DECISIONAL THINKING OF ARBITRATORS AND JUDGES

PROCEEDINGS OF THE THIRTY-FOURTH
ANNUAL MEETING
NATIONAL ACADEMY OF ARBITRATORS

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ANNUAL MEETING
NATIONAL ACADEMY OF ARBITRATORS

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PREFACE

The program of the 33rd Annual Meeting focused mainly on the decisional thinking of arbitrators and judges as triers of fact. Four panels of arbitrators, judges, and advocates exchanged views and prepared reports on the discussions they held prior to the Annual Meeting. Summaries of their reports were presented one morning and were discussed fully by the members in attendance at a second meeting the following afternoon.

Both the reports from the four geographic areas and the discussions of them illustrate that Academy members, judges, and advocates alike differ among themselves about many aspects of decision making. Credit for this unusual program goes to Ted Jones who organized the preparatory work, explained the project in a paper (included in this volume), and condensed the discussion.

Another innovation at this meeting was the use of the "dialogue" by Academy President Clare B. (Mickey) McDermott. His presidential lunch speech was interrupted "spontaneously" by Tom Roberts who served as the straight man, serving up the lines that our president wanted to debate. The presidential address will be particularly pleasing to the many arbitrators who are worried about the injection of unneeded technicalities into the arbitration process.

Yet another departure from past meetings was the selection of a linguistics professor, Bruce Fraser, as the first-day luncheon speaker. He amused the audience with his perceptive comments about the way meaning and intent are conveyed by language and by his examples, showing how clear language may be interpreted in one fashion by one cultural group in society and in another by a different group. This was grist for our mill!

In addition to the stimulating luncheon speeches by McDermott and Fraser and the provocative sessions devoted to the decisional-thinking project, the program also included interesting papers about the problems of the courts and arbitrators in specific areas. Reginald Alleyne, Raymond Britton, William Murphy, William Levin, and Charles Morris directed our atten-

tion, respectively, to the NLRA, OSHA, discrimination, fair representation, and *Trilogy* problems and developments. Labor and management representatives served as discussants and made valuable comments about the presentations.

The editors are grateful to President McDermott, Program Chairman Ted Jones, and members of the program and arrangements committees for the worthwhile sessions and pleasant surroundings. We are indebted also to the speakers and discussants for their cooperation in preparing their manuscripts for publication.

James L. Stern
Barbara D. Dennis

October 1980

CONTENTS

CHAPTER 1

THE PRESIDENTIAL ADDRESS— AN EXERCISE IN DIALECTIC: SHOULD ARBITRATION BEHAVE AS DOES LITIGATION?

CLARE B. MCDERMOTT*

You will not get novelty and innovation here today, at least not on substantive matters. The wine will not be new. Maybe the bottles will be.

It is essential that anyone bold enough to speak to this distinguished audience have at least sufficient mother wit not to try to regale you with dull stories about his cases. He must be careful also not to go to the other extreme and lay out airy new theories about arbitration unless he has air-tight arguments to support them. This room right now probably contains more knowledge about arbitration, both theoretical and practical, than will be gathered again in one place in this country or in Canada this year. Thus, the speaker should proceed with full regard for the plight of the man who was caught up in and lived through the catastrophic Johnstown Flood of 1889. For the rest of his life he enjoyed holding forth about the enormity of the disaster. The stories naturally expanded somewhat as the years passed. The man died, appeared at Heaven's gates, and St. Peter greeted him and asked what he would like to do in Heaven. The man thought a bit and explained that he had been through the great Johnstown Flood and that he enjoyed telling about his narrow escapes and heroic deeds, and that he would like to continue doing that in Heaven. St. Peter said that would be all right, but that it would be a good idea for him to remember that *Noah* would be in the audience.

This is one of my problems. There are a lot of Noahs in this audience.

I come now to the substance of some thoughts I would like to

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go over with you today. I should explain first what prompted me to discuss the subject I have chosen rather than one or more of the several hundred other aspects of arbitration. Some years ago and then again rather recently I had occasion to look at the so-called "services," subscribed to, I think, exclusively by managements, that gather performance data about arbitrators, collect citations of opinions, comments from management persons who have had cases with given arbitrators, and purport to give ratings, recommendations, batting averages, and preferences and predilections of arbitrators. By the way, those reports say that they accept as objective the comments of management representatives. That acceptance seems to me more an act of faith than of reason. The services I have seen were in the East, and in my experience, that is no accident. I have developed a theory, solely from my own observations, that there is a tilt to this country—the United States at least (I will not indict our Canadian members and guests in this)—that the farther east you go, the stronger and maybe nastier the litigious instinct grows. Our hosts here, Californians, have had to put up far too long with the base canard that someone tilted the country by raising it in the East so that everyone who was at all loose or flaky rolled into California. My litigiousness theory assumes a tilt in the other direction, in which those with a contentious bent rolled to the East, probably to New York. I say this in jest, but if there be anything to it, the eastern "services" are well placed near the demand.

In any event, as I read the comments about arbitrators, many of whom I knew, I noticed that it was said time and again, of this arbitrator or that, that he did or did not allow irrelevant material into the record, did or did not give weight to pertinent citations, did or did not substitute his judgment for that of management, did or did not recognize management's reserved rights doctrine, was or was not a strict constructionist, did or did not give more weight to arbitration awards in other bargaining relationships than to evidence and arguments as to the interpretive issue on the language of this agreement, wrote an opinion and award that did or did not settle the issues completely, was or was not *overly* legalistic regarding the rules of evidence—notice that the suggestion is that the fault lies not just in being legalistic, but in being overly legalistic—and that his awards have or have not been set aside by courts. These are only examples. Much more was said as well.

