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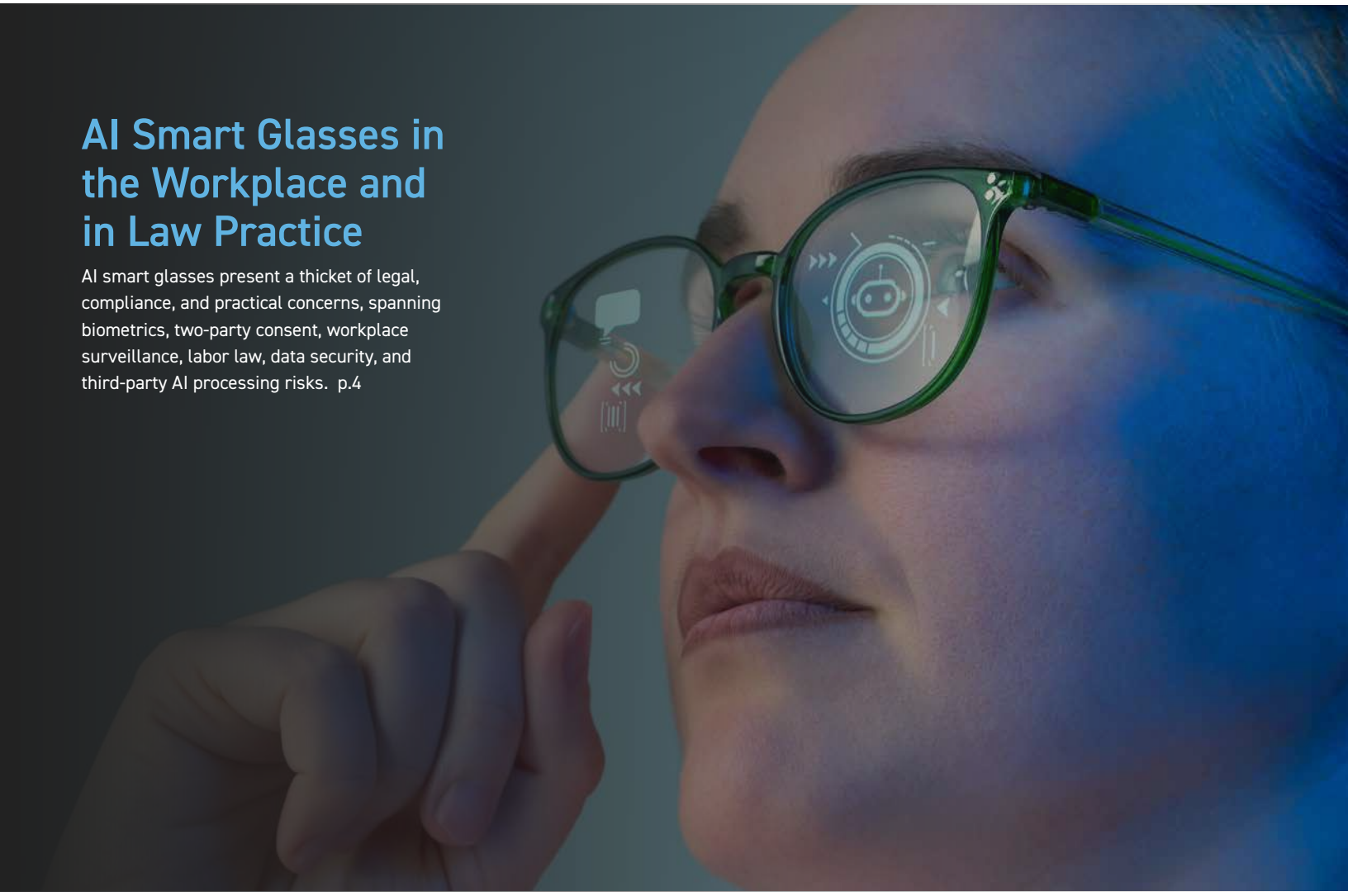
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Spoken of But Rarely Seen: PREHEARING DISCOVERY IS THE UNICORN OF LABOR ARBITRATION



By Christopher M. Shulman

Introduction

Employment arbitration—to the chagrin of many—has come to resemble employment litigation, with at least some form of the prehearing discovery processes found in the Federal Rules of Civil Procedure or the Florida Rules of Civil Procedure baked into the arbitration agreements, either expressly or by incorporation of an administering arbitration forum's rules. Labor arbitration—i.e., arbitration of collective bargaining agreement grievances—is different.

