, not only are collective contracts exempt from the arbitration statute, but assuming *arguendo* that an individual employer-employee contract is involved, a further hurdle to overcome would be the restrictive dimension of Rule 769.

It would appear then that the only well-recognized basis upon which to assert non-restrictive subpoena power in Michigan is where a collective controversy impacts upon interstate commerce. Here, the United States Arbitration Act would become operative; decisional law supports the proposition that an arbitrator can execute a subpoena and have reasonable assurance that it will be enforced by the courts.⁶¹ In *Great Scott Supermarkets, Inc. v. Local*

tem, 39 MICH. L. REV. 1110, 1135-53 (1941).

60. MICH. GEN. CT. R. 769.5(2).

61. See *Great Scott Supermarkets, Inc. v. Local 337, International Bhd. of Teamsters*, 363 F. Supp. 1351 (arbitrator is not bound by the Federal Rules of Procedure and did not exceed his powers by issuing a subpoena).

337, *International Brotherhood of Teamsters*⁶² a federal district court in Michigan found that the United States Arbitration Act gave the arbitrator authority to subpoena documents. The employer applied for enforcement of an award by the arbitrator who had issued a subpoena requiring the production of grievance panel hearing reports made by the secretary of the panel who was also the attorney for the union. The district court held that the arbitrator was not bound by the Federal Rules of Civil Procedure, having determined the reports did not constitute the work-product of the attorney for the union.⁶³

In addition to an express grant of authority provided by the United States Arbitration Act, arbitrators have been known to supplement this grant by capitalizing on their *inherent* authority to rule on procedural questions to determine the propriety of a discovery request.⁶⁴ In 1971, this authority was given formal judicial recognition in *Local 757, International Brotherhood of Teamsters v. Borden, Inc.*⁶⁵ The court held that the employer was required to comply with a subpoena duces tecum obtained from the state court by the union, requiring the production of certain books and records for use in the arbitration proceeding, as the issue of whether said production should be ordered was a procedural matter for an arbitrator to decide.⁶⁶

Further recognition of such authority was established in 1976 when a federal district court entered an order enforcing a subpoena issued by the arbitrator in a proceeding involving three discharge grievances.⁶⁷ The petition to enforce the subpoena clearly asserted that the respondent was in possession of facts and information relevant to the matter and essential for proper resolution of the dispute.

62. 363 F. Supp. 1351.

63. *Id.* at 1354-55.

64. Mark Kahn, a prominent Michigan labor arbitrator, has typically relied upon such authority. In *Pennsalt Chem. Corp.*, (unpublished AAA Case No. 16-15, 1961) the company was obligated to respond to the union's request for the point rating for each factor of the job where the contract gave the union the right "by use of the grievance procedure and arbitration" to review the company's determination of evaluation points for new or changed jobs. See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59 (1964).

65. 78 L.R.R.M. 2398 (S.D.N.Y. 1971).

66. *Id.* at 2400.

67. *Sears Roebuck & Co. v. Local 876, Retail Store Employees*, (unpublished AAA Case No. 5430 0766 76).

The courts, in sustaining an arbitrator's power to issue a subpoena, are generally guided by the standard of relevancy, materiality and pertinency before determining that a proper case exists for ordering discovery.⁶⁸ The materiality and relevancy must be established simultaneously with the request.⁶⁹ Fishing expeditions are no more tolerated in arbitration than in litigation; if the request for production of documentary material is deemed to be harassment, arbitrators and courts alike will restrict the use of the subpoena.⁷⁰

The actual propriety of a subpoena is for the court to determine.⁷¹ A person who takes it upon himself not to abide with the command of a subpoena, regardless of miscognition of the law, does so at the risk of being characterized as a "contemner." In *Oceanic Transport Corp. v. Alcoa Steamship Co.*⁷² a federal district court in New York denied a motion to punish for contempt and vacated the subpoena of a witness who had been ordered to appear and produce certain documents.⁷³ The basis of the denial given by the court was not one striking at the authority of the arbitrator to issue subpoenas, but rather the court's ability to compel the attendance of a witness if it is a proper case, the documents in the witness' possession are relevant and material. In this particular instance, the court found the documents were not material to the arbitration proceeding, and consequently not a proper case for the issuance of a subpoena.⁷⁴

III. THE BASIC PHILOSOPHICAL CONFLICT—SHOULD LABOR ARBITRATORS INVOKE FORMAL DISCOVERY PROCEDURES?

A troublesome area in the labor arbitration process is the scope of an individual arbitrator's or arbitration panel's power and authority. In the main, arbitrators follow one of two schools of

68. See *In Re Sun-Ray Cloak Co.*, 256 App. Div. 620, 11 N.Y.S.2d 202, *rehearing denied*, 257 App. Div. 815, 12 N.Y.S.2d 783 (1939) (the writ was vacated only on the basis that the subpoena duces tecum requiring the release of all "books and records" was too broad).

