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When Due Process Is Due: The Courts and Labor Arbitration

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WHEN DUE PROCESS IS DUE: THE COURTS AND LABOR ARBITRATION

Jay E. Grenig[*]

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INTRODUCTION

It is generally accepted in labor arbitration that employers must observe certain basic standards of fairness or due process in their disciplinary dealings with employees.[1] In addition, labor arbitrators are required to "provide a fair and adequate hearing which assures

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1. *See* Norman Brand, *Due Process in Arbitration in* LABOR AND EMPLOYMENT ARBITRATION (Tim Bornstein & Ann Gosline eds., 1988); John E. Dunsford, *Arbitral Discretion: The Tests of Just Cause in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING, PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 23 (Gladys W. Gruenberg ed., 1990); Harry T. Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. 141 (1970); FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 673-75 (4th ed. 1985); R.W. FLEMING, THE LABOR ARBITRATION PROCESS 139-40, 165-98 (1965); MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 229-72, 308-11 (2d ed. 1987) [hereinafter HILL & SINICROPI, EVIDENCE]; MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 245-64 (1991) [hereinafter HILL & SINICROPI, REMEDIES]; Raymond L. Hogler, *Industrial Due Process and Judicial Review of Arbitration Awards*, 31 LAB. L.J. 570 (1980); ADOLPH M. KOVEN ET AL., JUST CAUSE: THE SEVEN TESTS 179-85, 248-50 (2d ed. 1992); Christine D. Ver Ploeg, *Investigatory Due Process and Arbitration in* ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE 45TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 220 (Gladys W. Gruenberg ed., 1993); W. Willard Wirtz, *Due Process of Arbitration in* THE ARBITRATOR AND THE PARTIES 1 (Jean T. McKelvey ed., 1958); Arnold Zack, *Just Cause and Progressive Discipline in* LABOR AND EMPLOYMENT ARBITRATION § 19.03[2][a] (Tim Bornstein & Ann Gosline eds., 1988).

that both parties have sufficient opportunity to present their respective evidence and argument."[2]

This concept of fairness or due process implicates those fundamental principles of liberty and justice that are the foundations of a free society.[3] Arbitrator Carroll Daugherty explained the importance of due process:

> These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. . . . Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action. . . . [C]ompany and government prosecutors must understand that the legal technicalities exist also to protect the innocent from unjust, unwarranted punishment.[4]

This article examines how courts have treated arbitrators' rulings on due process issues arising under collective bargaining agreements in discharge cases involving major offenses.[5] First, it briefly summarizes the source and nature of these due process rights. The article then discusses several recent judicial decisions reviewing arbitrators' due process determinations. Finally, the article considers appropriate arbitral responses to due process violations.

I. Sources and Nature of Due Process Rights

In the collective bargaining relationship, due process rights may be derived from three contractual sources.[6] First, the just cause provision common in collective bargaining agreements has been held to require that certain due process essentials be observed.[7] Second, a collective bargaining agreement may require specific due process

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2. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, 1993 WL 495390 (American Arbitration Association, 1993).

3. *See* Fleming, *supra* note 1, at 165.

4. Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BNA) 555, 557 (1964) (Daugherty, Arb.).

5. The constitutional and statutory due process rights of public employees are outside the scope of this article.

6. *See* Brand, *supra* note 1, § 10.03; Zack, *supra* note 1.

7. *See, e.g.*, McCartney's Inc., 84 Lab. Arb. Rep. (BNA) 799, 804 (1985) (Nelson, Arb.). *See* Federated Dept. Stores v. United Food and Commercial Workers Union, Local 1442, 901 F.2d 1494 (9th Cir. 1990) (holding arbitrator did not go beyond essence of collective bargaining agreement in determining due process to be component of issue of good cause for discharge); Teamsters Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 718 (8th Cir.), *cert. denied*, 446 U.S. 988 (1980) (ruling arbitrator's interpretation of just cause provision as including requirement of procedural fairness was legitimate resolution of contractual ambiguity).

steps.[8] Third, some arbitrators imply a due process requirement in the collective bargaining agreement.[9]

