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SOME PROBLEMS OF EVIDENCE BEFORE THE LABOR ARBITRATOR†

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If a bus driver is disciplined for careless driving and the company wants to support its action by showing past misconduct, is such evidence admissible before the labor arbitrator?

If a tug company discharges an engineer for letting the boat fill with water and his attorney wants to see transcripts of contemporaneous interviews conducted by the company before conducting his cross-examination, is he entitled to them?

If a checker in a super-market is discharged for dishonesty and the company's evidence comes wholly from an unidentified agent, is the checker entitled to confront and cross-examine her accuser in the ensuing arbitration proceeding?

Can evidence which is illegally obtained through wiretapping be admitted in an arbitration proceeding to sustain a discharge?

These are real questions with which arbitrators are struggling every day. Moreover, the way in which they are answered says a good deal about the arbitration process. And now that the Supreme Court has, through the Steelworker Trilogy,[1] so greatly increased the stature of labor arbitration, it behooves both arbitrators and the parties to re-examine continually the system of private jurisprudence which they are building.

Legal rules of evidence do not, of course, apply before the labor arbitrator.[2] This is not surprising since such rules were de-

† This article is the outgrowth of a study financed by the Labor Project of the Fund for the Republic. To find out how arbitrators were handling various problems a series of hypothetical problems was devised and then discussed with arbitrators at seminars held in Boston, Chicago, Detroit, Los Angeles, Philadelphia, and New York. Subsequently a summary of the findings was prepared and sent to members of the National Academy of Arbitrators asking them to express agreement or disagreement.

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1 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

2 ELKOURI & ELKOURI, HOW ARBITRATION WORKS 173 (rev. ed. 1960).

veloped in connection with jury trials, and do not apply strictly in any tribunal but a jury-court.[3] The whole theory of the arbitration tribunal is that it is composed of experts who repeatedly inquire into a relatively homogeneous kind of cases. Exclusionary rules are hardly required as a precautionary measure. Indeed, as the late Harry Shulman said in his classic Oliver Wendell Holmes lecture at Harvard in 1955, "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."[4]

But it is not toward common-law rules of evidence, in general, that this inquiry is directed. Rather, it is toward specific rules which may apply in the sensitive area of individual rights. Broadly stated this is a due process question, not just in the legal sense of compliance with the requirements of the fifth and fourteenth amendments, but in the popular sense of action which is consistent with the fundamental principles of liberty and justice which undergird a free society. Private though an arbitration tribunal may be, the parties who appear before it have the right to expect that its procedures and processes will conform to fundamental standards of fairness which would be required in the case of governments. Paraphrasing a famous line from Daniel Webster, we can say: "In a tribunal like this, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done."[5]

THE USES OF PAST MISCONDUCT

In discipline and discharge cases, companies typically offer the record of previous derelictions on the part of the employee. In part this is because they have learned from personnel experts[6] and arbitrators[7] that progressive discipline is deemed desirable. In any event, the problem takes many forms. Does it make any difference, for instance, whether the company is using the past record to: (1) prove that the penalty which has been imposed is appropriate; (2) suggest the likelihood that the employee committed

3 1 WIGMORE, EVIDENCE § 4, at 27 (3d ed. 1940).

4 Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1017 (1955).

5 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 163 (1903). "In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done."

6 PIGORS & MYERS, PERSONNEL ADMINISTRATION 202 (1947).

7 Mueller Brass Co., 3 Lab. Arb. 271 (1946).

the present offense; or (3) undermine the credibility of the employee as a witness? The courts, in criminal cases, have certainly thought there was a difference. Former convictions are clearly relevant in connection with the degree of penalty.[8] But if the evidence of past misconduct is offered for the purpose of proving the likelihood that the present offense has been committed, there is what appears at first glance to be a flat rule against admission. Thus, "the doing of one act is in itself no evidence that the same or a like act was again done by the same person," and "where the doing of an act is the proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged."[9] There are, however, numerous exceptions to this rule.[10] And it would be unrealistic to distinguish between "proving likelihood" and "degree of penalty" when discussing the admissibility of past misconduct in arbitration proceedings because of two fundamental differences between the arbitrator and the judge. The first is that the arbitrator sits in review of a penalty which has already been imposed by the company, while the judge has the duty of setting the penalty. Secondly, the judge normally assesses the penalty *after* the jury has decided the question of guilt or innocence, whereas the arbitrator is both judge and jury. It is impractical for the arbitrator to hear the evidence, decide whether an employee deserves to be penalized, and then return to hear evidence of past misconduct which might bear on the degree of penalty. In this connection it may be worth noting that state statutes which permit the jury to fix a criminal sentence and allow the fact of prior convictions to be considered by jurors before verdict have been severely criticized,[11] although not held unconstitutional.[12]

Past misconduct may, of course, be offered in quite different contexts. Contrast the case in which the company offers the record of the past year showing progressive steps taken to correct absenteeism with the case in which it shows an admittedly bad absenteeism record five years before followed by an intervening period of satisfactory attendance. Consider also the case in which the employer wishes to show the record of the employee with his previous employer. Except for the last case, involving the previous em-

8 1 WIGMORE, EVIDENCE § 81, at 511 (3d ed. 1940).
9 *Id.* § 192, at 641-42.
10 MCCORMICK, EVIDENCE § 60, at 137 (1954).
11 United States v. Price, 258 F.2d 918 (3d Cir.), *cert. denied*, 358 U.S. 922 (1958).
12 *Ibid.*

ployer, arbitrators will almost certainly admit the evidence, although the "stale" absenteeism record may be given little weight. There is a split among arbitrators with respect to the case involving the previous employer. The company may well have known of the employee's record when it hired him, and thus condoned it; and there is more reason to believe that the evidence is being offered simply to prejudice the arbitrator against the individual. Nevertheless, some arbitrators feel that it is better to admit the evidence and weigh its credibility than to exclude it.

Instances in which the company offers an employee's past record for the purpose of suggesting the likelihood that he has committed the present offense are much more difficult to deal with. Typical examples are the following:

1. A bus driver is disciplined for negligent driving. He denies the charge, and the company offers to show that the driver has had three accidents of a similar nature during the past year and must now be considered "accident prone."

2. An employee is disciplined for drinking, gambling, or pilferage on the job. He denies the charge, and the company wishes to show that he was given a disciplinary layoff for the same reason during the past year, and had been warned on two other occasions.

3. The same basic facts as in examples one and two, except that the previous offenses occurred while employed by a previous employer, or were offenses against the civil or criminal law (*e.g.*, fined for being drunk and disorderly).

In all such cases there will be independent, but probably inconclusive, evidence that the employee has committed the present offense. The clear purpose of the past record is to suggest to the arbitrator the likelihood that an employee with such a past record has, in fact, committed the present offense. When questioned as to how they handle such evidence, arbitrators display a lack of uniformity. A large majority will admit the evidence and give it weight when the present offense has a functional relationship to the past offense: *e.g.*, the "accident prone" driver. But only a minority appear to be willing to receive evidence of past offenses insofar as this bears upon a currently alleged, but functionally unrelated, offense. There is also a much greater willingness to admit evidence of past misconduct with the present employer than with either a predecessor employer or against the public order.

Finally, there is the situation in which an attempt is made to introduce the past record for the purpose of undermining the

credibility of the witness. Three examples will make this type of problem clearer:

1. The contract requires that overtime be distributed equally. The company alleges that *X* was called at home when it was his turn, but that he did not answer. *X* insists that he was at home and did not receive such a call. The company then seeks to show that *X* has entered a similar claim in the past but that the grievance committee has never seen fit to process it beyond the first step. The implication, of course, is that not even his brethren believe *X*.

2. An employee is discharged for stealing, but he denies the charge. The evidence is wholly circumstantial, and the company wants to show that the employee has a record of criminal convictions for stealing despite the entry of pleas of not guilty in each case.

3. The employee is disciplined for sleeping—a charge which he denies. The contract contains a clause prohibiting introduction of an employee's past record, but the company wants to show that the employee has been disciplined in the past for this reason and has always denied the charge. The company insists that such a showing will not be contrary to the contractual clause because it is being offered only to attack the credibility of the witness.