Employment arbitration involves individual claims of violation of employment statutes or contracts.[1] These cases look a lot like employment litigation because employment arbitration is a one-off substitute for resolving the dispute in court. In contrast, collective bargaining disputes ("grievances") grow out of a disagreement between the relevant union and employer over interpretation or application of the collective bargaining agreement (CBA). Such CBAs have one, two, or three levels of pre-arbitration discussions (grievance steps) in which the parties try to resolve the disagreement. During that process, the parties often exchange substantial information about their positions and, in doing so, often frame the documents that would be exhibits and identify the persons with relevant information who would be witnesses at arbitration.[2] Thus, typically, the parties to labor arbitration have no right to the formal prehearing discovery afforded their employment arbitration counterparts.[3] This article discusses some of the nuances of that general rule.

Does the CBA allow discovery?

In keeping with the traditional approach, most collective bargaining agreements do not provide for formal discovery, such as interrogatories, requests for production,[4] and depositions. However, some—especially, but not exclusively, federal-sector CBAs—provide for a prehearing conference, in which the union and employer representatives meet to discuss the agreed issue(s) to be submitted to the arbitrator; to identify expected witnesses; and to exchange proposed exhibits. These conferences, usually held a week or two before the hearing, help to avoid undue surprise. Indeed, some arbitrators (including the author) recognize this process as being so conducive to a fair hearing that, even in the absence of a CBA provision on point, they *require* the parties to submit a joint prehearing statement, listing the issue(s) and expected witnesses, and attaching the expected exhibits.

Does labor law allow discovery?

Private-sector labor arbitration is subject to the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141–187; Florida public-sector collective bargaining is subject to the Florida Public Employees Relations Act (PERA), Chapter 447, Fla. Stat.; and federal public-sector collective bargaining is subject to the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101–7135. None of these laws expressly authorize discovery in labor arbitrations within their purview; however, all three make certain actions illegal, i.e., "unfair labor practices" or "ULPs."[5]

One such ULP is an employer's refusal "to bargain collectively with the [union]," 29 U.S.C. § 158(a)(5), which has been interpreted to include an employer's obligation to respond to a union's request for information in connection with grievances.[6] The union has a similar obligation under 29 U.S.C. § 158(b)(3).[7]

Florida has recognized that a public employer's failure to meet its obligation to respond to a public union's request for information constitutes a ULP under Fla. Stat. § 447.501(c).[8] The FSLMRS likewise contains similar requirements for agencies (employers) under 5 U.S.C. §§ 7114(b)(4) and 7116(a)(1), (a)(5), and (a)(8).[9]

Thus, the applicable labor laws provide a vehicle by which a labor arbitration party may get at least some information (*roughly* analogous to responses to requests for production) from the other party. However, it is *exceedingly* rare that parties would engage in—or that an arbitrator, at party request, would order—other traditional discovery methods, such as interrogatories or party/witness depositions. In the author's experience, both as an arbitrator and as an attorney representing parties, such formal discovery just isn't on the table in labor arbitration.



Can parties get prehearing information from third parties?

In litigation and employment arbitration, the disputing parties often will seek information, documents, or testimony from third parties (i.e., nonparties) in advance of the hearing. This can also occur in labor arbitration, if the nonparties cooperate, but the ability to obtain such information without the nonparty's cooperation, i.e., by subpoena, is somewhat limited.