"Once it is determined that due process applies, the question remains what process is due."[10] The interpretation and application of these due process requirements is an intensely practical matter.[11] "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[12]

However, what is frequently referred to as "industrial" due process has been held to include the right to a forewarning of prohibited conduct, notice of the charges against the employee, and a fair and objective investigation prior to the employee's discipline or discharge.[13] It may also include protection against unreasonable searches, and protection against self-incrimination.[14]

Although all of the requirements of due process that exist in judicial proceedings are not necessarily applicable in arbitration hearings,[15] certain basic notions of due process must be followed in the conduct of the hearing.[16] Due process rights relating to the conduct of the arbitration hearing include the right to confront and cross-examine witnesses, the right of the employee to present evidence and witnesses on the employee's behalf, and the right to notice of the charges.[17]

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8. *See, e.g.*, State Paper and Metal Co., Inc., 88-1 Lab. Arb. Awards (CCH) ¶ 8112 (1987) (Klein, Arb.) (contract required meeting with union to discuss charges).

9. *See, e.g.*, Indiana Convention Ctr., 98 Lab. Arb. Rep. (BNA) 713 (1992) (Wolff, Arb.). *But see* Local 342 UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969) (court refused to enforce arbitrator's award reinstating seven employees because "discharge was lacking in fundamental fairness" where contract did not contain just cause provision).

10. Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

11. Goss v. Lopez, 419 U.S. 565 (1975).

12. Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

13. *See* Donald S. MacPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, 38 LAB. L.J. 387, 401-03 (1987).

14. *See* Brand, *supra* note 1, §§ 10.06 and 10.07 and cases cited therein.

15. *See* Edwards, *supra* note 1, at 142 ("It is clear that the weight of authority in arbitral law still rejects the imposition of public criminal law standards of due process in the private arbitration forum").

16. Flintkote Co., 59 Lab. Arb. Rep. (BNA) 329, 330 (1972) (Kelliher, Arb.).

17. *See* Zack, *supra* note 1; Brand, *supra* note 1, § 10.08; Koven, *supra* note 1, at 180-81. *Cf.* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 548 (1985) (Marshall, J., concurring in part) (where there is factual dispute, due process includes opportunity "to test the strength of evidence 'by confronting and cross-examining adverse witnesses and by

II. THE COURTS AND ARBITRAL DUE PROCESS DETERMINATIONS

Following the principles of the Steelworkers Trilogy,[18] the courts have generally accorded great deference to arbitrators' due process determinations.[19] However, the courts have occasionally refused to confirm an award, holding that the arbitrator was dispensing his or her "own brand of industrial justice,"[20] or that the award would violate some public policy.[21]

Cases that seem to invite the closest scrutiny by the courts involve discharge for drug use,[22] discharge for airline safety violations,[23] discharge for violence,[24] and discharge for sexual harassment.[25] Nonetheless, many courts have upheld arbitrators' awards reinstating discharged employees, where the arbitrator found that the employee's due process rights under the contract had been violated.[26]

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presenting witnesses on [their] own behalf'") (alteration in original) (citation omitted); Matthew v. Eldridge, 424 U.S. 319, 333 (1976) ("fundamental requirement of due process is opportunity to be heard 'at meaningful time and in meaningful manner'").

18. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). *See also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) (judicial review of labor arbitration decisions is extremely limited).

19. *See* Brand, *supra* note 1, § 10.04[1].

20. *Id.* (citing *Enterprise Wheel*, 363 U.S. at 597).

21. *Id. See, e.g.*, W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S. 757 (1983).

22. *Misco*, 484 U.S. at 34 (arbitrator overturned discharge of employee charged with drug possession).

23. *See, e.g.*, Delta Air Lines, Inc. v. Air Line Pilots Ass'n, 861 F.2d 665, 666 (11th Cir. 1988) (discharge of airline pilot who became drunk during stopover overturned by arbitrator).

24. *See, e.g.*, United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146 (3d Cir. 1988) (discharge of employee for firing gunshots into supervisor's unoccupied vehicle overturned by arbitrator).

25. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992) (discharge of employee for sexual harassment overturned by arbitrator).

26. *See, e.g.*, Federated Dep't Stores v. United Food and Commercial Workers Union, Local 1442, 901 F.2d 1494, 1495 (9th Cir. 1990) (employee discharged for insubordination reinstated because employee not given opportunity to respond to charges against him); Super Tire Eng'g Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984) (employee discharged for drinking at work reinstated because employee not forewarned of consequences of conduct); Anaconda Co. v. District Lodge No. 27 of Int'l Ass'n of Machinists and Aerospace Workers, 693 F.2d 35 (6th Cir. 1982) (employee discharged for absenteeism reinstated because employee denied union representa-

The 1992 decision of the United States Court of Appeals for the Third Circuit in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters,*[27] has generated considerable discussion.[28] In *Stroehmann*, the employer discharged an employee for sexually harassing a customer's employee. Without determining the merits of the allegations against the employee, the arbitrator reinstated the employee on the ground that the employee's due process rights had been violated because the employer had not conducted a proper investigation.[29]

A three-judge panel for the Third Circuit affirmed the district court's decision[30] which vacated the arbitration award, and held, in a two-to-one decision, that the arbitrator's award violated well-settled policy regarding sexual harassment.[31] According to the court, "an arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace."[32] Disagreeing with the arbitrator, the majority found that the employer had provided the employee with industrial due process.[33]

Circuit Judge Hutchinson, the author of the majority opinion, commented that he believed it was important to distinguish the concept of industrial due process from due process as required by the Constitution. Judge Hutchinson interpreted the Supreme Court's "'public policy exception to the general rule against court review of the merits of a labor arbitration decision . . . [as implying] that a labor arbitrator's concept of industrial due process does not override

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tion); Chauffeurs Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir. 1980) (discharge of employee for dishonesty overturned because employer failed to give employee adequate opportunity to present his side of case before discharge); Safeway Stores, Inc. v. United Food and Commercial Workers Union, Local 400, 621 F. Supp. 1233, 1235 (D.D.C. 1985) (employee discharged for insubordination and threatening a supervisor with physical harm reinstated because employee not informed of sources of charges against him until after discharged).

27. 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992).

28. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION STUDY TIME, No. 3, Sexual Harassment in the Workplace 1 (Earl Baderschneider ed., 1992).

29. *Stroehmann*, 969 F.2d at 1438.

30. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 762 F. Supp. 1187 (M.D. Pa. 1991).

31. *Stroehmann*, 969 F.2d at 1438.

32. *Id.*

33. *Id.* at 1445.

a definitive public policy.'"[34] He concluded that a lack of full industrial due process would not prevent the court's vacating the arbitration award.[35]

In his dissenting opinion, Circuit Judge Becker agreed with the majority's vigorous condemnation of sexual harassment, but declared that "the majority [had] given short shrift to the industrial due process rights of [the employee]."[36] In Judge Becker's view, the employer's "egregious failure to provide [the employee] with the procedural protections guaranteed by the collective bargaining agreement justifie[d] his reinstatement."[37] Judge Becker found that the "arbitration award was . . . perfectly appropriate and well within the arbitrator's discretion."[38]

At least one court has considered and disagreed with the *Stroehmann* holding that an arbitrator's award reinstating an employee accused of a major offense without a determination regarding the merits of the allegation violates public policy. In *In re Pan American Corp.*,[39] the bankruptcy court ruled that a Board of Adjustment had not exceeded its jurisdiction in ordering a pilot's reinstatement based solely on due process grounds, without making any findings as to whether the pilot was guilty of the charged misconduct.

The discharged pilot in *Pan American* had allegedly permitted a flight attendant to manipulate the flight controls of a 747 during a regularly scheduled flight from New York to Los Angeles. After a hearing, the five-member Board sustained the pilot's grievance based on its finding that the pilot had been deprived of a full and fair investigation of the charges against him. The Board did not make a finding regarding whether or not the pilot had actually committed the conduct which he had been charged of committing.[40]

Relying on *Stroehmann*, the employer took the position that a finding regarding just cause necessarily includes a determination of the underlying issue of whether the pilot had in fact permitted a flight attendant to manipulate the plane's controls and, if so, whether that misconduct warranted the employer's discharge of the pilot. The

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34. *Id.* at 1445 n.7 (citing *Misco*, 484 U.S. at 29).