Most arbitrators will have little trouble with the overtime case, although they may feel that there are better ways of proving whether the telephone call was, in fact, made. Proof of prior criminal convictions will find arbitrators split, some feeling that any record outside the plant is irrelevant, but others admitting the evidence and giving it weight. The sleeping case, which comes under a contract barring evidence of past misconduct, will almost certainly find the evidence being rejected on the ground that the offer is simply being made in a way which circumvents the contract.

In discussing the law of criminal procedure, Wigmore has suggested that there are at least four reasons why information with respect to past misconduct should not be permitted to reach the judge or jury prior to a decision on the question of guilt. They are: (1) the tendency to find the defendant guilty simply because he is a likely person to do such acts; (2) the tendency to condemn for past unpunished offenses even though the defendant may not be guilty of the present charge; (3) the injustice of forcing one to defend himself against unexpected evidence or evidence which he

will find it hard to combat; and (4) the possible confusion of new issues which will inevitably result.[13] Arbitrators express concern over substantially the same problems in cases which come before them. How, then, should they rule when such questions arise? If the criminal cases may be taken as a proper analogy, it would not be inconsistent with legal due process to admit the evidence. Therefore, in the last analysis, the rule which is adopted in arbitration would seem to depend on the answer to the following question: At what point does the prejudice likely to result from the receipt of evidence of past misconduct outweigh the common-sense relevance of such information? And once that question is answered, a second question arises: If the evidence of past misconduct is admitted, what weight should be given to it?

Such questions do not lend themselves to firm and unalterable answers. However, it would seem that the arbitrator would be justified in holding to the following guidelines:

1. Unless the grievant has already put in evidence of his good character, evidence of his past offenses should not be received until the record contains more than a pro forma showing with respect to the offenses charged.

2. When evidence of past misconduct is offered for the purpose of inferring that the grievant committed the present offense it should be admitted, provided it is of record and known to the grievant. Such evidence should, however, be given weight only insofar as there is a clear relationship between the kinds of offenses involved, and insofar as the events have taken place within a reasonable span of time. (Example: Repeated absenteeism proves nothing with respect to a charge of stealing, but repeated accidents may suggest that the driver is "accident prone."[14])

3. When evidence of past misconduct is offered for the purpose of impeaching the credibility of the grievant it should be received, provided it does not appear to be offered simply to prejudice the arbitrator.

4. When evidence of past misconduct is offered in order to justify the severity of the present penalty it should normally be received. The weight to be given such evidence will then depend upon: (a) the relationship between the kinds of offenses, and (b) the period of time involved. This rule should apply to past con-

13 1 WIGMORE, EVIDENCE § 194, at 650-51 (3d ed. 1940).

14 James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

duct both within and without the company although in general the latter evidence will carry less weight. (Example: A company hires a known alcoholic at the request of Alcoholics Anonymous. The man comes to work drunk and the company imposes discipline. Surely it is *relevant,* in terms of the leniency which can be expected from the company, that the man is a known alcoholic. To hold otherwise would be to discourage companies from the socially-desirable policy of cooperating with rehabilitation agencies.)

5. A contractual limitation on the use of the past record should be broadly construed to exclude such evidence.

ACCESS TO INFORMATION IN THE FILES OF THE OTHER PARTY

The grievance procedure gives rise to at least two types of situations in which one party desires information which is in the hands of the other. In the first case the information is sought for its own sake. Thus if *A* contends that he has not shared equally in the distribution of overtime, although the contract so requires, the union needs the records showing how the overtime has been distributed. Similarly, if *B* contends that his seniority is greater than that of *C,* the union needs to know what the company records show in this respect. In the other type of case, however, the information is expected to serve a collateral purpose. Thus if *X* is fired for excessive absenteeism, the union may want to see the records of a number of other employees whom it knows have been guilty of absenteeism in order to see how their lost time compares with that of *X.* Or if *Y* is the senior man and he is denied a promotion on the ground that his education is inadequate, the union may want to compare the educational qualifications of other men now on the higher job.

In the run-of-the-mill case the company and the union readily exchange information in grievance cases, both because they recognize that this will contribute to the fair and equitable settlement of the case, and because they want to avoid the cost of arbitration. The essence of the dispute may revolve around a given fact: *e.g.,* who has the greater seniority. There would obviously be no point in hiding the seniority record in such a case. Nevertheless, there are situations in which one party declines to make available to the other information which it possesses and which is deemed by the other to be relevant to its position. The following two examples will illustrate the point:

1. A tugboat almost sinks from water which has entered the hold. The company attorney immediately interviews all crew members and obtains lengthy statements from them. Thereafter, the chief engineer is discharged for gross negligence. In trying to decide whether to take the grievance to arbitration, the union representative interviews all the crew members. In the process he becomes aware that all of them have already been interviewed by the company's attorney. Before making a decision as to whether to go to arbitration he would like to see these statements so that he will know how reliable the various witnesses are. He requests the company to let him see the transcript of such interviews, but the request is denied. What, if anything, can he do about this? If he goes to arbitration without seeing the transcripts, but then asks for them after the attorney for the company has completed examining the witness, may he then have them?

2. Production and management personnel are both covered by one master insurance contract, although the benefits for management personnel are higher. Individual employees receive certificates of insurance, and a statement in the collective bargaining contract specifies the amounts of their coverage, but neither the employee nor the union has access to the master contract. *X* then dies under circumstances which raise a question of whether he was entitled to the old or amended benefits, and the company insists that under the terms of the master contract he gets only the old benefits. The union then asks to see the master contract, and the company offers to have it photostated except for the provision showing management benefits. This the union refuses, contending that it is entitled to see the original master contract. What, if anything, can the union do about this? And if the case goes to arbitration should the arbitrator insist that the company put in evidence the complete master contract?

Faced with a similar problem in the civil courts, counsel might attempt, through use of the discovery procedure outlined in rules 26 to 37 of the Federal Rules of Civil Procedure, to obtain the information desired. But the arbitrator has no power to order discovery; and in the *ad hoc* cases there would not, in fact, even be an arbitrator at this stage. In lieu of discovery an action might be brought under the Taft-Hartley Act, contending that the reluctant party was refusing to bargain collectively by withholding the information. It is clear, of course, that good-faith bargaining requires that the company furnish the union with information

which will enable it to police the collective bargaining contract.[15] But this will be a time-consuming procedure, and may be of little value to the union in deciding whether it wishes to take the grievance to arbitration. What, then, can be done? Assuming the unfair labor practice proceeding is not used, the answer seems to be that little can be done short of arbitration. If this is so, what can be expected when the question reaches the arbitration level?

If we revert to the tugboat case, an issue as to the availability of the transcript of early company interviews with the crew members is likely to be made at the time any such witnesses are examined. And if counsel is present for the union, he is almost certain to mention the *Jencks* case[16] and to contend that it is applicable. That controversial case, it will be rememberd, involved a prosecution for filing a false non-communist affidavit with the National Labor Relations Board. At the trial two important prosecution witnesses admitted making prior reports to the Federal Bureau of Investigation. The defense then requested the trial court to examine those reports and turn over to the defense any portions found inconsistent with the answers given by the witnesses at the trial. The denial of the request, subsequently affirmed by the Fifth Circuit,[17] was based on the theory that prior to production the defense must establish a variance between the testimony and the documents. The Supreme Court reversed on the ground that the defense could hardly know that there was an inconsistency between the testimony and the document without seeing the latter, and stated that the defendant need only show that the material sought related to the testimony. The Court also said that the defense must have access to all relevant documents irrespective of their admissibility in evidence, and disapproved any necessity for an initial testing of admissibility by the trial judge.

Jencks was, of course, a criminal trial. When counsel for a company argued before the NLRB that the *Jencks* ruling required the Board to give the company access to the Board's file data in an unfair labor practice proceeding, although the Board's rules forbade any such disclosure, the request was turned down with the statement that the *Jencks* rule applied only to criminal

[15] *Cf.* NLRB v. Whitin Mach. Works, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).