I can see that a wrong answer on some of those factors might frighten a given management representative thinking of selecting or striking an arbitrator, but I cannot see that very much in the reports would enlighten anyone. But I do not speak to that now. I do not advise companies to subscribe or not to subscribe to those services or to be impressed or not by the comments. Those decisions are for them.

My purpose in bringing up those services here today was that, as I read such comments as those quoted above and other similar ones, I began to wonder what assumptions about the nature, function, and purposes of the arbitration process were held by the minds that wrote those comments and why it was that they probably were so different from my own.

It seems to me that the best, or at least one, way to expose and examine the differences in those assumptions (mine and the services') would be to lay out the way in which I view arbitration and then the assumptions about it that I think necessarily are revealed by the comments in the management services referred to above. I still start from the old battleground of the two diametrically opposed views of arbitration. I think the way you prepare for an arbitration hearing, the way you behave during the hearing, the poise or lack of it with which you accept an arbitration opinion and award, and the standards by which you measure whether arbitration is succeeding or failing its mission are seriously influenced, if not totally governed, by which of the two views of arbitration you have adopted.

In order to set up the background for these suggestions, I should make clear my basic assumptions, which probably color all other thoughts about arbitration. I think it so sensible as to be practically beyond reasonable argument to the contrary that arbitration is more a continuation of collective bargaining than it is just a substitute for litigation.

(A voice from the audience):** Just a moment! I never could stand that nonsense! That is the most fatuous of many such remarks I have heard at Academy meetings. I must protest and will explode if I don't do so right now.

McDermott: This is what I believe is described as highly irregular. I think I need the help of the Arrangements Committee

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**Thomas T. Roberts, Member, National Academy of Arbitrators, Los Angeles, Calif. Grateful acknowledgement of my indebtedness is due to Mr. Roberts for his kindness in taking part in this dialogue.

Chairman to restore order here. Good Lord, he *is* the Arrangements Committee Chairman. But, if I can't defend my views in the cozy surroundings of an Academy meeting, I probably would not escape alive if I were to advocate them at a meeting of corporate industrial relations officials or a union staff conference. So, Tom, stay on your feet and let's have it at each other.

Roberts: I intend to, and I warn you to be on your guard, for I will not tolerate any more of your loose thinking.

McDermott: Fair enough. I am forewarned.

We must settle first whether we can agree on some fundamental principles.

I don't suppose you would disagree that a system for rational resolution of labor-management disputes is to be preferred to strikes, lockouts, and other economic muscle.

Roberts: I'm an arbitrator. Of course, I agree.

McDermott: Would you agree also that an arbitration system, tailored to the parties' sense of their own needs and comfort is superior to the public system of litigation, at least for those collective bargaining relationships that are not already dead or dying?

Roberts: Yes, but your original outrageous statement was what got me up here, and now you've turned to pontificating. Will you get on with it?

McDermott: I will try. Another significant principle is that morale of employees and of front-line and middle-level supervision is essential to successful operation of an industrial enterprise and, in turn, a third is that a successful arbitration system is very significant, if not downright essential, surely for good employee morale and probably for good supervisory morale as well.

Roberts: Well, if you snookered me up here just to help you shoot fish in a barrel, then I'm going back to my seat, whence I may hiss at appropriate points, of which I think there are likely to be many.

McDermott: You are not a very patient fellow, are you?

Of course that was like shooting fish in a barrel, but we must begin someplace, and the beginning seemed like a good place. Moreover, I think that much of our trouble as arbitrators is caused not by those parties who don't know or have forgotten the finer points, but by those who ignore the basics. Basics can stand repeating.

Bear with me for a few more assumptions in which all who

engage in arbitration indulge. Two that are universally indulged in and that help remove arbitration from the realm of coin-flipping and witchcraft are that there really are rational answers to these industrial relations problems and that, given any kind of decent exposition at the arbitration hearing, we are smart enough to discern what the answers are under the facts and the terms of the labor agreement. And a third is that our entire loyalty is to the record so that objectivity is assured, to the extent that any human mind ever can know itself well enough to guarantee objectivity, by not caring a hoot about whether the company or the union should prevail in the end.

To return, finally, to what apparently got you so steamed up in the first place, I still am persuaded by George Taylor that arbitration is more accurately described as a continuation of collective bargaining during the term of the agreement than I am by Noble Braden that it is a mere substitute for separate occasions of litigation. Those phrases may overlap in a given setting. They are just shorthand expressions for more complex thought, but they will do for present purposes.

Roberts: You said that before. Merely repeating the conclusion does not establish your point. I need the evidence and reasoning that make you think that that ridiculous conclusion is valid.

McDermott: I can give you the evidence. It stems largely from experience about the fallibility of human beings. In a few words, it is that human minds are not sufficiently intelligent and foresighted to anticipate and provide for all or even many of the labor-management problems that will and do arise during the life of the two-year or three-year labor agreement and that English or any other language (not nearly as exact as that of mathematics) is not sufficiently precise to set out without some ambiguity the parties' agreed-upon solutions to all those problems even if they could have anticipated them.

Roberts: Isn't that a rather unflattering view of the parties' mentality?

McDermott: No. I don't suggest that arbitrators are any smarter. That comment applies to all humans, not just the parties. I am not saying that only the negotiators suffer from that inability. All of us do—laymen, lawyers, judges, and arbitrators, too.

But if that view be accurate, then the parties could not assert with any sense of reality that the labor agreement they nego-

tiated contains their *expressed, joint* solution to every problem that may arise during its life.