35. *Id.*

36. *Id.* at 1447 (Becker, J., dissenting).

37. *Id.*

38. *Id.*

39. 140 B.R. 336 (S.D.N.Y. 1992).

40. *Pan American*, 140 B.R. at 337-38. The National Transportation Safety Board subsequently determined that the flight attendant had not manipulated the controls and that the pilot had not violated FAA regulations. *Id.* at 341.

court declined to follow *Stroehmann*, noting that *Stroehmann* appeared to reflect the court's concern with the arbitrator's failure to explain how the employer's investigation was deficient and with evidence that the arbitrator was "biased and insensitive."[41] Furthermore, the court determined that the *Stroehmann* decision conflicted with a 1981 Second Circuit ruling "that it may be 'unnecessary' to make a finding on the underlying facts if a just cause determination can be made on other grounds[,]" such as the employer's discharge decision was procedurally defective.[42]

The court concluded that "the Board [had] not exceed[ed] its jurisdiction by failing to reach the underlying issue, because [the Board] found a sufficient basis for sustaining the grievance in the lack of due process provided during the investigation."[43] Rejecting the argument that the Board had erroneously injected due process considerations into the grievance process and that the award did not draw its essence from the contract, the court pointed out that the collective bargaining agreement required an adjustment board to include such procedural considerations in its just cause determination.[44]

The Tenth Circuit also declined to follow *Stroehmann's* public policy analysis in *Seymour v. Blue Cross/Blue Shield*.[45] *Seymour* involved the arbitration of a claim seeking health insurance benefits for a liver transplant. The arbitration panel denied benefits and the insureds appealed.

In *Seymour*, the Tenth Circuit declined to follow what it described as the Third Circuit's "broad view" of the public policy exception as expressed in *Stroehmann*. The court stated that, in determining whether an arbitration award violates public policy, a court must assess whether the specific terms in the contract violate public policy "by creating an 'explicit conflict with other laws and legal precedents,' keeping in mind the admonition that an arbitration award is not to be lightly overturned."[46]

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41. *Id.* at 339. *See also* United Indus. Workers, Local No. 16 v. Virgin Islands, 987 F.2d 162, 171 (3d Cir. 1993) (citing *Stroehmann* for the principle that an "arbitration award may be vacated when the arbitrator is biased against a party").

42. *Pan American*, 140 B.R. at 339 (citing Perma-Line Corp. v. Sign Pictorial and Display Union, Local 230, 639 F.2d 890, 894 (2d Cir. 1981)).

43. *Id.* at 340 (footnote omitted).

44. *Id.*

45. 988 F.2d 1020 (10th Cir. 1993).

46. *Seymour*, 988 F.2d at 1024 (citations omitted).

However, at least two courts have reached decisions consistent with *Stroehmann.* The United States Court of Appeals for the Eighth Circuit vacated an arbitration award reinstating an employee who had tested positive for drug use, holding that the employee's reinstatement violated the public policy against drug use by railroad employees.[47] The Public Law Board held that the employer had violated the employee's due process rights by denying him a fair hearing. Consequently, the Board never considered whether the employee had in fact violated the employer's rule prohibiting the use of drugs. The Board ordered the employee reinstated with backpay.