According to the seminal work on labor arbitration, *Elkouri and Elkouri*, it is "generally accepted that unless authorized by applicable statute or by the collective bargaining agreement, the arbitrator has no subpoena power."[10] The authors go on to note that there are few precedents about applying federal statutes and many differing arbitrator opinions on whether a labor arbitrator should—assuming a federal or state statute provides authority—issue subpoenas, especially prehearing subpoenas.[11]

Chapter I of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, governs many private-sector arbitrations and gives arbitrators express authority to issue subpoenas.[12] However, while the FAA clearly applies to individual employment arbitration agreements, the Eleventh Circuit has acknowledged "[t]here is some ambiguity in our case law about whether the FAA applies to labor arbitration awards arising out of collective bargaining agreements."[13] Moreover, in *Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.*, the Eleventh Circuit has since prohibited the issuance of prehearing discovery subpoenas by arbitrators to nonparties.[14]

By contrast, the Sixth Circuit has held that labor arbitrators do have the authority to issue subpoenas (for deposition and/or for prehearing appearance duces tecum) under § 301 of the LMRA, 29 U.S.C. § 185, the statute that gives federal courts jurisdiction over actions to compel labor arbitration and to enforce labor arbitration awards.[15] Specifically, said the court in *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV*, (hereinafter, "*AFTRA*"):

> We hold that under § 301, a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing. We caution that this decision should not be read to mean that a party to the arbitration is entitled to any such discovery, only that a labor arbitrator may issue such a subpoena.[16]

The Sixth Circuit reached that conclusion after quoting from *Avco Corp. v. Aero Lodge 735, International Association of Machinists* for the proposition that the LMRA "expressly furnishes some substantive law," but "[o]ther problems will lie in the penumbra of express statutory mandates," which must be examined to fill the gaps left by the LMRA.[17] The *AFTRA* court then noted that the United States Supreme Court:

> expressly recognized that federal courts may look to the [Federal Arbitration Act ("FAA")] for guidance in labor arbitration cases . . . . Thus, apart from the question of whether the FAA itself directly applies to the collective bargaining agreement in this case, we may find guidance in the FAA's provisions and in court decisions concerning a district court's power to enforce subpoenas under the FAA.[18]

The Sixth Circuit then applied the FAA's express provision authorizing arbitrator issuance of subpoenas, 9 U.S.C. § 7, to conclude that labor arbitrators have the stated subpoena authority under the LMRA, which the federal courts have the jurisdiction to enforce under LMRA § 301, 29 U.S.C. § 185.[19]

The author can find no Eleventh Circuit precedent specifically addressing this *AFTRA* § 301 argument directly, although the

Managed Care court,[20] in ruling on arbitrator authority under the FAA, distinguished *AFTRA*'s allowance of a subpoena to a non-party for prehearing documents on the basis that, notwithstanding the use of the FAA as a guide, "[*AFTRA*'s] holding was limited to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185."[21] This may not be that helpful, however. To the extent this was to be used by a party in support of a request that a labor arbitrator issue nonparty prehearing discovery subpoenas under the LMRA, that argument would likely run afoul of *Managed Care*'s interpretation of the FAA banning non-labor arbitrators from issuing such subpoenas, since *AFTRA* relied on the FAA as a guide. While labor arbitrators may (as may any arbitrator under the FAA) issue subpoenas, even subpoenas duces tecum, for nonparties to appear before the arbitrator and give testimony at hearing, receiving the information at that late date would defeat the purpose of getting the information beforehand.

Neither PERA nor FSLMRS provides labor arbitrators with express authority to issue subpoenas, but the Revised Florida Arbitration Code (RFAC), Ch. 682, Fla. Stat., does. Section 682.08(4), Fla. Stat., provides that, "[i]f an arbitrator permits discovery under subsection (3), the arbitrator may . . . issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding . . . ." Thus, if a labor arbitration is subject to the RFAC, the arbitrator appears to have authority to compel nonparties to attend a prehearing deposition, duces tecum or otherwise; the term "discovery proceeding" is not defined in the statute.

Conclusion

Labor arbitration is substantially different from employment arbitration, with regard to the availability and means of prehearing discovery. Absent language in the applicable CBA, parties cannot require the opposing party to engage in traditional discovery but can, typically, request information from the opposing party under applicable labor laws. When information is held by third parties, as discussed above, compelling such nonparties to provide the requested information before the hearing itself can be problematic under the FAA (and, in this author's view, under the LMRA); of course, if the RFAC applies, some form of nonparty prehearing discovery may be in the cards.