Roberts: But what about the concept of "meeting of the minds"? Somebody on one side or the other in my hearings is always telling me about a "meeting of the minds." Don't they do that in your hearings?

McDermott: Of course they do. But most of the time the speaker has not thought his way through that thicket.

Roberts: And the reason must be, if you are right, that the only thing the negotiators' minds met on was the form of words they would use to express their separate, individual intentions. Their minds did not meet on a joint and specific solution of every problem. They could not have. Some problems could not have been foreseen, must less jointly provided for in the agreement.

But the phrase must mean something!

McDermott: It seems to me the most it could mean is that at about 3:00 a.m., in a foul hotel room, red-eyed and beat to their socks, sick and tired of each other and even of the other persons on their own team, and with the employees about to go out at 7:00 a.m., the negotiators finally decided, almost in desperation, that some form of words would just have to do. The union negotiator agreed to a form of expression with reluctance, but he still could say to himself as he staggered back to his room for some sleep that, although he would have liked the stronger expression he had been advocating, he was satisfied that under the language they had agreed upon he still would be free to argue with some force to an arbitrator that the union position was the better supported. In similar fashion, the management negotiator could feel some satisfaction in reasoning to himself that, although he would rather have had somewhat weaker language on the point, he still could argue not unreasonably to an arbitrator that the company position was the one more firmly grounded in the agreement language that they had agreed upon.

Roberts: I just awoke to the feeling that you're hypnotizing me with platitudes. What practical consequences does any of this have?

McDermott: I think it has some, if only the principle that clear expression and clear thought ordinarily go hand in hand.

One practical consequence of looking at arbitration more as a continuation of collective bargaining than as a substitute for

litigation is the development of a rather healthy skepticism about the sometimes sanctimonious reverence exhibited toward clauses in collective bargaining agreements prohibiting the arbitrator from "adding or subtracting" to or from the express terms of the agreement.

Roberts: Now you really have gone round the bend. Your elevator does not go all the way to the top or you don't have both oars in the water. Are you seriously suggesting that the arbitrator should ignore the terms of the agreement?

McDermott: There you go again, reading my words for the most they *might* mean rather than the least they *must* mean.

All that I intend by urging that we be less than reverent about clauses prohibiting "adding or subtracting" is that those party spokesmen who are given to heavy reliance on them ordinarily appear to view arbitration merely as an exercise in semantics. And he is no friend of arbitration who would treat it as no more than that. It may include that, but it involves much more that is considerably more significant. For instance, decision of the early contracting-out cases in nearly all industries and many of the grievances involving deep-seated differences in incentive administration in some industries clearly required more than a semantical approach. It required that the arbitrator poke and probe and knead the record, and the parties, too, if necessary, in order to get the best and most confident impression he could of how the language on which their minds did meet—the language of their agreement—would be understood in the context in which it was negotiated by an objective, informed, and independent person. And when all the dust had settled after those decisions, something has been "added" to those agreements, but without changing anything substantive.

Roberts: But the lawyers' cry of outrage will be heard throughout the land!

McDermott: Probably. But the cry should be expected only from those lawyers who think discerning the meaning of a consensual document and applying it is the same as a carpenter's measuring a plank. It is not—or, at least, it rarely is. Only the naive lawyer should be surprised at what I have said, for the same process and result occur every time a court interprets and applies a contract. The cry ordinarily is to have arbitrators act as judges supposedly would. When they do, the lawyer should not complain. Indeed, even the routine discipline grievance under a typical "just cause" standard in a collective bargaining

agreement requires more than mere semantics. It requires that the arbitrator pour the appropriate content into "just cause," much as a judge must do in filling out the specific contours of a "due process" clause, over the years and case by case.

My point here is that a wooden and mechanical approach to arbitration is more likely to be taken by those who think arbitration is just a substitute for a judicial proceeding than it is by those who, I think, view it more realistically as a continuation of the collective bargaining process.

An ironic twist arises when it is so often seen that a representative (often not a lawyer, but an overly impressed layman) urging the strictly judicial approach to arbitration shows that he does not know what the judicial approach in a given setting would be. Indeed, lawyers now have seen that pressure for settlement in some pretrial conferences can be almost brutal, that formal pleadings may be amended with considerable freedom, and that it is not at all unusual for a judge to seek recommended findings of fact and conclusions of law from the parties or, indeed, a party. Thus, the judicial approach, too, sometimes acts in ways that the advocates of a "judicial approach" to arbitration apparently are not aware of and surely would not approve. Syl Garrett pointed this out in greater detail at the Annual Meeting in Santa Monica in 1961.

Roberts: I suppose if I wait long enough, you will at least try to tie all this in with the services that advise about arbitrators.

McDermott: I will try right now. It seems clear to me that the comments from the services that I read earlier, including references to irrelevant evidence, pertinent citations, substituting the arbitrator's judgment for management's, management's reserved rights doctrine, strict constructionism, and having awards set aside by courts pretty clearly disclose that the people who rate arbitrators by those standards see arbitrators largely as trial judges and would give them passing or failing grades depending upon whether they acted more or less as judges. That is where we part.

Roberts: Wait a moment! Don't you think the parties are entitled to try to find out about and understand a given arbitrator in advance of picking him or her before the arbitration hearing?

McDermott: Of course they are. I simply do not see what degree of "understanding" they get from the material they receive. Have you ever seen the "hot dope" on you?

Roberts: No.

McDermott: Well, years ago I saw a report about me and about several other arbitrators, too, and the material was so general that I do not believe it could have done anyone any good. It might have frightened some parties. Although general and very broad brush, some of the things said were very rough. I know the arbitrators. They were seasoned and top-flight professionals, and many of the remarks about them were totally unjustified.