In overturning the employee's reinstatement, the court held that the Board's reinstatement of the employee without determining the likelihood of his working on the railroad in the future under the influence of alcohol or drugs violated the public policy against drug use by railroad employees.[48] The court rejected the union's argument that by vacating the Board's award the employer's due process violations would go unpunished. The court explained that arbitrators remain free to sanction employers for violating employees' contractual rights and to determine appropriate remedies within the confines of the collective bargaining agreement.[49] The court stated:

> As long as the arbitrator's remedy is "rationally explainable as a logical means of furthering the aims of the contract," the arbitrator may, for example, impose monetary penalties, order the railroad to reimburse the employee for rehabilitation programs, order reinstatement of the employee to a position in which he poses no danger to the public, or create its own sanction to deter overreaching by the employer. . . . The only option that we have foreclosed today on public policy grounds is the reinstatement of a railroad employee to a safety-sensitive position in those cases in which the employee poses a significant risk to the public because of the danger of future substance abuse.[50]

In *United Transportation Union v. Burlington Northern Railroad Co.*,[51] the court, relying on *Stroehmann*, vacated an arbitration award and reinstated an employee. The railroad employee had been discharged for sexually harassing another employee of the railroad during a company-sponsored social function. After a hearing before

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47. Union Pac. R.R. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994).

48. *Union Pacific*, 3 F.3d at 262.

49. *Id.* at 263.

50. *Id.* (quoting International Ass'n of Machinists and Aerospace Workers v. Northwest Airlines, 858 F.2d 427, 430 (8th Cir. 1988) (citations omitted)).

51. 864 F. Supp. 138 (D. Or. 1994).

the Railroad Adjustment Board, the Board held that "'because of procedural violations the merits of this matter need not be [addressed].'"[52] Pointing out that a work rule provided that complaints by workers against co-workers must be in writing, the Board found that the co-worker's complaint was oral and that "'[d]iscipline resulting from a flawed charge cannot stand.'"[53] Without even a brief acknowledgment of the due process issue, the court held that the Board's award violated a well-defined and dominant public policy against sexual harassment and ordered the award vacated.[54]

III. RECOMMENDATIONS FOR DEALING WITH JUDICIAL CONCERNS

The principles of due process as embodied in the concept of just cause protect all employees from arbitrary and capricious action and protect the innocent from unjust, unwarranted punishment.[55] Whether charged with a major or a minor offense, employees covered by just cause provisions are entitled to the protection of due process and fundamental fairness. Charges of outrageous misconduct or the commission of major offenses do not excuse an employer's compliance with the agreed upon due process requirements found in the collective bargaining agreement.[56] Guaranteeing procedural fairness to employees accused of major offenses does not violate any public policy.[57]

No one should be surprised that arbitrators generally interpret just cause provisions as including due process protections. In *Teamsters Local Union No. 878 v. Coca-Cola Bottling Co.*,[58] the court stated:

> The Company indicates surprise at being presented with an arbitrator's award in which "just cause" was interpreted as having a fair hearing dimension. We think that this surprise is unfounded; arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. As Professor Summers noted, "[o]n the bare words 'just cause'

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52. *Burlington Northern*, 864 F. Supp. at 139 (citation omitted).

53. *Id.* (citation omitted).

54. *Id.* at 142.

55. Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BNA) 555, 557 (1964) (Daugherty, Arb.).

56. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966) (conviction for kidnapping and rape overturned by Supreme Court, where conviction was result of improperly obtained confession).

57. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1447 (3d Cir. 1992) (Becker, J., dissenting).

58. 613 F.2d 716 (6th Cir.), *cert. denied*, 446 U.S. 988 (1980).

> arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law."[59]

However, because the full dimensions of the concept of "just cause" may not be readily apparent to persons not experienced in labor-management relations, an arbitration award based in whole or in part on due process should carefully describe the contractual source of the due process requirement. In addition, the award should explain how the employer violated the employee's due process rights and how the employee was prejudiced by that violation.[60]

In most cases, the finding of a due process violation should not prevent the arbitrator from addressing the merits of the charges against the employee. If the arbitrator orders the employee reinstated, the award should then explain why the reinstated employee does not pose a threat to the health or safety of other persons.[61] If the reinstatement of the employee does pose a threat to the health or safety of others, then the arbitrator should consider a remedy other than reinstatement.[62]

Where there is a due process violation, the remedy should reflect the significance of the due process violation. Although in proper cases the remedy may result in a reduction of the penalty assessed by the employer, the remedy should not be considered merely as a mitigating factor in determining the proper remedy for the offense.