[16] Jencks v. United States, 353 U.S. 657 (1957).

[17] Jencks v. United States, 226 F.2d 540 and 553 (5th Cir. 1955).

cases and not to proceedings before an administrative board.[18] But shortly thereafter, in *Adhesive Products Corp.*, another Board ruling to the same effect came to the Second Circuit and was reversed.[19] In that case Adhesive was being charged with failure to bargain, and in the course of the proceeding before a trial examiner a union organizer used a non-confidential written statement made to Board officials for purposes of refreshing his memory before taking the witness stand. The company asked the examiner to order the witness to turn over the statement for use in impeaching him on cross-examination and the examiner refused to so rule. On review, the court brushed off the fact that *Jencks* was a criminal trial, and expressed the view that there was no significant distinction between civil and criminal proceedings in this regard. Said the court:

> "Accordingly, these rules set forth in the Jencks decision provide an *a fortiori* basis for holding that the statement demanded in the case at bar should have been produced and made available for respondent's inspection if they are applicable to civil proceedings, such as administrative hearings, as well as to criminal trials. In our opinion, logic compels the conclusion that these rules are applicable to an administrative hearing . . . . The production and inspection, and possible use for cross-examination purposes, of such a document could serve only to test the memory and credibility of the witness, while, in the absence of a claim of confidence or privilege, there can be no sound reason to bar such production. The request in the case at bar was not a mere fishing expedition, but rather concerned the credibility of the most important witness who testified in support of the charges."[20]

Jencks represented an exercise of the Supreme Court's power to prescribe procedures for the administration of justice in the federal courts. It was not decided on constitutional grounds, although, as Mr. Justice Brennan later said, "[I]t would be idle to say that the commands of the Constitution were not close to the surface of the decision . . . ."[21]

If an arbitrator, in the tugboat case, denies the union access to

18 Great Atl. & Pac. Tea Co., 118 N.L.R.B. 1280 (1957).

19 NLRB v. Adhesive Prods. Corp., 258 F.2d 403 (2d Cir. 1958); *accord*, NLRB v. Capitol Fish Co., — F.2d — (5th Cir. 1961); Schauffler v. Local 107, Teamsters' Union, 196 F. Supp. 471 (E.D. Pa. 1960).

20 NLRB v. Adhesive Prods. Corp., *supra* note 19, at 408.

21 Palermo v. United States, 360 U.S. 343, 362-63 (1959).

the earlier statements of the witnesses he will probably not be guilty of denying the grievant due process of law in the legal sense —although it may not be beyond the bounds of reason to suppose that at some future date, in a proceeding to enforce an arbitration award, a grievant who had been denied access to such a statement would be held to have been deprived of due process of law. But the principle of *Jencks* is as sound for the arbitrator as for the administrative agency. The request is not a mere fishing expedition. It does concern the credibility of an important witness and should be produced.

The question of the master insurance policy raises a somewhat different issue. Here the company claims that the union is on a fishing expedition, for the question of the level of benefits for management personnel is not relevant to the issue of whether *X* is entitled to the new or old level of benefits. What is unsatisfactory about having the arbitrator examine the master contract to satisfy himself that the photostat is an exact copy except for the irrelevant clause showing management benefits? How can the union possibly be prejudiced by this? This is the exact procedure which Congress provided for in a statute[22] enacted to narrow the effect of the *Jencks* decision.[23]

Since the arbitrator is usually without the power of subpoena he will not be able to force production of the documents in either the tugboat or the insurance policy cases. But this is not a serious handicap—as is evidenced by the fact that the proposed United States Arbitration Act, drafted by a committee of the National Academy of Arbitrators, does not even include such a provision. Neither side is inclined to withhold a genuinely relevant document because to do so invites an adverse ruling arising partly out of the arbitrator's inference that the document is damaging to the party withholding it.

There is doubtless a considerable temptation in arbitration proceedings to embark on "fishing" expeditions. Even so, the experienced arbitrator will have little difficulty dealing with such

22 18 U.S.C. § 3500 (1958). That statute was upheld in Palermo v. United States, *supra* note 21.

23 The statute applies only to criminal prosecutions and provides, *inter alia*, that no report in the possession of the United States shall be subject to subpoena or discovery until after a witness has testified, and if the United States claims that part of the material does not relate to the matter at hand, the court must inspect the statement in camera and excise irrelevant portions.

cases. For the rest of the cases, would not the following guidelines adequately serve the purpose?

1. In the absence of any showing of prejudice, relevant information in the hands of one party should be made available to the other party in an arbitration proceeding at the request of the arbitrator.

2. In the event the party to whom such a request is made refuses to honor it, and in the absence of a subpoena power in the hands of the arbitrator, an inference may be drawn against the party refusing to produce the evidence.

3. In a *Jencks*-type case, the principle involved in that case should be followed.

4. The arbitrator should, on request of a party, excise irrelevant portions of a document after privately inspecting it.

CONFRONTATION AND CROSS-EXAMINATION

Problems of confrontation and cross-examination are particularly troublesome in the labor arbitration field because there is likely to be a square conflict between the informality of the hearing and certain industrial relations policy considerations, on the one hand, and some very sensitive personal rights and fundamental considerations of fairness, on the other. Some examples will make the point clearer.

Retail stores, public utilities, and other similar businesses, have a problem of customer relations. A customer in a supermarket may, for instance, complain that a certain checker is consistently overcharging him. Yet he may be unwilling to make any formal statement, and be even less willing to appear as a witness against the checker if disciplinary measures are taken by the company and then brought to arbitration. Or a female customer may complain that a utility service man has made improper advances to her in the course of a service call. Yet she may be unwilling to discuss the issue in more than general terms, or appear as a witness at an arbitration hearing if the company takes disciplinary action.

Another line of cases involves the peculiar problems of certain businesses in which the honesty and integrity of employees can be checked only by the use of "spotters" who, while playing the role of customers, actually watch for any irregularities. Retail stores and bus companies frequently employ such assistance. Usually it is supplied by established firms which furnish trained agents who

make routine checks. To remain useful these agents must be anonymous. Their reports may identify irregularities on the part of a bus driver in dealing with fares, or on the part of a retail cashier or salesman. The employee is then confronted with the evidence, but given no opportunity to talk to the person from whom it came. And if a grievance results from disciplinary action the arbitrator finds himself presented with the question of receiving evidence from an unidentified source and without the right of confrontation or cross-examination.

There are other kinds of cases, some of them more common than either of the above examples. A substantial number of grievances involve situations in which the result hinges on the word of one management man versus one union man—but there is another employee, who is also a union member, who could testify. If, for instance, *X* is discharged for hitting his foreman, *X* may claim that he thought the foreman was about to hit him with a piece of steel. The foreman may deny that he had anything in his hand, or was in any way threatening *X*. *Y*, working at a nearby machine, may have seen the whole incident. Suppose, in fact, that after *X* struck the foreman *Y* rushed over and said to the admittedly hot-tempered *X*, "Are you crazy? What did you want to hit him for?" If and when the case comes to arbitration the company may not wish to call *Y*. Many companies simply refuse to call one production employee against another. They know that this puts him in an impossible position, for *Y* is then not only a "squealer," which our mores condemn, but is guilty of treason against a fellow union member as well. The latter can result in disciplinary action. The fact remains that the arbitrator's job would be much easier if he knew what *Y* had to say. Should he insist that *Y* be called? Suppose *Y* refuses to testify? In the absence of *Y*, suppose the foreman wants to repeat *Y*'s remark after *X* hit the foreman? Should this be permitted? Suppose the union objects?