Roberts: How did you make out?

McDermott: I came out in pretty good shape at first. The report said that McDermott runs a decent hearing and sticks reasonably close to the agreement, but then, after that good start, things just went to hell. The report concluded by saying that he sometimes was slow and that it would not be a good idea to hold your breath until you got an opinion and award out of him.

I wonder whether a party's desire for assessments of arbitrators by others who will not be engaging them stems from the thought that there were some occult rituals that could be conducted before the hearing when picking the arbitrator that would make all the rest fall nicely into place without much further effort and without regard to whether the case was strong or weak on the merits. I wonder that they appear to put more stress on the identity of the arbitrator and less on their own efforts, rather than acting as if the result in arbitration would depend more on the quality of their case and their own efforts than on the happenstance of the identity of the arbitrator.

Roberts: I would not think you would want to ride that horse too far. You seem to be suggesting that the identity of the arbitrator is irrelevant, as if arbitrators were fungible.

McDermott: By no means! No arbitrator with a healthy assessment of his own worth would suggest that. The identity of the arbitrator can make a great difference in the quality of the product, but it cannot be as conclusive on winning as opposed to losing as some parties appear to think. If the parties show the arbitrator that they want a stiff and formal proceeding, they should be able to get that from the arbitrator, no matter who he or she is, but if they have a very able arbitrator, they should get that kind of proceeding at a higher level of professional performance than with a less able arbitrator. My concern is that the parties who rely on those reports seem to think that there are

categories of grievances which they simply could not lose, no matter how weak their case on the merits, if they could just get the "right" arbitrator. I deny that or, at least, I hope that is not true.

Roberts: Isn't it about time that you give me some concrete examples of the difference your two theories would create?

McDermott: Well, the hearing stage is the one where it is easiest to see the difference between the attitudes and approaches of a representative who leans toward the judicial or quasi-judicial theory of arbitration from one who tends to accept the idea of arbitration as a continuance of collective bargaining. It shows up even before that, of course, in the degree of open-handedness or tight-fistedness with which they reveal or conceal the facts they rely upon and the theory of their case under the agreement. How often do we hear, halfway through the hearing, the lament that this or that line of evidence or argument is new and never has been disclosed before? Sometimes that may have occurred because of careless conduct of the grievance proceedings. But it seems equally obvious that it arises more often because a party looks upon arbitration as a game (although a very serious one) to be won by a game plan, part of which is that as much of the case as possible be concealed until it unfolds with all its surprising effect at the hearing, by which time the hope is that it is too late for the other party to do the digging necessary to meet it. The delusion that arbitration is a substitute for litigation feeds the gamesmanship approach, with all its ploys.

Roberts: I've let you go on too long. Are you saying that each party should disclose to the opponent, the enemy, all of the case before the hearing?

McDermott: Pretty nearly all. How else assess realistically the necessity or advisability of settlement? But, before we deal with that, look back at your name-calling. The other party is the company or the union. It is not an "opponent" and surely not an "enemy." Thinking of the other party in those militaristic pejoratives helps to create and sustain the paranoid delusion that arbitration is a game or a battle in which the other party is to be hindered by every formal petition, motion, and objection carried over from the law.

Roberts: Paranoid delusion! What preposterous charges! You are not suggesting, are you, that arbitration has nothing to learn from the law?

McDermott: Of course not. But it should not be made to learn

only from the law, and it should not accept unquestioningly *all* that the lawyers seek to encumber it with. It should learn from all trades, professions, and disciplines that can shed any helpful light on sensible methods for pursuing the goals that are peculiar to it, which are not *necessarily* the same as those of judicial proceedings. Judicial proceedings are more appropriate for parties who never saw each other before (some tort situations) or, if they had some more or less amicable relationship during which they carried on consensual transactions, something pretty terminal must have happened to their relationships in the past so that they now despise each other, to the point that the well-being of the one is no longer of any material concern to the other.

Roberts: You speak as if you never have seen or heard spiteful actions or words in an arbitration proceeding.

McDermott: I have, and I guess everybody has. I have often wondered, however—and I say this only partly in jest—whether some of that insensitive behavior had not seeped into arbitration from habits sometimes used by some lawyers in some judicial proceedings. That is, I wonder if, when the parties hire the gun, they also hire the gunman's forensic devices. Unpleasant though they may be, they perhaps have a purpose in litigation, but only when the well-being—indeed, the survival—of the other party no longer matters.

In contrast, and aside from a few psychopathic collective bargaining relationships, that simply could not be said with any accuracy about the great bulk of the parties to arbitration proceedings. They not only will continue to see each other every day in the plant, as most parties to judicial proceedings will not, but much more—they must continue to cooperate with each other every day in the future in the efficient operation of the enterprise. Whatever they do, or make, or sell, their long- and short-range interest is in continuing to do it efficiently, and they cannot do that if their various spokesmen and representatives are treated in arbitration as if all were liars, cheats, and scoundrels, or as if what one party or the other sees as a serious problem were time and again shut off from rational treatment on the merits by overly formal objections borrowed from the public system of the law, which might be appropriate to moribund or dead relationships, but which should have no place in a private, rational, dispute-resolution procedure set up for that purpose by parties whose endeavors must go on *jointly* if either

is to survive *separately*. I am saying that arbitration is for those who simply must continue to care about each other, in contrast to litigation where concern for the well-being of the other is rather far down on the list of priorities.

Roberts: You are terribly hard on the law and lawyers!