As in the case of any violation of a collective bargaining agreement, the remedy for a due process violation should attempt to make the employee whole for the injury caused by the violation. The remedy should take into consideration the significance of the due process requirement and the prejudice suffered by the employee as a result of the violation.[63] Reinstatement, with or without backpay,

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59. *Coca-Cola*, 613 F.2d at 719-20.

60. *Compare Stroehmann*, 969 F.2d at 1438 *with In re Pan Am. Corp.*, 140 B.R. 336, 339 (S.D.N.Y. 1992).

61. *See* Exxon Shipping Co. v. Exxon Seamen's Union, 801 F. Supp. 1379, 1387 (D.N.J. 1992) (explaining that *Stroehmann* was concerned with failure of arbitrator to determine whether sexual harassment had occurred, because that undermined the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in workplace); United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d at 146, 149 (3d Cir. 1988) (arbitrator found that employee was amenable to discipline and showed no proclivity to more violence after he shot at supervisor's unoccupied car).

62. *See* Union Pac. R.R. v. United Transp. Union, 3 F.3d 255, 263 (8th Cir. 1993).

63. *See, e.g.*, Cameron Iron Works, 73 Lab. Arb. Rep. (BNA) 878 (1979) (Marlatt, Arb.) (in order to overturn employer actions on procedural grounds, arbitrator must find there was at least a possibility that procedural error may have deprived grievant of fair consider-

should not be the automatic response for a due process violation. Arbitrator Robben Fleming has explained the importance of considering the appropriate remedy for a procedural violation as follows:

> The procedural irregularity may not have been prejudicial in any sense of the word, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process, and the end result could on many occasions be quite ludicrous. If, for instance, an employee gets drunk on the job and starts smashing valuable machinery with a sledge hammer, it would hardly seem appropriate to nullify his discharge on the sole ground that . . . the union be given advance notice.[64]

Appropriate remedies for due process violations may include using the violation as a basis for upholding the grievance without regard to the underlying facts, reducing the disciplinary penalty, disregarding the due process violation and denying the grievance, and providing a remedy for the due process violation that has no effect on the underlying discipline.[65] Some arbitrators have reinstated discharged employees without backpay;[66] others have awarded backpay in varying amounts without reinstatement.[67]

The right to be informed of the charges is perhaps the most fundamental of due process rights, since without proper notice the accused cannot prepare an adequate defense.[68] An employee who is not informed of what he or she is accused cannot defend against the accusations.[69]

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ation of case).

64. Fleming, *supra* note 1, at 139-40; *See* Dunsford, *supra* note 1, at 31 (substantial number of reputable arbitrators measure significance of procedural deficiency against the harm done to the interests of the employee by the omission).

65. Brand, *supra* note 1, § 10.09. *See generally* HILL & SINICROPI, REMEDIES, *supra* note 1. *See also Union Pacific*, 3 F.3d at 255 (for a list of suggested remedies for due process violations).

66. *See, e.g.*, Meyer Products, Inc., 91 Lab. Arb. Rep. (BNA) 690 (1988) (Dworkin, Arb.).

67. *See, e.g.*, Chromalloy Am. Corp., 93 Lab. Arb. Rep. (BNA) 828 (1989) (Wolff, Arb.) (backpay from date of discharge to close of arbitration hearing awarded, since grievant not informed of specific charges against him prior to hearing); State Paper & Metal Co., 88-1 Lab. Arb. Awards (CCH) (1987) (Klein, Arb.) ¶ 8112 (backpay awarded from date of discharge to date of hearing where contract provided that no employee would be discharged without hearing). *See also* Skelly v. State Personnel Bd., 539 P.2d 774 (1975) (remedy for violation of employee's due process rights is backpay for the period the discipline was improperly imposed, that is from the effective date of the imposition of the discipline until the date of the decision after a fair hearing).

68. *Cf. In re* Ruffalo, 390 U.S. 544 (1968) (in criminal proceedings, prosecution must give defendant fair notice of charges to permit adequate preparation of defense).