In trying to decide how arbitrators should deal with cases of this kind, it is useful to check the court analogy. In the courts the confrontation requirement has always been considered to have two purposes, only one of which was essential. The first, and critical, purpose is to permit cross-examination. Of secondary importance is the opportunity to scrutinize the witness while testifying in order to get some feel for the truth or falsity of what he is saying. Thus, the second requirement can be dispensed with where the witness has testified at a previous hearing and been under cross-

examination, and is not now available for a reason such as absence from the state, death, illness, etc.[24]

The principle of confrontation is given constitutional protection under the federal constitution, and in practically every state, in criminal cases. Wigmore has pointed out that there is a considerable carry-over into the civil law.[25]

Perhaps the most interesting analogy in the courts to the kind of cases which arise in arbitration involves the government's dismissal of employees for security reasons. Such dismissals have disturbed the courts, and indeed the nation, because of the inherent unfairness in depriving a citizen of his job and his reputation without an opportunity to know his accusers, to confront them, and to cross-examine them.[26] Counsel for government employees in such cases have long argued that the individuals were being deprived of due process. In the only case which has squarely presented the point the Supreme Court divided four to four, thereby leaving undisturbed a court of appeals case in which the court held that due process had not been denied. Said the court: "Due process of law is not applicable unless one is being deprived of something to which he has a right."[27] And since executive offices are held at the will of the appointing authority, the court thought there could be no such right.

Despite the above opinion, the Supreme Court has expressed concern about the absence of confrontation and cross-examination in two more recent cases involving security dismissals. In *Vitarelli v. Seaton*,[28] the Department of Interior had established a procedure for considering cases of dismissal for security reasons, and then failed to follow its own procedure. One of the deficiencies was that the dismissed employee was not given a chance to cross-examine one of his identified accusers. In an opinion which concurred in part and dissented in part, Mr. Justice Frankfurter made these significant comments:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. . . . Accordingly, if dismissal from employment is based on a defined

24 5 WIGMORE, EVIDENCE § 1395 (3d ed. 1940).
25 *Id.* § 1400, at 144.
26 Arnold, *The American Ideal of a Fair Trial*, 9 ARK. L. REV. 311 (1955).
27 Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).
28 359 U.S. 535 (1959).

> procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. . . . He that takes the procedural sword shall perish with that sword.
> "The Secretary of the Interior concededly had untrammeled right to dismiss Vitarelli out of hand, since he had no protected employment rights. He could do so as freely as a private employer who is not bound by procedural restrictions of a collective bargaining contract."[29]

In the other case, *Green v. McElroy*,[30] the Supreme Court reversed an administrative decision which had resulted in a denial of clearance to an executive of a company doing business with the Navy, on the ground that neither Congress nor the President had authorized the procedures whereby the security clearance had been denied. The opinion contained language which caused Mr. Justice Clark to comment: "While the Court disclaims deciding this constitutional question [due process], no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy."[31] Particularly disturbing was the portion of the majority opinion which stated: "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . . ."[32] This proposition, thought Mr. Justice Clark, was clearly erroneous and unsupported by past cases.[33]

The thing which stands out about labor arbitration, in the kind of cases under discussion, is the amount of experimentation and horse-sense procedure which are used.

To be specific, hearsay is almost universally accepted in preference to calling one production employee against another. The arbitrator's reasoning is fairly simple. Such a witness is, unquestionably, in an extremely difficult position—so difficult, in fact, that he may not be very reliable. And the reason for this runs deeper than just possible union discipline. No one likes a "squealer"—this is as basic to the growing child as the acquisition of his ABC's. Hearsay may be equally unreliable, but when it is

29 *Id.* at 546-47.
30 360 U.S. 474 (1959).
31 *Id.* at 524.
32 *Id.* at 492.
33 *Id.* at 512-13.

received the party against whom it weighs, usually the union, can decide that it is better to produce the reluctant employee and encourage him to testify. To go back to the earlier example, most arbitrators will permit the foreman to say that when *X* hit him, *Y* grabbed *X* and said, "Are you crazy? What did you want to hit him for?" The union can always call *Y* to deny that he said this. If it doesn't, common sense suggests that *Y* probably did make the remark. And it has some weight in deciding the credibility of *X* in saying that he hit the foreman only when the latter came after him with a piece of steel in his hand. One arbitrator, much respected nationally, goes as far as to refuse to let one production employee testify against another. But at the same time he allows almost unlimited hearsay as to what the employee might say if called. Another distinguished arbitrator deplores the tradition of not calling bargaining unit witnesses.[34]

"Private" investigations, conducted by the arbitrator, are not infrequently authorized. Take the case of the female who complains that the utility's service man made improper advances to her. Its own investigation may convince the company that the customer is telling the truth so it fires the employee. But when the arbitration comes along she refuses to testify. The arbitrator may be, and usually is, without the power of subpoena. The union, in recognition of the problem, may be willing to authorize the arbitrator to visit the complaining customer and interview her. He may then decide the case based upon conclusions reached as a result of the interview.

In transit cases the collective bargaining contract sometimes gives formal recognition to the "private" witness. Thus article 2 (g) of the 1953 agreement between the Philadelphia Transportation Company and the Transport Workers Union of America, Local 234, reads: "In case any testimony by a secret investigator of the Company is offered it shall be given only before the Chairman with no one else present and such a witness shall be referred to only by number so that this identity shall not be disclosed."

Another variation that has been worked out in at least one grocery chain calls for the acceptance, at the hearing, of customer complaints based upon company records, but then provides the

34 Wirtz, *Due Process of Arbitration*, in NATIONAL ACADEMY OF ARBITRATORS, THE ARBITRATORS AND THE PARTIES, PROCEEDINGS OF THE ELEVENTH ANNUAL MEETING 1, 18 (McKelvey ed. 1958).

union an opportunity to check privately with the customer. If discrepancies appear the arbitrator is then authorized (the subpoena power being there available) to call the customer.

Most difficult of all, perhaps, are the rare cases in which, during a recess, both counsel suggest to the arbitrator that they think a given witness was not telling the truth, counsel also suggesting that the arbitrator have a private chat with the witness afterwards to see if he can come any nearer to the truth.

Many arbitrators are unwilling, even with the consent of the parties, to talk privately with a witness if the decision is to be influenced by the results of the conference. Even when the contract authorizes the arbitrator to make such investigations as he thinks proper, the propriety of private interrogation may be challenged as it was under the General Motors agreement.[35] In some cases, as a sort of compromise, arbitrators have agreed to talk privately with witnesses provided they can then report back to both parties the substance of the information obtained. In a transit "spotter" case, one arbitrator overcame the problem of the anonymous witness by placing him behind a screen where he could be seen only by the arbitrator and counsel for both sides while he was testifying.

It is quite obvious that in this area arbitrators depart drastically from the common-law rules of evidence known to the courts. In doing so are they violating fundamental considerations of fairness which are essential to due process of law? By taking hearsay in preference to an available witness it is difficult to see that a serious due process question is involved. In practically all cases this procedure is accepted or condoned by the parties.

Private investigations offer more difficulty. Surely it can be agreed that they should never be undertaken without the consent of the parties. Even then, one may question whether the individual will be bound by the action of his union in agreeing to such a procedure. Communicating the results of the investigation back to the parties before decision seems preferable to no such report.

In the spotter cases it does not necessarily follow that because, as one arbitrator said, "The System may be odious, but there is

35 Alexander, *Impartial Umpireships: General Motors—UAW Experience*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW, PROCEEDINGS OF THE TWELFTH ANNUAL MEETING 108, 121 (McKelvey ed. 1959).

no practical alternative,"[36] confrontation and cross-examination cannot be provided. It may be that spotters must be utilized, but there are ways of insuring the parties an opportunity to cross-examine without revealing the identity of the witness or exposing him.

Perhaps it is possible to summarize what seem to be desirable rules as follows:

1. Depositions and former testimony of witnesses should be accepted where such witnesses are now unavailable.

2. When the alternatives are hearsay evidence versus one employee testifying against another, the choice should ordinarily lie with the parties. If the witness is available, but either is not called or declines to testify, hearsay evidence should be received in place of his testimony.

3. Private investigations by the arbitrator should be held to a minimum and conducted only with the authorization of the parties. Where possible, arrangements should be made to report back to the parties on the investigation before the arbitrator makes a final decision.