69. See Local 99, *ILGWU v. Clarise Sportswear Co.*, 44 Misc. 2d 913, 255 N.Y.S.2d 282 (Sup. Ct. 1964).

70. See O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 132 (1973).

71. *Id.*

72. 129 F. Supp. 160 (S.D.N.Y. 1954).

73. *Id.* at 161.

74. *Id.*

thought: (1) those who subscribe to the application of federal and state law where questions of public policy are inextricably intertwined with the dispute arising out of the collective bargaining agreement, and (2) those who do not believe that federal or state law applicability is a matter for the arbitrator, and who, deplore arbitral excursions into areas where no real "expertise to vindicate statutory rights exist."⁷⁵ Those adhering to the latter perspective assert that an arbitrator's authority is derived from the four corners of the collective bargaining agreement, and if the parties wanted the arbitrator to consider outside law, as opposed to the "laws of the workplace," then the parties would negotiate such a clause into their contract.

Those arbitrators, on the other hand, who subscribe to the former perspective have a discernible tendency to engage in arbitral activism, the arbitral equivalent to judicial activism. This degree of activism generally spills over into the area of discovery, where the arbitrator is faced with imposing benchmarks for collective cooperation or the increased likelihood that an adverse award against the recalcitrant party may be entered. Arbitrators then, who pattern the conduct of an arbitration hearing after an adjudicatory process with its inherent formalities, are much more inclined to exercise those same formalities, to the extent permissible by law, in the arbitral forum. What follows are the opinions of prominent arbitrators relating to arbitral subpoena power. All whose opinions have been cited responded to a single question: "is it your opinion that labor arbitrators maintain the authority to issue subpoenas to compel the attendance of witnesses or to require the production of documents and records?" None of the arbitrators have been classified as "activists" or "non-activists."

Nathan Lipson⁷⁶

"There are two points of view in regard to arbitral subpoena power; the first is subpoenas should issue automatically and even *ex parte* upon request; the other is that the arbitrator should carefully scrutinize the issuance of subpoenas.

75. Edwards, *Labor Arbitration at the Crossroads: The Common Law of the Shop v. External Law*, 32 *ARB. J.* 65, 65 (1977).

76. Nathan Lipson is an Associate Professor of Labor Law at the University of Detroit Law School. He is a permanent umpire for the Fremont plant of the Kelsey-Hayes Corp., the United Steelworkers, the McLouth Steel Corp. and the United Steelworkers of America.

I generally prefer not to issue subpoenas, and that production of witnesses, and materials be consensually arranged. That point of view applies to both subpoenas and subpoenas duces tecum. I have concern for the relationship of the parties that transcends the problems of a particular arbitration case, and a complicated arbitration matter can strain the relationship of the parties and further denigrate it. Where issuance of a subpoena involves cooperation, I will ask the parties to consent to subpoenas prior to the hearing. If the parties are unable to resolve the matter internally, then the arbitrator should be entitled to exercise discretion, but only after hearing argument. For example, a recent case which I arbitrated between the Duluth Herald and the newspaper union involved the discharge of a district circulation manager.⁷⁷ The employer claimed throughout the course of the proceedings that the circulation manager was discharged for neglect of duty and failure to perform in a proper manner. The position of the union was that the grievant did not deviate from the established norm and this could be proven if they had access to the records. It was the position of this arbitrator that if convinced it was relevant, the production of the records would be ordered. I encouraged the parties to resolve all record production matters, recognizing full well that the failure to produce could allow for National Labor Relations Board intercession as a result of 8(a)(5) charges.⁷⁸ The parties resolved

77. Newspaper Guild of the Twin Cities and the Duluth Herald (undesignated grievance and unpublished case subject to private arbitration).

78. A Section 8(a)(5) violation, as established by the National Labor Relations Act, constitutes the basis of an unfair labor practice charge where parties have failed to bargain in good faith. A leading case on this issue is *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). The issue presented on appeal to the Supreme Court was "whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the Union's statutory rights under § 8(a)(5)." *Id.* at 436. The United States Supreme Court upheld the power of the Board to find a § 8(a)(5) violation where there was a failure to provide information for an arbitrable grievance. The Court advanced strong policy considerations buttressing the necessity of discovery in arbitration.

Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the

the problem between themselves prior to the scheduled oral hearing.