69. *See* Bethlehem Steel Co., 29 Lab. Arb. Rep. (BNA) 635, 640 (1957) (Seward,

The right to notice of the charges should be distinguished from the issue of admissibility of after-acquired evidence. When evidence is discovered after commencement of the grievance procedure, the arbitrator may admit the evidence, with protection for the other party for any resultant surprise.[70] The evidence in such a situation is offered in support of the charges against the employee or as a defense to those charges for which the employee has already been given notice and is prepared to present a defense. However, when the new evidence in reality charges the employee with a new offense, then due process requires that the employee be given adequate notice of those new charges so that the employee can prepare a defense.[71]

Thus, an arbitrator may decline to hear evidence of new or additional grounds for discipline or discharge brought up for the first time at the arbitration hearing.[72] Where evidence of the pending charge is concealed or not revealed to the opposing party before the hearing, the evidence may be excluded or the arbitrator may continue the hearing in order to give the party surprised by the evidence time to prepare a response.[73]

Arb.) (if employee is to have a reasonable opportunity to present evidence on his or her behalf, the employee must be given at least some idea of the acts, events, or issues to which the employee's evidence should relate).

70. HILL & SINICROPI, EVIDENCE, *supra* note 1, at 317. *See also* Jay E. Grenig & R. Wayne Estes, *Making and Responding to Objections in* LABOR ARBITRATION ADVOCACY EFFECTIVE TACTICS AND TECHNIQUES 163 (1989) (some arbitrators will admit surprise evidence, but give party claiming surprise time to prepare response to new evidence).

71. *Cf.* Koven, *supra* note 1, at 248. *See* Golden Grain Macaroni, Co., 86 Lab. Arb. Rep. (BNA) 1260, 1262-63 (1986) (Armstrong, Arb.) (reason for rule that employer cannot bring up at arbitration hearing new and additional grounds for discharge of which grievant and union are unaware is to prevent unfair surprise). *See also* General Elec. Co., 74 Lab. Arb. Rep. (BNA) 125, 128 (1979) (Clark, Arb.) ("serious questions of whether [a] company can shift the grounds for discharge in an arbitration to a claim that was not alleged or explored in prior grievance proceeding[s] because of the lack of notice to the grievant as to the precise nature of the defense he must erect"); Dubuque Lorenz, Inc., 66 Lab. Arb. Rep. (BNA) 1245, 1251 (1976) (Sinicropi, Arb.) (arbitrator refused to take into account charges of post-discharge complaints about pre-discharge misconduct of which grievant had not been charged); Beck's Transfer Inc., 71-2 Lab. Arb. Awards (CCH) (1971) (Witney, Arb.) ¶ 8490 (post-discharge charges of pre-discharge dishonesty excluded by arbitrator); Yellow Cab Co. of Cal., 44 Lab. Arb. Rep. (BNA) 175, 182 (1965) (Jones, Jr., Arb.) (union's preparation of case depends on direction given in employer's statement of charges).

72. *See* Koven, *supra* note 1, at 248-50. *See, e.g.*, Price Bros. Co., 61 Lab. Arb. Rep. (BNA) 587, 589 (1973) (Howlett, Arb.) ("[g]enerally, arbitrators hold that an employer may not present evidence of alleged offenses which were not specified as reasons for the discharge when notice was given").

73. Grenig & Estes, *supra* note 70, at 163.

CONCLUSION

By addressing the concerns of reviewing courts, arbitration awards should withstand judicial scrutiny, protect the health and safety of third persons, as well as safeguard the contractual due process rights of employees. Where there is a due process violation, the remedy for the violation should reflect the significance of the due process violation as well as recognize the seriousness of the employee's offense and the impact of reinstatement. If a discharged employee is reinstated as a result of a due process violation, the award should explain why the employee does not pose a threat to the health or safety of other persons.

In no event should the due process rights guaranteed by the collective bargaining agreement be disregarded by reason of the employee's having committed a major offense. Public policy should protect fundamental fairness, just as it protects other important interests in the workplace. When properly dealt with in labor arbitration, due process does not conflict with other important public policies.