

OUTLINE

PREFACE	V
TABLE OF CASES	XXIII
TABLE OF STATUTES	XXXV

Introduction. The Development of Labor and Employment Arbitration	1
A. Definition of the Concept.....	1
B. Origins and Development.....	3
C. The Arbitration Profession.....	8

PART I. LABOR ARBITRATION

Chapter I. Arbitration Procedure	13
A. Contractual Requirements	13
1. In General.....	13
2. The Submission Agreement.....	13
3. The Arbitration Clause.....	14
B. Initiating Arbitration.....	17
1. The Demand for Arbitration.....	17
2. The Reply.....	19
C. Types of Arbitration Systems.....	19
1. The Single Permanent Arbitrator System	20
2. The Permanent Panel System.....	23
3. The Temporary Arbitrator System	24
D. Selecting the Arbitrator.....	25
1. The Arbitration Profession	25
2. Methods of Selection	27

3. Learning About an Arbitrator	30
a. Educational Background	30
b. Work Experience	30
c. Arbitration Experience	32
4. Appointment.....	35
E. Advocates in Arbitration	35
F. Preparing for Arbitration	37
1. The Grievance Procedure	37
2. Discovery	40
3. Preparing the Evidence	42
G. The Arbitration Hearing.....	44
1. Time and Place.....	44
2. Record of the Hearing	44
3. Swearing Witnesses.....	45
4. Order of Presentation	46
H. Post-Hearing Procedure	49
1. Briefs.....	49
2. The Award; Finality.....	51
3. Costs.....	52
I. Summary Evaluation of Labor Arbitration: Time and Expense.....	54
J. Online Arbitration Hearings	56
1. Advantages of Virtual Hearings	57
2. Disadvantages of Virtual Hearings	58
3. Preparing for the Virtual Hearings	59
4. Security Concerns	62
5. The Virtual Hearing Itself.....	63
Chapter II. Variations on Traditional Labor Arbitration	67
A. Expedited Arbitration.....	67
B. Compulsory Arbitration.....	72

C. Advisory Arbitration and Fact-Finding.....	77
D. Interest Arbitration	80
1. In General.....	80
2. The Private Sector	81
3. The Public Sector	86
4. Criteria	87
5. Final-Offer Arbitration	91
E. Labor Arbitration in an International Context.....	94

Chapter III. Application of Arbitration to

New Situations	101
A. The Public Sector	101
1. The Federal Government.....	101
2. State and Local Governments	108
B. Police.....	110
C. Higher Education.....	112
D. Professional Sports	113
E. Airlines	122

Chapter IV. The Legal Status of Labor

Arbitration	125
A. At Common Law.....	125
B. Statutes Before the Taft-Hartley Act	127
1. Early State Laws on Labor Arbitration.....	127
2. Federal Legislation for Railway Labor Disputes	127
3. Other Federal Laws Before 1947	129
4. Modern State Arbitration Laws	130
C. Section 301 of the Taft-Hartley Act	132
1. The Language of Section 301	132
2. The <i>Lincoln Mills</i> Case.....	134

3. An Introduction to the Relationship Between the Arbitrator and the Courts: The <i>Steelworkers Trilogy</i>	136
a. Introduction.....	136
b. The <i>Trilogy</i>	137
c. Criticism of the <i>Trilogy</i>	142
4. Section 301 and the Norris-LaGuardia Act: <i>Boys Markets</i> and Later Developments	144
a. Revival of the Labor Injunction: <i>Boys Markets</i>	144
b. Limiting the <i>Boys Markets</i> Exception to Norris-LaGuardia: <i>Buffalo Forge</i>	147
c. Ramifications of the <i>Buffalo Forge</i> Limitation.....	149
D. Section 301 Preemption.....	151

Chapter V. The Relationships Between Arbitrators, the NLRB, and the Courts	157
A. Arbitrability.....	157
1. Substantive Arbitrability	158
a. General	158
b. Arbitral Determinations of Substantive Arbitrability.....	162
c. Post-Expiration Arbitrability	164
d. Successorship	168
2. Procedural Arbitrability	171
B. Arbitrators and External Law	172
1. The Theories.....	175
2. The Application	178
C. The NLRB and the Arbitration Process	180
1. Introduction.....	180
2. Post-Arbitration Deferral	182
3. Pre-Arbitration Deferral.....	185

D. Court Deferral	188
1. Labor Cases	188
2. Statutory Cases in the Collective Bargaining Context.....	189
a. The <i>Alexander</i> Decision	189
b. Impact of <i>Gilmer</i> on <i>Alexander</i>	196

Chapter VI. Judicial Review of Labor

Arbitration Awards	203
A. Introduction.....	203
B. Failure of the Award to “Draw Its Essence” from the Collective Agreement.....	207
C. Lack of Jurisdiction or Authority for the Award.....	208
D. Party Misconduct, Arbitral Partiality, and Procedural Unfairness.....	214
1. Party Misconduct	214
2. Arbitral Partiality	215
3. Procedural Unfairness.....	218
E. Gross Error or Irrationality.....	221
F. Violation of Law or Public Policy	224
G. Incompleteness, Ambiguity, or Inconsistency	229
H. Individual Challenges: The Duty of Fair Representation	230
I. Administrative and Judicial Review of Federal Sector Arbitration Decisions	235

Chapter VII. The “Common Law” of the

Arbitration Process.....	239
A. Some Problems of Due Process and Individual Rights	239
1. Notice	241