4. Where the nature of the business requires that witnesses remain anonymous, arrangements should nevertheless be made to permit counsel for the parties to confront and examine them in the presence of the arbitrator.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

We know, of course, that under the federal and many state constitutions no man "shall be compelled in any criminal case to be a witness against himself."[37] And we know that despite the language which purports to limit the privilege to criminal cases, the courts have held that "the privilege of a witness not to answer incriminating questions extends to all judicial or official hearings, investigations or inquiries where persons are called upon formally to give testimony."[38] But in order to assess the role, if any, which the privilege should play in arbitration proceedings, one needs to be aware of two or three other facets of the privilege as applied in the courts.

In the first place, it is only when a person has been formally

36 Los Angeles Transit Lines, 25 Lab. Arb. 740, 741 (1955).
37 U.S. CONST. amend. V.
38 MCCORMICK, EVIDENCE § 123 (1954).

accused or officially suspected of crime that he may not be questioned at all. In all other situations the witness must answer non-incriminating questions and must claim his privilege when the question is incriminating.[39] Secondly, many courts have held that the privilege extends only to testimonial compulsion. Thus the privilege is not breached if the accused is fingerprinted, photographed, deprived of his papers and other objects in his possession, physically examined, required to submit to blood or other bodily fluid exams, required to give a specimen of his handwriting, etc.[40] Finally, the due process clause of the fourteenth amendment is not violated by a state law which permits the prosecuting attorney to comment on the failure of the defendant to take the stand.[41] Mr. Justice Cardozo once addressed himself to this point in the following language:

> "This too [compulsory self-incrimination] might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."[42]

In the purely private world of labor arbitration the constitutional protection against self-incrimination presumably has little application except insofar as it may be a desirable principle in the interest of a fair procedure. In that connection one ought to note at the outset that the proportions of the problem are almost certain to be different before the arbitrator than in the court. There are two reasons for this. The first is that the question of the privilege usually arises in a collateral, rather than direct, way in arbitration. And the second is that since the arbitrator usually has neither the power of subpoena nor the power to hold a party in contempt, the question is not really one of compelling someone to testify, but rather of whether it is permissible to draw an inference against him because he has not testified. To see the problem a little more clearly, let us examine some of the kinds of cases which arise in arbitration.

39 *Id.* at 288.
40 *Id.* at 264.
41 Twining v. New Jersey, 211 U.S. 78 (1908).
42 Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

Post-war ideological differences, which have given a new emphasis to security measures, account for a number of cases. Employees have frequently been called before legislative committees and asked about their affiliation with subversive organizations. On a number of occasions they have refused to testify, claiming the privilege of the fifth amendment. The employer might then discharge the individual on the ground that he is a security risk. If the employee protests he may be entitled to take the case to arbitration—thereby, on occasion, posing a difficult internal problem for the union.[43] After a certain amount of struggle, arbitrators now quite uniformly hold that the employee must be reinstated where the sole cause for the discharge is the individual's unwillingness to testify.[44] In reaching this conclusion much emphasis has been placed upon Supreme Court decisions, particularly *Slochower v. Board of Higher Educ.*[45] That case involved a situation in which the New York City Charter provided that when a city employee utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct before a legislative committee his employment would terminate. Slochower was a teacher in one of the city colleges. He was discharged without notice or a hearing when he invoked the fifth amendment before a federal legislative committee with respect to his membership in the Communist Party. The court held that the summary dismissal of Slochower violated the requirements of due process of law. In his opinion Mr. Justice Clark said: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."[46]

But *Slochower* was followed by *Beilan v. Board of Pub. Educ.*,[47] in which, by a five-to-four decision, the Supreme Court held that it did not constitute a violation of due process under the fourteenth amendment to discharge a public school teacher for failure to cooperate by refusing to answer questions of supervisors concerning membership in subversive organizations. Although the employee had based his position on the privilege against self-

43 Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959).

44 R.C.A. Communications, Inc., 29 Lab. Arb. 567 (1957); Pratt & Whitney Co., 28 Lab. Arb. 668 (1957); J. H. Day Co., 22 Lab. Arb. 751 (1954); United Press Ass'n, 22 Lab. Arb. 679 (1954).

45 350 U.S. 551 (1956).

46 *Id.* at 557.

47 357 U.S. 399 (1958).

incrimination, the Court said this was irrelevant since he was discharged not for claiming the privilege, but for refusing to cooperate.

Beilan, like *Slochower*, has found its parallel in arbitration decisions. Thus an arbitrator held that a newspaper did not have to retain editorial writers who invoked the fifth amendment.[48] And other arbitrators have held that if the plant is engaged in defense work,[49] or there is unrest in the plant,[50] the discharge of an employee who invokes the fifth amendment may be justified. There is, it should be added, another decision reinstating an individual discharged because of the alleged unrest when management made no effort to control the unrest.[51]

Aside from the security cases, arbitrators find themselves faced with occasional cases in which the plant offense gives rise both to disciplinary action and a criminal charge. When this happens the two proceedings will seldom proceed simultaneously. The result is that either the criminal trial or the arbitration may have been concluded and a decision announced before the other tribunal acts. In one such case[52] an employee was indicted for allegedly stealing tires from his employer's plant. He was suspended pending trial, in the course of which he was acquitted after claiming his privilege against self-incrimination. When the arbitration began, involving the man's discharge for the same offense, the grievant once again refused to testify. The arbitrator upheld the discharge on the ground that by refusing to explain his admitted possession of the tires, the employee had failed to satisfy his obligation to his employer to cooperate in stopping thievery from the plant.

In a reverse situation[53] the grievant refused to testify on the ground that his criminal trial was pending, and that the arbitration record could be subpoenaed for that proceeding. The arbitrator thought the refusal was justified in such a case, and ought not to be used against the grievant. In discussions of this case many other arbitrators have indicated that they agree with the ruling. It is, in a sense, inconsistent with the majority of the court cases which have held that a witness may not refuse to

48 Los Angeles Daily News, 19 Lab. Arb. 39 (1952).
49 Bethlehem Steel Co., 24 Lab. Arb. 852 (1955).
50 Burt Mfg. Co., 21 Lab. Arb. 532 (1953).
51 Republic Steel Corp., 28 Lab. Arb. 810 (1957).
52 Wirtz, *supra* note 34, at 20.
53 New York Times Co., 29 Lab. Arb. 442 (1957).

testify on the ground that his answers may subject him to prosecution in another forum.[54]

All of the above examples involve situations in which dual proceedings account for the difficulties in connection with the privilege against self-incrimination. Only rarely, arbitrators report, do they get a case in which a witness makes a direct issue of the privilege against self-incrimination where the problem is limited to the arbitration proceeding. One such case is an unreported one in which the employee was discharged for having advised other employees to violate a clear company rule. In the course of the arbitration hearing the dischargee refused to take the stand and testify on the question of whether he had given such advice. He justified his position on the basis of the privilege against self-incrimination. The arbitrator could not force the grievant to take the stand, but he did infer from the employee's failure to do so that he had probably given the advice. Of course, in arbitration, as in court cases, it is difficult to know how much weight to assign to the adverse inference. Usually the grievant defendant's greatest difficulty is not the inference arising out of refusal to testify, but the fact that there is other evidence in the record which remains uncontradicted because the defendant refuses to speak.

Many arbitrators feel that the privilege against self-incrimination has no place in the arbitration proceeding. Often they explain this on the ground that the arbitration is not a criminal proceeding. Since the courts have long held, as indicated previously, that the privilege extends beyond criminal proceedings, this may be an unsound ground for an otherwise correct conclusion. Would not the following rules adequately serve the purpose in dealing with the privilege against self-incrimination in arbitration proceedings?

1. Since the privilege against self-incrimination owes much of its existence to historical developments which have no relevancy to the field of arbitration, the privilege should have only a very limited application to arbitration.

2. When the grievant claims the privilege against self-incrimination for purposes of the arbitration proceeding, either without reference to another forum or on the ground that a

[54] MCCORMICK, EVIDENCE § 135 (1954).

criminal proceeding elsewhere is pending against him for the same offense, he should be advised that a failure or refusal to testify may give rise to an inference against him.