McDermott: Again, you misunderstand, and if you have, perhaps others have as well. I should hasten to add, therefore, that I do not suggest that *all* lawyers behave disrespectfully or even discourteously toward the other side or with undue formality even in court, nor that all do so when they find themselves in arbitration. I seek to compare the two processes at what I judge to be about the average level of performance, and that comparison has convinced me, at least, that many attitudes and devices found satisfactory in court are entirely unsatisfactory when transferred to arbitration—so much so that they distort what arbitration is meant to do and, if not fought with tooth and nail, will destroy it.

Of course, I do not speak here of parties whose labor agreement indicates that they want a totally arm's-length, bare-knuckles procedure, with the panoply of petitions and motions and stops and starts from the law. If that is what the parties want, they should have it. That is one of the major advantages of arbitration. On the other hand, I never have seen any such labor agreement.

What I really am concerned about is the rather easy time lawyers seem to have had in persuading so many parties, almost by default and without half trying, to join in their assumption that because a certain procedure, motion, or objection is appropriate to litigation, it automatically and almost in the very nature of things should be applied in arbitration. Who said so? What labor agreement ever adopted common law procedure, or that of Code States, or the Federal Rules? I never saw one that did, and yet it often happens that as soon as a lawyer makes a motion or objection in arbitration, everybody in the room acts as if they were in court and begins to deal with the motion or objection as would the law. I rarely hear a response that says, "I don't care what the law would do with that point. We are not in court, and that is by choice and not by accident. The result sought by the motion or objection is not consistent with the very different purposes of arbitration, and the motion should be ignored or at least denied, without consideration of what its fate might have been if it had been made in court."

Sometimes you hear the sincere response that says, "I object to your objection." Considerable sense lurks in that ingenuous remark.

Roberts: But are you advocating some kind of formless, "be nice" procedure where everybody just wings it and hopes for the best?

McDermott: There you go, oversimplifying again.

I am saying only that arbitration should be conducted with those proceedings, from whatever source, that best will promote its own goals which are very different from those of the law. If a particular procedural device from the law fits, arbitration should wear it. But the law should not be the sole source of arbitrational inspiration.

Let us move on. What causes most of the procedural arguments and heat in your hearings?

Roberts: Without a doubt, rulings on objections to the admission of evidence.

McDermott: That is true in my hearings as well, and the degree of emotional heat engendered seems higher when I sustain the objection than when I deny it. But, now that I think of it, nearly all my rulings allow the evidence to come in.

Roberts: So you, too, are one of those lazy arbitrators who take nearly everything "for whatever it may be worth."

McDermott: Of course, don't you? Trial judges do, too, I think, at least when sitting without a jury, and they are reversed much less frequently for admitting evidence than for excluding it. And laziness has nothing to do with it.

Roberts: Baloney! It's either laziness or refusal (perhaps inability) to learn the rules of evidence. I hope your opinions are more tightly reasoned than your arguments so far here today.

McDermott: Well, maybe some questions will force you to show me what is wrong with my reasoning.

Have you ever seen a labor agreement that required the arbitrator to follow the rules of evidence? If you have, I would be interested in knowing "whose rules of evidence." The state where the hearing is held, where the plant is located, where the company is incorporated, or some center-of-gravity state? Or should the arbitrator adopt an "outcome determinative" rule? Indeed, why the rules of evidence of any *state?* If the parties are in commerce, as most are, is there not authority to develop and apply a body of federal law of arbitration? Perhaps better wording would say that the rule when applied, whatever its source,

automatically would become *federal* law in those circumstances.

It will not be necessary here to go all the way back to borrow analogies from *Swift* v. *Tyson, Erie Railroad* v. *Tomkins,* or *Clearfield Trust* and their progeny. It is enough to say that the questions just asked must demonstrate that even those who shout most loudly in demanding application of the rules of evidence often do not know whose rules they are insisting upon and rarely have thought of the point. Thus, the most that could be said of them is that they are advocating adoption of somebody's formal rules of evidence, probably what the law schools would call the "better rule."

Roberts: Well, you really become very lawyer-like when you are accused of poorly reasoned awards. You seem quick to take refuge in lawyers' talk when your attacks against the law are challenged.

McDermott: You bet! And the reason is that I think the lawyers can be beaten on their own ground on this point.

First, however, you again misread me. I am not attacking the law or lawyers. I am not *attacking* anybody or anything. The situation is quite the other way around. I am trying to *defend* the arbitration process against what I see as a wholesale invasion by the law, and I am concentrating right now on evidence just because the major invasion so far has come on the rules of evidence.

Roberts: You must have been smoking something funny during lunch. You sound as if you want a chaotic hearing, with no forms and everybody speaking at once.

McDermott: It is at least an open question as to which one of us was smoking something, straight or funny. Why must it always be all or nothing with you?

I am not saying that an arbitration hearing should operate as an anarchic "Good and Welfare" meeting. On the contrary, in my hearings the parties take turns and only one person speaks at a time. That prevents chaos. That deals with who may speak and when. The rest is *what* may be said, and that is evidence. And on that point, aside from pretty wildly irrelevant matters and unaccepted offers to settle or compromise the grievance, I am prepared to listen to just about anything a party wants me to hear. I think that is not only *a* defensible position, but very nearly the *only* position that is defensible at all.

Of course, you must understand that I am not speaking of situations where the collective bargaining agreement says that

certain matters shall not be used or mentioned in arbitration, such as the parties' negotiating proposals and discussions on them or a grievant's disciplinary record more than one year or five years old. If the parties *jointly* make it clear that certain information shall not come out in the hearing, I do my best to see that it does not come out. But that is not the typical problem. The parties, in my experience, are pretty good about policing their own jointly stated "rules of evidence."