In the event the parties cannot work their problems out and a subpoena must be issued, I will not issue it on an *ex parte* basis. Statutes are drafted so the arbitrator will carefully consider whether he should subpoena. An adversary to the issuance of a subpoena should have a hearing so that problems or objections may be aired. In some situations, the arbitrator must be aware that the collective bargaining sphere is one where gamesmanship often is employed.

There are many nefarious possibilities when discovery requests are made. The employer can use such a request as a fishing expedition to delve into internal union affairs unrelated to the arbitration. By the same token, a union might be looking for an opportunity to get at confidential company information unrelated to arbitration issues. Therefore, an arbitrator must make sure that requests for records are clearly relevant and necessary to the hearing. There are situations where even relevancy should not be the sole benchmark for the issuance of a subpoena, namely if potential harm outweighs the good. For example, a violent grievant may be pitted against a rather docile witness which could result in possible post-hearing complications as a direct consequence of requiring the presence of the witness, even though the witness is material to the case. The key to the discovery and witness production process is the balancing of due process against the labor relations process.”⁷⁹

Harry H. Platt⁸⁰

“The matter of subpoenaing witnesses or requiring the produc-

way through to arbitration without providing the opportunity to evaluate the merits of the claim. The expense of arbitration might be placed upon the union only for it to learn that the machines had been relegated to the junk heap. Nothing in federal labor requires such a result.

Id. at 438-39. See also *Montgomery Ward & Co.*, 234 N.L.R.B. 88, 98 L.R.R.M. 1022 (1978) where a charging party union challenged the failure of the employer to disclose information relevant to the preparation of the grievance, subsequent to an arbitral determination that the respondent was duty bound to release the information and issued a subpoena thereon.

79. Interview with Nathan Lipson, Associate Professor of Law, Univ. of Detroit, in Detroit (March 21, 1979).

80. Harry H. Platt, is chairman of the Board of Arbitration, Consumers Power Company and Utility Workers Union. He is also designated as a neutral referee under agreements between major airlines and the airline pilots association. Other “chairs” include the International Board of Arbitration, the American Newspaper Publishers Association and the Inter-

tion of books and records is really a matter for the courts, unless there is a clear provision to the contrary granting such activity to an arbitrator. Although as an arbitrator, I have signed subpoenas upon request, the legality or validity is something I do not vouch for. There is no warranty, and certainly there are no contempt powers.

The arbitrator can encourage the parties to work out their differences pertaining to discovery, once advised that such differences exist. If there continues to be a failure on the part of one party to produce the material or witness relevant to the resolution of the controversy, then it could very well cause the arbitrator to establish more than an inference of culpability. Recently, I heard a seniority integration case. There was a substantial amount of quarreling and devious confrontation between the parties. The company attorney would not relinquish the requisite exhibits, which on the face of the claim, were clearly relevant and material to the dispute. I suggested that the other party was entitled to have the material and to introduce it into evidence. Otherwise, I would be in a position to make certain inferences based on the company's reluctance to comply with the request. The next morning, the exhibits were released by the company and were properly introduced into evidence."⁸¹

Alan Walt⁸²

"An arbitrator in the private sector under federally enacted legislation has the right to issue a subpoena, but it is still within his discretion to do so. While issuance of a subpoena or a subpoena duces tecum might be central to resolve a controverted area, the requesting parties should establish the need for that legal process since the parties are responsible for fashioning their case and gathering the evidence. In the public sector, the issuance of process may be controlled by state statute. Here too, the arbitrator can exercise a significant amount of discretion. The arbitrator, however, cannot enforce his or her subpoena. As a result, it might be preferable under certain circumstances to request that subpoenas

national Printing Pressmen & Assistants' Union of North America.

81. Telephone interview with Harry H. Platt, arbitrator, in Detroit (March 22, 1979).

82. Alan Walt, arbitrating in various industries, is a fact-finder for the Michigan Employment Relations Commission. He serves on the Arbitration Panel for the Detroit News Publishers Association and the Detroit Printing Pressmen's Union No. 13.

be secured from a court of appropriate jurisdiction in the first instance.

In Michigan, in the public sector, the statute exempts labor, and to my knowledge, there are no court holdings opposing an arbitrator's right to issue subpoenas in labor cases under the court rules. Of course, the labor arbitration rules of the American Arbitration Association do grant the necessary authority in cases administered by that organization. The basic tenet which I strongly adhere to is fair dealing; I do not issue subpoenas without putting the other party on notice."⁸³

Robert G. Howlett⁸⁴

"There is nothing in the Michigan Labor Relations Mediation Act which authorizes an arbitrator to issue a subpoena. Section 9(d) provides for arbitration of labor disputes.⁸⁵ The statute and court rules which cover commercial arbitration do provide for the issuance of subpoenas.