3. An adverse inference arising out of failure or refusal to testify, whether before the arbitrator or elsewhere, will rarely, if ever, be sufficient by itself to sustain the penalty which has been imposed.

4. An adverse inference arising out of failure or refusal to testify before the arbitrator or elsewhere may, when coupled with unrefuted evidence against the grievant, be used to sustain the penalty.

5. Insofar as the privilege against self-incrimination has any standing before an arbitration tribunal it should not apply to other than testimonial compulsion.

In brief, these rules give a minimum scope in arbitration to the privilege against self-incrimination. This, it is submitted, is desirable. Justice can, as Cardozo so eloquently pointed out, survive without the privilege.[55] Employment with a given employer is not a right.[56] The importation into the field of arbitration of concepts having little relevance to the special problems before the tribunal would be unfortunate.

SEARCH AND SEIZURE

There appear to be very few reported arbitration cases which squarely face the question of whether evidence obtained by an illegal search is admissible. Interestingly enough, one of the few was decided in 1946 by Joseph D. Lohman, who has recently been appointed Dean of the School of Criminology at the University of California at Berkeley. In that case,[57] a woman had been discharged for violation of a company rule which prohibited possession by employees of a dangerous knife on company premises. The evidence showed that a guard had allegedly seen the knife in the woman's purse through the open door of her locker. This information was conveyed to a supervisor who then asked the grievant to report to the office on her way off duty. The employee, without being told the reason for the request, was then

55 Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).
56 U.S. Steel Corp. v. Nichols, 229 F.2d 396, 399 (6th Cir. 1956).
57 Campbell Soup Co., 2 Lab. Arb. 27 (1946).

asked by the head guard to empty her purse. This she did, with the result that the knife was revealed. A majority of the arbitration board ruled that the evidence of possession of the knife was inadmissible and that the discharge was unjustified. Although the whole incident took place on company property, the majority said that "the aggrieved's locker and purse continue inviolate as the private realm of the individual and are not to be searched or seized in an illegal fashion."[58] The opinion speaks of entrapment, self-incrimination, and illegal search and seizure. One gets the impression that the majority felt there were other, and better, ways in which the company could implement its undeniably valid rule. It is a little difficult to know just how much weight to assign to each of the respective factors relied upon by the arbitrators.

A 1957 decision,[59] involving an employee who was discharged for "writing numbers" on company property, furnishes an interesting comparison with the above case. In that case plant protection officers detained a cook at the company's canteen and asked him to go to the plant protection office. Enroute a numbers slip was found in a package of cigarettes carried by the employee. At the plant protection office the employee was told to empty his pockets, which he did. Several other slips were then discovered. This evidence was turned over to a city magistrate who tried the defendant and found him guilty. Subsequently the man was discharged. No point was apparently made of an alleged illegal seizure, and the discharge was sustained without referring to the question.

Most of the arbitrators who have been asked about illegal search and seizure cases indicate that they have never had such an issue. However, there are some unreported cases in which arbitrators say they have dealt with the following situations:

1. The company furnished lockers and padlocks to individual employees. Upon suspicion that an employee was stealing tools, the company opened his locker in his absence and without his permission and found some missing tools. The arbitrator admitted the evidence.

2. An employee had developed a gadget for his machine which would greatly speed up production. However, he used it

[58] *Id.* at 31.

[59] Jones & Laughlin Steel Corp., 29 Lab. Arb. 778 (1957).

covertly and refused to enter it in the company's suggestion system. Knowing of the gadget the company attempted, unsuccessfully, to take it out of his personal tool box. When the employee was discharged the arbitrator held that the company could not search the tool box.

3. An employee, *X*, was suspected by his fellow employees of stealing their tools. They broke into his locker (which belonged to the company but had on it his personal lock). While this was taking place the company guard came along and found that the locker contained tools belonging to the company. *X* was discharged and the arbitrator allowed the evidence to be entered on the theory that the company did not break into the locker.

4. An employee was suspected of stealing inventory. Company guards went to his home when he was not there, and were permitted by the man's wife to search his house. They found evidence which resulted in his discharge. The arbitrator permitted the evidence to be entered in the record.

5. An employee, *X*, was opposed to the contract which his union officers had negotiated with the company, and which was about to be offered to the local for ratification. *X* started making notes for a speech on the floor of the meeting in opposition to the proposed contract. The foreman found the notes and attempted to get them away from *X*. In the process the notes were torn. *X* refused to give up the balance of the notes and was fired. The arbitrator reinstated him on the ground that the notes were his personal property.

None of these cases deny the right of the company to impose, as a condition of employment, an inspection of the employee's clothes and packages on entering and leaving the plant.[60] Arbitrators know that industrial pilferage is a major problem, and there is no disposition to interfere with proper rules to control it.

At common law the admissibility of evidence was not affected by the illegality of the means through which it had been obtained.[61] However, in 1941 the Supreme Court ruled that illegally obtained evidence was inadmissible in the federal courts,[62] and

60 See Sunbeam Corp. reports in Bus. Week, Feb. 11, 1956, p. 148; *id.* March 31, 1956, p. 167.

61 8 WIGMORE, EVIDENCE § 2183, at 7 (McNaughton rev. ed. 1961).

62 Weeks v. United States, 232 U.S. 383 (1914).

in a very recent decision, *Mapp v. Ohio*,[63] has ruled that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible even in state courts. Since the latter decision was placed squarely on constitutional grounds it may also wipe out the "standing" requirement, which had been imposed by the lower federal courts, and which considerably diluted the impact of the 1941 decision.[64] The effect of the "standing" requirement was to impose on one seeking to suppress illegally obtained evidence the necessity of showing a definite interest in either the premises searched, or the property seized, or both. Unless the defendant insisted that the property belonged to him he had no standing to challenge its admission. But if he claimed the property he waived his privilege against self-incrimination.

The constitutional protection which the *Mapp* case extends against illegally obtained evidence applies to governmental, rather than private, acts. Conceivably there are circumstances under which a private arbitration award could be considered governmental action for purposes of invoking the constitutional protections. The more important question is whether arbitrators ought to evolve a rule against the receipt of illegally obtained evidence simply because this would contribute to the fairness and integrity of the arbitration process. Here one suspects there is a great difference between the privilege against self-incrimination, for instance, and the use of illegally obtained evidence. The difference is both theoretical and practical. The historic influences which gave rise to the self-incrimination rule have little or no relevance to arbitration. On the other hand, the fact that the modern industrial age requires most individuals to work for another, rather than for themselves, should not necessarily deprive them of historic rights with respect to private property. And on the purely practical level, management can in fact establish rules and procedures which will adequately protect its business without resorting to illegal searches. The individual is entitled to know the rules under which he is working, and these normally preclude illegal searches and seizures.

Interrogation reveals that all arbitrators agree that a company may impose reasonable rules as to the search of one's person and

63 367 U.S. 643 (1961).
64 See Comment, 55 MICH. L. REV. 567 (1957).

property where such rules are made a condition of employment. Many arbitrators would permit companies to use evidence obtained without the knowledge or consent of the employee if it is obtained from company property (*e.g.*, a locker), even though the property is momentarily under the control of the employee. Few, if any, arbitrators think that a company ought to be permitted to use evidence obtained by breaking and entering an employee's personal property, even though the property is located on the plant premises. There is a difference of opinion among arbitrators as to the use of evidence of this type when the employee's personal property is searched without his consent, but without the necessity for entering by force.

Since all arbitrators agree that a company can, as a condition of employment, impose reasonable rules as to search of one's person and property, why should there be any other guideline for what to do about illegally obtained evidence? In the absence of a rule known to the employee, if evidence is obtained without his consent and from property under his control (even though without a breaking and entering), should it not be barred? There is no apparent handicap to the company in such a rule, and it contributes to the employee's sense of dignity. Surely human values are not to be completely ignored in the industrial context.