On the other hand, the routine evidentiary problems of our hearings arise when one party wants something in and the other wants it out. We then get into the nuances and quiddities of hearsay and its thirteen exceptions, best evidence, parol evidence (perhaps not a rule of evidence at all), opinion evidence, leading questions, and such. I am ashamed to admit that not too long ago I found myself seriously trying, with the parties, to plumb the difference between past recollection recorded and present recollection revived. I must admit that there was some personal fun in it, but it was a disservice to the process. Imagine the unspoken thoughts of the employees and supervisors in the hearing room. Without intending to patronize them, I fear that they must have thought that the representatives and I had taken leave of our senses, and if they had, that would not be good. If those for whom arbitration was established begin to feel that it is being conducted more as a kind of exotic sport by and for the parties' representatives and the arbitrator, they will lose whatever faith they have developed in it over the years as their own private system, in place of a strike or lockout, for settlement *on the merits* of their problems under the agreement.

Thus, I let in nearly all that either party wants to have in and largely for that reason alone. That, of course, is the cathartic explanation for allowing more evidence in an arbitration record than in some court records, those with a jury, but I don't want to pursue that now for, adequate though it is, it is not the best reason for not adhering to the rules of evidence in arbitration.

Roberts: What better one can there be?

McDermott: The one that puts the burden on those who seek to apply extra-contractual rules to the arbitration hearing. We have agreed that when the agreement says that certain matters may not be introduced, they are not. Aside from that, however, not only do labor agreements not require adherence to the rules of evidence, neither do the procedural rules of the appointing agencies. So it is not just the wild-eyed, power-hungry arbitra-

tors who are less than enamored of the rules of evidence in arbitration. Other directly interested institutions are of the same mind.

Roberts: But you said you had a better rule and then you mentioned only a general, burden-of-proof principle.

McDermott: All right. The better reason is that the formal rules of evidence deal entirely with stark admission/exclusion alternatives. When all the arguments pro and con are said, a ruling is made and the evidence is either in or out. That must be why you feel such an affection for the rules of evidence. They appeal to your all-or-nothing instincts.

The trouble with application of rules of evidence in arbitration is that they would only keep the evidence out or let it in, and they give no help at all in selecting one of the many and varying ways to assess its weight, if it be admitted—that is, as carrying much, some, little, or no persuasiveness. That is where the bind comes.

Look at the development of the rules of evidence. They stemmed at least several centuries ago in large part from the mistrust of English judges in the reasoning ability of English lay jurors. Now, with the last name of McDermott and a first name of Clare, after a country in Ireland, I am not one who is inclined to dispute it when some Englishmen say that other Englishmen cannot think straight. I never have had any trouble accepting that.

Seriously, however, notice the gulf of difference between the circumstances in which rules of evidence developed in court and those of arbitration. What if the jurors could not think straight in court? There are no jurors in arbitration. Thus, the lawyers' thought, and the thought of those laymen who have become more technical than lawyers, that the rules of evidence should be easily transferred from court to arbitration is not sound. The circumstances are not the same. I may agree that an English juror cannot think straight, but it would be entirely different to suggest that an Irish-American arbitrator, sitting with no jury, could not think straight. Without a jury in arbitration, much of the basis for the development and application of the rules of evidence simply is not present.

Here is another example of the tendency of some of those who want to apply the law in arbitration not fully understanding even the way the law would operate in given circumstances. For instance, a judge sitting without a jury is much less concerned with

the importance of strict adherence to the rules of evidence than he is when sitting with a jury. Therefore, those who want to transfer the rules of evidence from court to arbitration, first, should get straight what situations they are seeking to make negotiable from one forum to another. If the judge, without a jury, can let in much evidence and then treat it as persuasive or not, why cannot an arbitrator do the same, sitting without a jury?

Roberts: Are you saying we should ignore the rules of evidence in arbitration?

McDermott: Just about—or better yet, develop a rather charitable sense of relevancy and then work out arbitration rules for deciding the proper weight to be given to evidence once it is in. That's what counts in any event. More often than not, at least in my experience, the opponent of the evidence is not really so concerned about the evidence's coming in. He is more concerned, should it come in, about the time he might have to spend and the lengths he might have to go in order to dig up countervailing proof. Thus, if the doubtful evidence were admitted, the proponent would be satisfied, and if the opponent then were told that, although the evidence is in, it will carry almost no weight because it is only remotely relevant or because it is very unpersuasive hearsay, then the opponent would be satisfied, too. If the proponent thereafter were not successful on the merits, he could blame it on the arbitrator's stupidity, but he could not say that the arbitrator did not even listen. And there is a world of difference between those two positions—between losing after full argument and losing after having been shut off from making any argument because of rules that are not fully understood even by all lawyers and surely not by very many employees or supervisors.

An arbitration system that followed the rules of evidence and thus might have weeded out undeserved union claims or management defenses by refusing to hear them at all might reach the right ultimate result, but I fear it quickly would lose the essential support of men and management, and that collective bargaining relationship would be back in court or on the street, that is, on strike or locked out. In contrast, an arbitration system that admitted almost all the evidence for those claims and defenses and heard them on the merits and, after considering and explaining the results under the terms of the labor agreement, reached the very same answers, would, I think, be far superior and would retain the respect of men and management.

Roberts: Well, even though I might admit that some of that sounds pretty good when you say it quickly enough, you must run a "loose" hearing, and I would fear that some of them would never end, as I fear this dialogue never will end.