The United States Arbitration Act which is applicable to enterprises in interstate commerce, does provide for the issuance of subpoenas. There is, however, a split of authority between the circuits as to whether the United States Arbitration Act is applicable to arbitration under collective bargaining agreements; the United States Supreme Court has never passed upon the question. The Sixth Circuit, by dicta, has stated that the Act does cover collective bargaining arbitration.⁸⁶

I have, on a number of occasions, issued subpoenas in private sector cases under the United States Arbitration Act. I have never had a case where the subpoena has not been obeyed. I also note that there is nothing in the public sector similar to the United States Arbitration Act authorizing an arbitrator to issue a subpoena. Clearly, the Act does not apply to any public sector situation. I have issued subpoenas in public sector cases—patently,

83. Telephone interview with Alan Walt, arbitrator, in Detroit (March 22, 1979).

84. Robert G. Howlett, is a partner in the law firm of Schmidt, Howlett, Van't Hof, Snell & Vana in Grand Rapids, Michigan. He is chairman of the Michigan Employment Relations Board, a position he has occupied since 1964.

85. MICH. COMP. LAWS ANN. § 423.9(d) (1978).

86. See *Chattanooga Mailers Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305 (6th Cir. 1975).

without authority. However, they have always been obeyed.”⁸⁷

William M. Ellmann⁸⁸

“I assume that inherent in arbitral rights is the requirement that I sign any and all subpoenas which may expedite the hearing and ultimate resolution of the matter presented to me. In the event that the subpoena is not honored, the arbitrator can adjourn the hearing to permit time for the subpoena to be issued under court aegis, although this seems altogether too time consuming; apparently, it may become necessary under appropriate circumstances. All other witnesses may be heard beforehand. Thus, the hearing is not really delayed.”⁸⁹

IV. POLICY CONSIDERATIONS

The evolution of labor management collective bargaining has been sustained by pragmatic and intrinsic considerations rather than the theoretical.⁹⁰ As a by-product of this stimulation, there has been less reliance upon statutory criteria and more upon contractual standards as bargained for between the parties.

Several important policy considerations come to bear upon the prospect of arbitral discovery. First and foremost is the assumption which is made regarding the general unavailability of discovery as an incident to the arbitration proceeding.⁹¹ Here, it is argued that the parties have opted for a more informal and expedited process, and to utilize discovery apparatus at this juncture would jeopardize and undermine the intent of the parties. In this vein a Michigan arbitrator, in response to a request to issue a subpoena, observed that he had no power, either under the United States Arbitration Act nor any other statute to issue such a document. In his decision he stated:

Moreover, the fact-finding process in arbitration is really not equivalent to judicial fact-finding. The record of the arbitration proceedings is not

87. Telephone interview with Robert G. Howlett, arbitrator, in Detroit (March 23, 1979).

88. William Marshall Ellmann is a commissioner for the Michigan Employment Relations Commission.

89. Telephone interview with William M. Ellman, arbitrator, in Detroit (March 23, 1979).

90. See Jones, *The Assertion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 PA. L. REV. 830 (1960).

91. *Id.* at 835.

as complete; the usual rules of evidence do not apply; and the rights and procedures common to Civil Trials . . . such as the compulsory process . . . are often severely limited or unavailable . . . *Indeed it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.*⁹²

The adoption of formal discovery might well chill the free flow of information and unduly formalize rather than simplify labor arbitration. Additional support for this position is found in *Cavanaugh v. McConnel & Co.*⁹³ wherein the court stated:

We also feel that arbitration, once undertaken, should continue freely without being subjected to a judicial restraint which could tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitral. We also might add that it seems somewhat incongruous to resort to judicial help for pre-hearing discovery after a voluntary understanding has left the entire matter to the determination of arbitrators.⁹⁴

What would be jeopardized in this situation would be the relationship of the parties; discovery lubricated with the element of compulsion is deemed to be incompatible with a bilaterally negotiated contract premised upon consent.

On the other hand, it could be established with equal cogency that the mere existence of the consensual elements in the collective bargaining setting support a contractual commitment to disclose information. Moreover, the disclosure of relevant information can occur without the need to replicate in arbitration the formalized and complex discovery mechanisms permitted in litigation.⁹⁵ Additionally, it cannot unequivocally be said that silence in a collective bargaining agreement demonstrates the parties' intention not to be compelled to make disclosures through discovery. Obligations of

92. Arbitrator Howard C. Cole's response constituted a ruling as to whether he maintains the power to issue the subpoena requested by the Union. (unpublished AAA Case No. 54 30 0777 73).