WIRETAPPING

Wiretapping has apparently not constituted much of a problem before arbitrators. Only one reported case had been located, and in response to an inquiry no other cases were disclosed. Nevertheless, the subject is deserving of comment, if for no other reason than its early and largely disreputable history in the field of labor-management relations. There was a time when employers' associations, Pinkerton offices, and so-called "vigilante" committees, which were hostile to labor, made widespread use of wiretapping.[65] And there have been many unfair labor practice cases before the NLRB which involved employer use of tapped wires in connection with alleged anti-union activity.[66]

[65] *Hearings on S. 266 Before a Subcommittee of the Senate Committee on Education and Labor*, 75th Cong., 1st Sess. 1585-88 (1937).

[66] Chesapeake & Potomac Tel. Co., 98 N.L.R.B. 1122 (1952); Mid-Continent Petroleum Corp., 54 N.L.R.B. 912 (1944).

There is one reported arbitration case involving the warehousing operation of the Sun Drug Co. which deals with the problem of wiretapping.[67] In that case, outsiders had complained to the company that "numbers-writing" was being carried on within the warehouse. In the course of its investigation the company installed a microphone in the telephone booth and connected it to a recording machine. After gathering incontrovertible evidence against one of its employees the company turned the evidence over to the district attorney who then carried the investigation further. Three detectives apprehended the employee as he left the telephone booth following completion of a conversation to which they had listened on the recording machine. The employee admitted writing numbers, and both money and slips were confiscated from him. The employee was discharged and in arbitration the union contended that the company had entrapped the individual, that placing numbers bets was common knowledge to all employees in the warehouse, that the employee accrued no profit from this activity, and that his discharge really stemmed from his activity as a shop steward rather than from writing numbers. There was a Pennsylvania statute which made number writing illegal, but there was also a statute making it a misdemeanor to intercept a communication by telephone.[68] The latter act specifically stated: "Except as proof in a suit or prosecution for a violation of this act, no evidence obtained as a result of an unlawful interception shall be admissible in any such proceeding."[69] The opinion in *Sun Drug Co.* does not indicate whether the union argued that the wiretapping evidence was inadmissible, but it does say: "Suffice it to say that while the legality of the means by which information has been gathered is for other authorities to determine, it is sufficient for the purpose of arbitration, based upon the uncontroverted facts in the instant case, for the arbitrator to sustain the discharge."[70] Thus, for all practical purposes, the evidence was received.

Although the *Sun* case had not been decided at the time arbitrators were being asked what they would do with a wiretapping case, it turned out that the hypothetical example which was used

67 Sun Drug Co., 31 Lab. Arb. 191 (1958).
68 PA. STAT. ANN. tit. 15, § 2443 (1958).
69 *Ibid.*
70 31 Lab. Arb. 191, 194 (1958).

in the interrogation almost exactly paralleled that case. Arbitrators were badly split in their responses. Many said that they would not admit evidence which had been illegally obtained; others said that they would follow the law of the particular state as to admissibility; and still others pointed out that illegal methods used in securing the evidence did not impair its truth or relevancy.

In view of the dearth of arbitration experience with wiretapping, it is likely that arbitrators will look to the law for guidance in dealing with the problem. If so, they may find less help than they had expected. More than thirty years ago the Supreme Court, despite an eloquent dissent by Mr. Justice Brandeis, settled on the rule that neither the unreasonable searches and seizures provision of the fourth amendment, nor the self-incrimination provisions of the fifth amendment, were violated by the introduction of evidence obtained by tapping wires.[71] Subsequently Congress passed the Federal Communications Act, which included the provision that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."[72] Supreme Court decisions then established that the act applied to federal officers and forbade the introduction in federal courts of intercepted messages,[73] or evidence gained thereby;[74] that intra-state messages were protected from disclosure equally with interstate communications;[75] and that the consent of one party to the conversation, secured by confronting him with recording of the conversation and by promises of leniency, was not "authorization by the sender" within the meaning of the act.[76] On the other hand the Supreme Court also held that it was not a violation of the act to use a detectaphone to overhear the words of one party to the conversation, and if this was done without a trespass it was not a search or seizure;[77] that only the participants in the conversation may object to the use of intercepted conversations since they are

71 Olmstead v. United States, 277 U.S. 438 (1928).
72 Communications Act of 1934, 48 Stat. 1104 (1934), 47 U.S.C. § 605 (1958).
73 Nardone v. United States, 302 U.S. 379 (1937).
74 Nardone v. United States, 308 U.S. 338 (1939).
75 Weiss v. United States, 308 U.S. 321 (1939).
76 *Ibid.*
77 Goldman v. United States, 316 U.S. 129 (1942).

the only ones whose privacy has been invaded;[78] that the Federal Communications Act does not require the exclusion of wiretap evidence in the state courts;[79] and that a conversation which is overheard on a regularly-used telephone extension, with the consent of the person who is both the subscriber to the extension and a party to the conversation, is admissible because it is not an "intercepted" message within the meaning of the act.[80] All of this may have been complicated, however, by two decisions of the Supreme Court at its most recent term. In *Mapp v. Ohio*[81] the Court held for the first time that evidence obtained by searches and seizures in violation of the Constitution were constitutionally inadmissible in state courts. But at the same time, in a per curiam opinion, it upheld a lower court decision denying an injunction against the use of illegally obtained wiretap evidence in a state court.[82] In point of time, the *Mapp* case was the last decided. Does this foreshadow a change in the rule with respect to the admissibility of wiretap evidence in state courts?

Many states have wiretap statutes. They vary in type from the Pennsylvania statute, under which evidence obtained as the result of unlawful interception is inadmissible,[83] to the New York constitutional provision which permits wiretapping after obtaining a warrant in accordance with the state law.[84] Some states, like New Hampshire, have no statute and admit wiretap evidence.[85]

Unless and until the Supreme Court holds the introduction of wiretap evidence inadmissible in state courts—and this decision may not be far off—an easy rule for arbitrators to follow would be to abide by the law of the state in which the case is being heard. But such a rule would not be entirely satisfactory. Multi-plant companies and unions would find themselves with different rules, depending on the state in which the incident took place. Moreover, such an automatic rule would give no consideration to the differences between an employer's use of wiretap evidence to

78 Goldstein v. United States, 316 U.S. 114 (1942).
79 Schwartz v. Texas, 344 U.S. 199 (1952).
80 Rathbun v. United States, 355 U.S. 107 (1957).
81 367 U.S. 643 (1961).
82 Pugach v. Dollinger, 365 U.S. 458 (1961).
83 PA. STAT. ANN. tit. 15, § 2443 (1958).
84 N.Y. CONST. art. I, § 12.
85 8 WIGMORE, EVIDENCE § 2184 (b), at 57 (McNaughton rev. ed. 1957).

maintain production and plant discipline, and police use of wiretap evidence in criminal cases. Clearly there are some differences. An employee is on company property, and perhaps on company time. The telephone which he is using may very well be the company's. Is this not different from tapping an individual's private phone at his home or business? At least one well-known arbitrator thought so, for he said in no uncertain terms that the problems of the public prosecutor in trying to use wiretap evidence in court in no way related to the in-plant problem.

In the last analysis, one must weigh in the balance the problem of the employer in maintaining production and discipline against the privacy of the individual—even though the latter is in an industrial plant. This calls for a value judgment on which there can be legitimate differences of opinion. The facts of the case might well influence the decision. Should an employer who is harassed with in-plant gambling be denied the right to introduce in an arbitration hearing evidence obtained by tapping his own telephone during working hours? On the other hand, suppose the employer gets his evidence when the police, at the employer's suggestion, tap a public telephone across the street from the plant and during the noon hour?

Wiretapping is at best a dirty business.[86] Surely it has no place in the plant under any save extraordinary circumstances. Would it not be better for arbitrators generally to discourage the use of such evidence? And at the present time can any better rule be suggested?