McDermott: Well, if you are going to get mean about it, I'm going to stop. I will close by borrowing Jim Hill's reply to a similar accusation. I will say I am loose only when I am tight.

The burden of my argument here today is that litigation and its formalistic trappings are for dead and dying relationships, whereas arbitration is for living ones, and that it could be dangerous to arbitration's health if some practitioners were to succeed in transplanting techniques suitable to the law into arbitration, without very careful and critical analysis.

CHAPTER 2

THE ROLE OF LANGUAGE IN ARBITRATION

BRUCE FRASER*

During the past few months, in preparing for this opportunity to address the 33rd Annual Meeting of the National Academy of Arbitrators, I have been talking with many of you about the role of language in arbitration. Each of you has argued that language is very important in your work, and each of you has, in turn, volunteered suggestions concerning in what ways you believe language plays a crucial role.

Obviously I can't address each of your suggestions. What I would like to do, however, is discuss with you three main areas which I, from my perspective as a researcher of language and an observer of arbitration, see language playing a significant role.

Part of what I say here will be obvious to some of you. After attending several dozen hearings over the last year with different arbitrators, it becomes clear that issues of language arise in slightly different forms over and over again. However, I hope that most of what I have to say will provide you with an expanded view of the role of language and with more specific information on how it relates to the arbitration process.

I will discuss three areas: the language of the grievance, the language of the hearing, and the language of the decision. I will dwell only briefly on the first area since it is probably the best known to most of you. I will concentrate primarily on the second area, the language of the hearing, since it is in this area that I believe language plays a most important and subtle role. I will outline the issues of the third area, the language of the decision, but will not go into any detail, primarily because there is very little research to report at the present time.

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The Language of the Grievance

Let us turn then to the first area, the language of the grievance. Here we have as the issue the particular terms of language found in the contract or in the statement of the grievance issue itself. In short, what we are concerned with is the language as it exists prior to the hearing itself; for example, the contract language or the statement of the issue. As one arbitrator commented to me, "It's often the careless or thoughtless use of words that creates many of these grievances, not the actions of the parties themselves." We might highlight the problem by referring to a conversation between Alice and Humpty Dumpty in Lewis Carroll's *Through the Looking Glass:*

> " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'
> " 'The question is,' said Alice, 'whether you can make words mean so many different things.'
> " 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

Though many of us might share the confidence expressed by Humpty Dumpty—that we control word meaning rather than the reverse—I suspect that reality dictates otherwise.

Consider, for example, a contract provision which reads in part that ". . . seven days after the posting of a position, the employer may fill the vacant position." On its face, this appears to pose no challenge. However, a hard look at this clause and the functions of the "may" will reveal that it can be interpreted as indicating (1) that after seven days there is some greater than zero probability that the employer will fill the position; (2) that after seven days the employer will face no union challenge if it fills the position; or (3) (analogous to the use of "may" in "You may go to your room this instant," spoken to a child) that after the seven days of posting, the employer is obligated to fill the position. Each of these positions was argued in one case, and the arbitrator was obliged to wade through a brief containing five pages of citations from various dictionaries and learned sources commenting on the various interpretations of "may."

Consider as a second example a case of a flight attendant grievant discharged for stealing liquor, who states that "I will admit I stole the liquor if I can have my job back." Was this an admission? A confession? Was this an offer of a settlement? If so, was there any consideration involved? Would it be fair to

argue that the loss of reputation sustained by an admission of theft was sufficient consideration for her utterance to count as a legitimate offer of settlement? What if, instead of the statement quoted above, she had indicated a consideration by saying, "I will admit I stole the liquor if I can be reinstated with a loss of back pay"? One main issue underlying the questions I have posed here is my suspicion that what counts as an admission, a confession, or an offer of settlement will differ substantively among those who rely on the legal definition, those who have dealt with the arbitration process over a period of time, and those speakers of ordinary language who are now entering the arbitration lists.

As a final example, consider the case of an employee who was discharged for threatening his immediate supervisor with physical violence based, in part, on his having been heard to say as he left the scene of the confrontation, "I know where you live!" Of course, the quoted utterance could have been intended as a threat, but we all make statements occasionally which could convey a threatening intent if the hearer wishes to hear it that way. Sometimes we are only joking; sometimes we are serious about the threat; sometimes we are serious for the moment, yet have absolutely no intention whatsoever of carrying out any subsequent action. And sometimes we don't intend a threat at all, merely a warning, or perhaps we aren't even sure that we meant anything other than that we were angry and felt the need to express it.

Threats can be a very serious kind of language use, and there are a number of statutes that deal directly with them. Perhaps the most notable is that concerned with threats to the President. Statute 18 U.S.C. 871(a) (1970), initially passed in 1917, provides penalties for anyone who knowingly and willfully makes any threat against the President. The position taken most often by the courts was established in *Ragansky* v. *United States,*[1] as follows:

> "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him. . . . And a threat is willfully made if, in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent intention to carry them into execution."

[1] 253 F. 643 (7th Cir. 1918).

Under this standard, there is no need to prove that the defendant intended to carry out his threat, or even that the defendant had any sort of bad purpose in making the statement which could reasonably be understood as threatening.

More recently, in *Roy* v. *United States,*[2] the court decided that the requirement of willfulness is met if the defendant intentionally makes a statement " . . . in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm . . . and that the statement not be the result of mistake, duress, or coercion." The view here is that the defendant need not intend to execute his or her threat or entertain any bad purpose in order to violate 871(a).