93. 357 Mass. 452, 258 N.E.2d 561 (1970).

94. *Id.* at 457, 258 N.E.2d at 564.

95. The requirement to disclose information was most recently incorporated into the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, which established administrative practices and procedures for federal civil service employees. Section 7132 sets forth the basic practice to be followed by the general counsel or a member of the Federal Labor Relations Authority who seeks, in aid of resolving the dispute, to subpoena witnesses or compel the production of documentary material. Provisions for enforcement proceedings in the event of contumacy or failure to comply with the issuance of a subpoena are likewise established therein.

discovery may impliedly be integrated into the conceptual contractual framework. Absent such obligations of disclosure, the parties' own concern for expediency and efficient resolution of the matter in controversy might well require the interjection of well-defined discovery requirements.

The law clearly imposes a statutory duty to bargain, and it can be argued that this duty concomitantly imposes an obligation to disclose data relevant and material for the resolution of the dispute. The collective agreement, deemed to have been entered into consensually, requires the parties to abide by the obligations imposed upon them by law, including the necessary disclosure with respect to hours, wages and conditions of employment. Although the authority to administer discovery can be expressly withheld from an arbitrator, the main problem arises when the agreement is silent as to the prospect of discovery. One commentator concludes that "disclosure through the grievance procedure is the deductible intent of the parties when their agreement is silent on the subject of arbitral discovery. The arbitrator who issues an arbitral discovery order in appropriate circumstances is functioning within the ambit of their interest."⁹⁶

The posture of the United States Supreme Court regarding arbitral discovery, has vacillated from non-recognition to acceptance. For example, in 1924, Mr. Justice Holmes, speaking for a unanimous Court in *FTC v. American Tobacco Company*,⁹⁷ denounced as "contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."⁹⁸ He also declared that it would "sweep all our traditions into the fire . . . [were] fishing expeditions into private papers" to be tolerated.⁹⁹ Later, in the famous case of *Hickman v. Taylor*,¹⁰⁰ an equally enlightened Court held "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."¹⁰¹ Certainly the safeguard procedures available in civil litigation could become operative in the arbitral forum, and

96. See Jones, *supra* note 90, at 838.

97. 264 U.S. 298 (1924).

98. *Id.* at 306.

99. *Id.*

100. 329 U.S. 495 (1947).

101. *Id.* at 507.

the possible likelihood of abuse and embarrassment could be sufficiently laid to rest.

CONCLUSION

The attitude of courts relative to the presumption of favoring arbitration has been given wide-spread judicial recognition. It is not as well-settled that this presumption extends to include the formalized discovery conduct regularly engaged in by arbitrators who derive their power from precarious bases.¹⁰²

If formalized discovery is to be given credence it can only be accomplished via the reliance upon the persuasive policy considerations herein set forth. Discovery in labor arbitration is inherent within the conceptual legal and collective contractual framework. With the increased use of arbitration as a by-product of mushrooming unionization, it is reasonable to predict that labor arbitrators faced with granting a discovery request would extend their arbitral authority to the most permissible boundary, and act affirmatively on such requests where it is deemed to be material to the resolution of the dispute.

Where meaningful collective relationships exist, compliance with reasonable discovery requests would naturally flow from such a relationship, and therefore obviate the necessity of third-party intervention. A strained collective relationship should certainly not be subject to any less legal protection; it is equally important for the principles of fairness and justice to prevail. While an express grant of authority to invoke formal discovery might not exist in those interactions falling outside the aegis of the United States Arbitration Act, procedural questions which bear directly upon the determination of a matter in controversy nevertheless fall within the ambit of arbitral authority. It would appear, therefore, that more potential for abuse exists where an arbitrator does not exercise implied authority to issue subpoenas for the production of records or

102. Numerous arbitrators in Michigan have honored requests to issue subpoenas in public sector disputes. By the great weight of authority, arbitrators if challenged, would have to overcome three major hurdles: (1) the collective labor contract exclusion as provided for in MICH. COMP. LAWS ANN. § 600.5001(3); (2) the inapplicability of the United States Arbitration Act which requires a condition precedent that the dispute arise out of or affect interstate commerce; and (3) the inapplicability of AAA Rule 28 which permits an arbitrator to subpoena, if so authorized by law, assuming that the dispute is subject to AAA jurisdiction.

to compel the attendance of a material witness. The exercise of such authority is preferable over permitting a protraction of the hearing by a recalcitrant adversary. Certainly this power should be exercised to augment arbitral procedures whenever it appears necessary to promote a full and fair hearing, and to reach a just and equitable solution.