2. Separate Representation and Third-Party Intervention.....	243
3. Self-Incrimination.....	246
4. Search and Seizure.....	249
5. Confrontation and Cross-Examination.....	252
a. Hearsay.....	252
b. Customers, Co-Workers and “Spotters”... ..	253
6. Surprise: Changed Issues, Arguments, or Evidence.....	254
7. <i>Ex Parte</i> Hearings.....	257
8. The Agreed Case.....	258
B. The Burden of Proof.....	260
1. The Burden of Producing Evidence.....	261
2. The Burden of Persuasion.....	262
3. The Quantum of Proof.....	263
C. Some Problems of Evidence.....	265
1. The Applicability of Evidentiary Rules to Arbitration.....	265
2. Hearsay.....	267
3. The Plain Meaning Rule and Extrinsic Evidence.....	269
4. Past Practice.....	273
a. Creating a Past Practice.....	274
b. Using a Past Practice.....	276
c. Terminating a Past Practice.....	278
5. Past Employee Conduct.....	279
6. Medical Evidence.....	283
D. The Arbitration Award and Opinion.....	286
1. Form and Content.....	286
2. Time Limitations.....	286
3. Arbitration Panels.....	288
4. The Opinion.....	289
5. Publication.....	291

6. Termination of the Arbitrator's	
Authority	293
a. By Withdrawal of One of the Parties	293
b. By Expiration of Time Limits	294
c. By Rendition of a Final Award	294
d. By Operation of Law	294
7. Interpreting, Modifying, or Correcting the	
Award by the Arbitrator	295
8. Actions to Enforce or Vacate an	
Arbitrator's Award	296
E. Remedies	298
1. In General	298
2. Discharge Cases	300
3. Monetary Awards in Non-Discharge	
Cases	301
4. Calculating the Amount of Damages	302
5. Punitive Damages	305
6. Rights Without Remedies	306

Chapter VIII. The Process of Contractual	
Interpretation	309
A. The Role of Arbitral Precedent: Stare Decisis,	
Res Judicata, and Collateral Estoppel in	
Labor Arbitration	309
1. Legal Concepts of Precedent	310
2. Judicial Application of the Legal Concepts	
in Labor Arbitration	311
3. Arbitral Approaches	314
4. Persuasive Authority	316
B. The Arbitration Clause and Its Meaning:	
Arbitrability from the Arbitrator's Point	
of View	319
1. Substantive Arbitrability	319

a. Issues Involving the Type and Number of Jobs and Employees Covered by the Agreement	320
b. Issues Involving the Level or Amount of Contract Wages or Benefits	323
c. Issues Involving the Range of Subjects with Which the Contract Concerns Itself	323
d. Summary	324
2. Procedural Arbitrability	325
a. Time Limitations	325
b. Changed Issues	329
C. Principles of Interpretation	330
1. If the Relevant Language Is Clear and Unambiguous, the Arbitrator Should Apply It Without Considering Other Indications of Intent	331
2. The Sounds of Silence: Interpretation Without Specific Language	332
a. Evidence of a Consistent Past Practice May Fill Gaps and Supplement the Written Agreement	332
b. Management Retains All Rights Not Limited by the Agreement	333
3. Arbitrators Should Avoid Interpretations That Would Bring the Contract into Conflict with Positive Law	334
4. Specific Language Controls General Language	335
5. Arbitrators Should Construe Ambiguous Language in Context	335

6. Arbitrators Should Give Words Their Normal Meaning Absent Proof the Parties Intended Otherwise	336
7. Arbitrators Should Construe Ambiguous Language Against the Drafter	337
8. Arbitrators Should Avoid Interpretations That Would Create a Forfeiture.....	337
9. Arbitrators Should Avoid Interpretations That Would Produce Harsh, Absurd, or Nonsensical Results, if Another Interpretation Would Lead to Just and Reasonable Results.....	338

Chapter IX. The Subject Matter of Labor

Arbitration	341
A. Discipline and Discharge.....	341
1. The Just Cause Principle.....	341
2. Common Reasons for Discipline and Requirements for Just Cause	346
3. Off-Duty Conduct	348
B. Management Rights.....	355
C. Seniority	358
D. Wages and Hours	361
1. Wage Disputes.....	361
2. Hours Disputes.....	364
E. Fringe Benefits.....	365
F. Subcontracting	374
G. Union Security	376
H. Occupational Safety and Health	380

PART II. EMPLOYMENT ARBITRATION

Chapter X. Arbitration of Statutory

Rights	387
A. The Role of the Federal Arbitration Act.....	387
1. Introduction.....	387
2. The <i>Gilmer</i> Decision	389
B. Post- <i>Gilmer</i> Developments.....	392
C. Special Legal Concerns.....	394
1. FAA Section 1.....	395
2. Impact of Title VII and the Civil Rights Act of 1991	396
3. Effective Vindication of Statutory Rights....	399
a. An Example: <i>Hooters</i>	399
b. Costs.....	402
c. Availability of Statutory Remedies.....	407
4. Rights and Obligations of Non- and Third- Parties.....	408
5. Collective Actions, Unconscionability, and a Potential Return to <i>Hooters</i>	409
6. Mandatory Arbitration of Discrimination and Sexual Harassment Claims.....	417
D. The Merits and Demerits of Employment Arbitration.....	419

Chapter XI. Enforcing Individual

Agreements	427
A. Introduction.....	427
B. Application of State Contract Law.....	428
1. Notice	428
2. Assent	431
3. Consideration	433
4. Unconscionability.....	437

Chapter XII. Special Procedural

Concerns	443
A. The Employment Arbitration Profession	443
B. Selecting an Arbitrator	444
1. Disclosure Obligations	445
2. Consequences of a Failure to Disclose	447
C. Discovery	448
D. The Burden and Quantum of Proof	450
E. Dispositive Motions.....	452
F. Form of the Award.....	453
G. Confidentiality	454
H. Judicial Review	456
INDEX.....	463