DISCOVERY IN ARBITRATION - AN UNSETTLED QUESTION*

ORS 36.335(1). Arbitrators have the power to compel the attendance of witnesses and to enforce from any party the production of all documents the arbitrators deem material to the cause. The circuit court may require witness to show cause why he or she should not be punished for contempt. ORS 36.340.

Federal Arbitration Act, 9 U.S.C. §7. Arbitrators may summon any person to appear before them and in appropriate cases bring with them any document which may be deemed material as evidence in the case. The summons shall be issued in the name of the arbitrators and signed by them. If a person refuses or neglects to obey, the U.S. District Court in which the arbitrators are sitting may compel the attendance or punish the person for contempt.

Discovery "in aid of arbitration" is permitted by the courts where a movant can demonstrate "extraordinary circumstances." Oriental Commercial & Shipping Co., Ltd. v. Rosseel, N.V., 125 F.R.D. 398, 400 (S.D.N.Y 1989); see also Koch Fuel International, Inc. v. M/V South Star, 118 F.R.D. 318, 320 (E.D.N.Y.1987); Recognization Equipment, Inc. v. NCR Corp., 532 F.Supp. 271 (N.D.Tex.1981); E.C. Ernst, Inc. v. Potlatch Corp., 462 F.Supp. 694, 695 n. 1 (S.D.N.Y.1978); Bergen Shipping Co., Ltd. v. Japan Marine Services, Ltd., 386 F.Supp. 430, 435 n. 8 (S.D.N.Y.1974); Application of Katz, 3 A.D.2d 238, 160 N.Y.S.2d 159 (2d Dep't 1957).

One of the "extraordinary circumstances" in which discovery has been deemed proper is where a vessel, with crew members possessing particular knowledge of the dispute, is about to leave port. See, e.g., Bergen Shipping Co., Ltd., supra, 386 F.Supp. at 435 n. 8.

The test [concerning discovery] is necessity rather than convenience. Matter of State Farm Mut. Auto Ins. Co. v. Wernick, 90 A.D.2d 519, 455 N.Y.S.2d 30 (2d Dep't 1982). "Necessity" in this context has been held to include such discovery as is required "to present a proper case to the arbitrators." Hendler & Murray P.C. v. Lambert, 127 A.D.2d 820, 511 N.Y.S.2d 941 (2d Dep't 1987) (quoting Matter of Moock v. Emanuel, 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep't 1984)).

Discovery in arbitration proceedings may be directed by the arbitrators. Bigge Crane and Rigging Co. v. Docutel Corp., 371 F.Supp. 240, 246 (E.D.N.Y. 1973).

Under the FAA, the arbitrator may order such discovery as they deem necessary, including pre-hearing appearances. Stanton v. Paine Webber Johnson & Curtis, Inc., 685 F.Supp. 1241, 1242 (S.D. Fla. 1988); Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558 (S.D. Miss. 1976).

While an arbitration panel under the FAA has authority to compel witnesses and documents, by necessary implication the parties may not subpoena documents or witnesses. National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 187 (2nd Cir. 1999); Burton v. Bush, 614 F 2d 389, 390 (4th Cir. 1980).

LAW OFFICES OF MICHAEL G. HANLON
A PROFESSIONAL CORPORATION
1001 S.W. FIFTH AVENUE, SUITE 1300
PORTLAND, OREGON 97204
TELEPHONE (503) 228-9787
FACSIMILE (503) 224-4200

Open questions remain as to whether 9 USC §7 constitutes authority for pre-hearing depositions and document discovery, especially where sought from third parties. National Broadcasting, 165 F.3d at 187.

Arbitrator may not rely on FAA to obtain pre-hearing depositions from non-parties. Integrity Ins. Co. v. American Centennial Ins. Co., 885 F.Supp. 69, 72-73 (S.D.N.Y 1995).

The power to compel documents from third parties at the hearing implicitly authorizes the lesser power to compel production prior to hearing. Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994).

Pre-hearing discovery between parties is governed by applicable arbitration rules and what the arbitrator decides. In re Technostroyexport, 853 F.Supp. 695, 697 (S.D.N.Y 1994).

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LAW OFFICES OF MICHAEL G. HANLON
A PROFESSIONAL CORPORATION
1001 S.W. FIFTH AVENUE, SUITE 1300
PORTLAND, OREGON 97204
TELEPHONE (503) 228-9787
FACSIMILE (503) 224-4200