THE LIE DETECTOR

Prior to 1959 only one reported arbitration case has been located which involved the question of the admissibility and weight of lie-detector evidence.[87] Responses from arbitrators confirm the conclusion that there were, indeed, few such cases. However, there is reason to believe that the problem is going to become more important. There were at least five reported cases in 1959,[88] and since then there has been a steady sprinkling of

86 See generally DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959).

87 Allen Indus., Inc., 26 Lab. Arb. 363 (1956).

88 Publishers' Ass'n, 32 Lab. Arb. 44 (1959); Marathon Elec. Mfg. Corp., 31 Lab. Arb. 1040 (1959); Coronet Phosphate Co., 31 Lab. Arb. 515 (1958).

cases.[89] Personnel literature suggests that the polygraph is very widely used in American industry for testing prospective or present employees of banks, department stores, chain stores, etc., for honesty in previous employment, honesty during current employment, or in connection with a particular theft.[90] Massachusetts has found this practice sufficiently distasteful to pass a law forbidding an employer, under penalty of a 200-dollar fine, to require or subject any employee to a lie detector test as a condition of employment or continued employment.[91] A similar bill was under consideration in New York in the spring of 1961. A major drug manufacturer urged its defeat on the ground that polygraph tests aided in the selection of trustworthy employees—a consideration which was particularly important where narcotics were involved.[92] And a consultant who specialized in pre-employment examinations for bus drivers also opposed the bill on the ground that polygraph tests helped to detect potential child molesters, on-the-job drinkers, narcotics users, and accident-prone persons.[93]

A number of the arbitration cases involving lie detectors have been discharge cases. Interestingly enough, in some of the cases the company wanted the employee to take a lie detector test or have an inference of guilt drawn against him, while in other cases the employee wanted to take a lie detector test to establish his innocence. Generally, arbitrators have attached no significance to an employee's refusal to take a test,[94] but in one case the arbitrator appeared to give it considerable weight.[95] On the question of admissibility arbitrators have tended to rule against lie-detector evidence whether offered for the purpose of proving innocence or guilt.[96]

Two other cases illustrate the limited significance which lie

89 See, *e.g.*, B. F. Goodrich Tire Co., 36 Lab. Arb. 552 (1961); Brass-Craft Mfg. Co., 36 Lab. Arb. 1177 (1961).

90 *Cf.* McEvoy, *The Lie Detector Goes into Business*, Readers Digest, Feb. 1941, p. 69; *Lie Detectors for Employees*, Bus. Week, Sept. 16, 1939, p. 36.

91 MASS. ANN. LAWS ch. 149, § 19-B (Supp. 1961).

92 N.Y. Times, March 15, 1961, p. 41, col. 1.

93 *Ibid.*

94 Publishers' Ass'n of New York City, 32 Lab. Arb. 44, 48 (1959).

95 Allen Indus., Inc., 26 Lab. Arb. 363 (1956).

96 Brass-Craft Mfg. Co., 36 Lab. Arb. 1177 (1961); Marathon Elec. Mfg. Corp., 31 Lab. Arb. 1040 (1959).

detector tests seem to have in arbitration. In one of them[97] false production reports had been filed under circumstances which made it impossible to pin the blame on any individual or individuals. The company therefore deducted a proportionate amount of pay from the wages of all employees in the department. The union protested that this was unfair because it penalized innocent employees. The company then sought what amounted to a declaratory judgment from the arbitrator which would permit it to insist that all of the employees take a lie detector test. Those who refused, or failed to pass the test, would then have the amount of money which had been wrongfully paid deducted from their wages. Those who passed the test would not be so charged. The arbitrator held that the employer could not impose a lie detector test wholesale, when it lacked a basis for a formal accusation against any given employee. In the other case,[98] a company was losing spark plugs from its Chicago warehouse. By 1960 losses were running as high as 50,000 dollars, and no system of prevention seemed to work. Since everything pointed to an inside job the company gave lie detector tests to all warehouse employees. The employees agreed to submit to such tests and the first round showed that three employees were lying. Two of them refused to take any further tests, while the third took the test over and again failed. The company then suspended all three for failure to cooperate with the investigation. The arbitrator held that the suspensions were unjustified since no evidence connected any of the three employees with the thefts, and their consent should not operate as a waiver in view of the "implicit social threat" of refusing.

Although the reported cases would indicate that arbitrators are tending more and more to exclude lie-detector evidence, inquiry among arbitrators suggests that there are unreported cases in which arbitrators have admitted lie-detector evidence but given it little weight.

In excluding lie-detector evidence arbitrators have tended to cite, in support of their position, the fact that courts typically do not admit it.[99] The constitutional question of whether an individual can be required to take a lie detector test is unlikely

97 General Am. Transp. Corp., 31 Lab. Arb. 355 (1958).
98 B. F. Goodrich Tire Co., 36 Lab. Arb. 552 (1961).
99 See Brass-Craft Mfg. Co., 36 Lab. Arb. 1177 (1961).

to arise, since the art of lie detection is not at the moment sufficiently well developed to make a reliable test possible upon a person who is unwilling to submit.[100]

No experienced arbitrator harbors the illusion that he can unerringly separate truth from falsehood in proceedings before him. There is evidence that the lie detector, in competent hands, is accurate about eighty percent of the time.[101] This may well be substantially higher than the unaided judgment of the average arbitrator. But it does not follow that the lie detector will be a constructive addition to either the grievance procedure or the arbitration tribunal. Hardly a grievance arises which does not present some form of dispute as to what was said or done on a given occasion. Did the business agent privately agree in a telephone conversation with the personnel manager that the company could make a certain promotion without having it contested by the union? When an employee called in to report his absence did he say that he would be out for two days or only one? In the course of negotiations did the parties discuss clause *X* and agree that it was to be interpreted in the same way as clause *Y* in a companion contract? Is the foreman or the production worker telling the truth with respect to their altercation?

Can a union live with its members if, when a grievance arises on which there is a conflict of testimony, it accepts resolution of the grievance through the lie detector? Can a company maintain morale among its supervisors if, when their reports are contradicted by employees, the company uses the lie detector to tell the truth? Suppose the business agent did tell the personnel manager that the company could make a promotion without opposition from the union, and then found that his membership felt strongly to the contrary. Does the company really want to prove that the business agent is lying?

In summary, when arbitrators deny admission to lie-detector evidence, and decline to draw an inference against the employee who refuses to take such a test, is not their position sound? Sound not just in the court sense that such tests are still unreliable, but in the policy sense that the lie detector has little to contribute to

100 Trovillo, *Scientific Proof of Credibility*, 22 TENN. L. REV. 743 (1953).

101 Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953).

the arbitration procedure. If there is to be any exception would it not be wise to limit it, as have the courts,[102] to those cases where the parties have entered into an agreement and stipulation as to the use of the results?

CONCLUSION

Arbitrators have, happily, largely dispensed with the exclusionary rules of evidence developed at common law for the jury trial system. One can say that this is a happy result because, in the colorful language of Judge Traynor, "just as no one will tell the emperor that he has no clothes, there are too few who will whisper that the law of evidence has too many."[103] Even so there are situations in which evidence which may be relevant and of probative value should be excluded. Sometimes this is for constitutional reasons, and other times it is simply for reasons of policy.

Since the arbitration tribunal is private it is not likely that a constitutional question of due process will arise. But this could happen, at least in theory, in either of two ways. In a proceeding to enforce an award the claim might be made that there was a denial of due process before the arbitrator. There is clear precedent for a holding that even privately-constituted tribunals must accord their constituents due process. Secondly, it is not beyond the realm of possibility that some future court will hold, under an expanded concept of what constitutes governmental action, that the labor arbitrator is an agent of the state and as such bound by the provisions of the fifth and fourteenth amendments.

Only a few of the issues here discussed are even remotely likely to raise a question of legal due process in the constitutional sense. More often it is policy which is involved—policy from the standpoint of the arbitrator and the parties in the sense that the arbitration process will have dignity, integrity, and fairness in every respect, and policy from the standpoint of the company and the union in that the methods which are used in processing and trying grievances will contribute to the harmonious and productive relationship of the parties.

102 See INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 132-35 (3d ed. 1953).

103 Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 234.

Arbitral experience in certain areas of evidence is meager. When sensitive personal rights are involved the experience of the courts may be instructive, though not necessarily binding. The attempt here has been to analyze certain problems and suggest guidelines for the future. Experience and the perspective of time and events will no doubt suggest variations.