***Christopher M. Shulman** has mediated more than 4000 disputes and served as arbitrator, hearing officer, or decision-writer in approximately 2500 adjudicative matters. He has been a lawyer for more than thirty years.*

Endnotes

[1] Of course, parties may arbitrate class or collective actions but, as allowed by the United States Supreme Court, employers will frequently require waiver of individuals' rights to bring actions in class or collective format. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 510–15 (2018). See the discussion by Christopher Shulman, *Waivers of Collective Actions in Employment Arbitration: The Supreme Court Makes an* Epic *Decision*, The Checkoff, Vol. LVIII No. 1, at 1 (Oct. 2018).

[2] Indeed, some CBAs—and arbitrators—will limit a party to the arguments and contract provisions referenced during the grievance steps.

[3] *See, e.g.*, *Burton v. Bush*, in which the court stated:

> An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege. *Foremost Yarn Mills*, 614 F.2d 389, 390 (4th Cir. 1980) (internal citations omitted).

[4] *But see* "Does labor law allow discovery?," *infra*, and accompanying footnotes about requests for information.

[5] Notwithstanding the term "unfair *labor* practice," all three statutes ban conduct by unions, employers, or both, using the same term.

[6] *See NLRB v. Acme Indust. Co.*, 385 U.S. 432 (1967).

[7] *See UNITE HERE Local 1*, 369 NLRB No. 65 (2020).

[8] *See, e.g., School Bd. of Polk Cty. v. PERC*, 399 So. 2d 520 (Fla. 1st DCA 1981); *School Bd. of Leon Cty.*, 7 FPER ¶ 12083 (1981); *Orange Cty. Classroom Teachers Ass'n v. School Bd. of Orange Cty.*, 9 FPER ¶ 14178 (1983). The author cannot find a Florida precedent that matches the *UNITE HERE Local 1* NLRB decision, but an argument might be made in that regard, since PERC has adopted NLRB analysis for most analogous PERA provisions.

[9] *I.R.S. and NTEU*, 57 FLRA No. 86, at 661 (1995). It is unclear, due to the lack of a union-facing version of the agency's obligations under 5 U.S.C. § 7114(b)(4), that the union has a corollary duty to respond to agency requests for information.

[10] Elkouri and Elkouri, How Arbitration Works 8–20 (8th ed. 2016).

[11] *Id.*, pp. 8–20 to 8–23.

[12] 9 U.S.C. § 7.

[13] *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1087 n.1 (11th Cir. 2016).

[14] 939 F.3d 1145 (11th Cir. 2019). In *Managed Care*, the Eleventh Circuit limited arbitrator subpoena authority under the FAA solely to summoning persons (with or without documents) to appear in person before the arbitrator for an "arbitration proceeding"; thus, the court prohibited enforcement of arbitrator subpoenas that purport to require nonparty discovery—whether subpoenas for depositions, duces tecum or not, or for production without deposition. *Id.* at 1161. See the discussion by Christopher Shulman, *Managing Arbitration in Light of Managed Care*, The Checkoff, Vol. LXI, No. 2, at 1 (Feb. 2022).

[15] Of course, the Supreme Court, in the so-called *Steelworkers'* Trilogy, has, generally, directed federal courts to compel arbitration and to enforce such awards. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (ruling that courts cannot look into the merits of a grievance: if CBA has an arbitration clause, a court must compel arbitration even if it thinks the claim is frivolous or lacks merit); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (finding strong presumption of arbitrability: a dispute must go to arbitration unless the contract contains express, positive assurance that the specific subject matter is excluded); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) (noting that judicial review of an arbitrator's award is extremely narrow: courts must enforce the award as long as it "draws its essence" from the collective bargaining agreement and the arbitrator did not exceed his or her authority).

[16] 164 F.3d 1004, 1009 (6th Cir. 1999).

[17] *Id.* (quoting *Avco*, 390 U.S. 557, 559 (1968).

[18] *Id.* at 1009.

[19] *Id.*

[20] *Managed Care*, *supra* note 14.

[21] 939 F.3d 1145,1160 n.5 (11th Cir. 2019).

Write for
The Checkoff
Contact Viktoryia Johnson at VJohnson@fordharrison.com
The Florida Bar Labor and Employment Law Section EST. 1957