In one notable case, *Watts* v. *United States,*[3] an individual said, "If they ever make me carry a rifle, the first person I want in my sights is LBJ." He was originally convicted of threatening the President, but later the Supreme Court reversed the conviction, saying that this statement was a form of crude political hyperbole and, therefore, protected under the First Amendment. One wonders to what extent putative threats in the workplace enjoy the same hyperbolic latitude.

Through all of this, the Court left unresolved what is to count as a true threat as well as what constitutes willfulness. The Court has not made clear whether speakers must be understood as making a joke or hyperbole, or whether they may simply have intended to make a joke or hyperbole in order for their speech to be protected. If the Court's decision is interpreted to mean that the speaker must be understood as joking or exaggerating, there is really no substantive difference between the *Watts* standard and the original formulation in *Ragansky.* If, on the other hand, *Watts* is interpreted to mean that an utterance is protected speech and outside the statute if the speaker intended it to be a joke or exaggeration, regardless of the way it was understood, the interpretation that a particular utterance falls within the statute whenever it would be reasonably understood as a threat has serious problems.

A further complication arose in the case of *United States* v.

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[2]416 F.2d 874 (9th Cir. 1969).
[3]394 U.S. 705 (1969), *rev'g* 402 F.2d 676 (D.C.Cir. 1968).

Patillo,[4] where a guard at a naval shipyard had told a fellow guard that he would "take care of Nixon personally." Here the court, in reversing the conviction of the guard, drew a distinction between threats where communication to the President was intended and where it was not intended, holding that where communication of the true threat is not intended to be communication to the threatened party (here, the President), the threat can form a basis for conviction only if made with a present intent to actually do injury.

I have somewhat belabored the background legal struggle to come to grips with the notion of a threat and the grounds for its knowing and willful commission because I see it to be but representative of many terms-of-the-art that pervade grievance issues today: threats, insubordination, an offer, sexual harassment, seniority, and the like. To the extent to which arbitration is moving from the comfortable, albeit effective, process of familiar faces dealing with familiar problems to new, legally trained advocates, unfamiliar with both the arbitrators and each other, the more conflict I envision on what these words, so familiar to the arbitration history, are going to mean. Will the interpretation from case law prevail? Will the advocates defer to the tried wisdom of the arbitrator? Will the interested parties insist on imposing their own, relatively untested interpretations of these terms on the process? I surely cannot hazard an informed guess, but the controversy I have observed over such issues suggests that when we encounter a word, it does not mean what we choose it to mean, neither more nor less.

The Language of the Hearing

My second area of concern in this paper is what I have called the language of the hearing. The focus here lies principally with the reliability of witnesses as they attempt to communicate to the arbitrator the sense and details of past events that they have seen, heard, or experienced in some way. It is my purpose in this discussion to create in you a sense of disquiet, to convince you that there is a serious risk in placing great reliability on the accuracy of a single given witness.

To begin, we should recognize that even the finest citizen is

[4]431 F.2d 293 (4th Cir. 1970).

frequently guilty of avoiding the truth, quite deliberately and consciously. One hears statements such as "I'm fine, thank you," "That's a lovely new dress; it looks fantastic on you," "Your paper was very interesting," "The check is in the mail," and "I am not a crook." The list can (and does) go on indefinitely. It is not that we always evade, equivocate, prevaricate, and downright lie without social repercussions; it is just that in certain situations such representation is quite acceptable and expected. (One doesn't respond to a greeting with "I'm terrible, I was sick last night" or "I have this pain right here.") During testimony, however, the ground rules permit absolutely no straying from the narrow truth.

For purposes of this discussion, I will exclude from consideration those witnesses who deliberately and intentionally create testimony which they believe deviates from the truth. There is very little I, as a linguist, can say about them.

I think we can best discuss the reliability of witness testimony by considering the transformation of facts that takes place between the actual occurrence of an event and its communication to the arbitrator. I will refer to the event itself as being composed of *real facts*—actions that did in fact occur with some structure and in some particular sequence. These are the facts we would observe were we to have available an instant replay such as that used to second-guess football referees.

However, when we experience an event, we do not record in our memory these real facts as a video recorder would. The Greek historian Thucydides, writing in the Fifth Century B.C., pointed out part of the difficulty when he wrote about gathering information: "The task was a laborious one because eye witnesses of the same occurrence gave different accounts as they remembered or were interested in the action of one side or another." More recently Justice Cardozo (1921) echoed this point when he stated, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." We impose our own, and sometime unique, filter to the data that impinge on our sensory organs, thereby providing us with what we may call a set of *perceived facts* in order to construct the event for memory.

One way of characterizing this perceptual filter is to recognize that most of us, with the exception of those few (if any) individuals with total recall, organize events we experience into large, general categories from which the details flow in later recollec-

tion. One does not attend to details, especially small unfamiliar details, much less recast them accurately days or weeks later, without deriving them from some general categories in which they have been stored. For example, if you observe a man reading the mail on the supervisor's desk, the likelihood is that you will perceive the sex of the individual and not the height, weight, or complexion, and will, if queried on these, provide details that characterize your view of the average man, held in memory long before you ever observed the mail event.

To be sure, the real and perceived facts are often identical. A witness is unlikely to fail to identify that it was his supervisor who was arguing with a fellow employee, or that it was a mail truck rather than a motorcycle that struck him in the company parking lot. In such cases where the facts in question are thoroughly familiar to the witness and/or the facts are uniquely distinguishable from any competing facts, there is certainly little reason to doubt a witness who testifies immediately after the event occurred.

But we must consider the more frequent case of testimony where the witness is being asked to remember exactly where the grievant was standing, what he said, whether the phone call came before or after the argument, whether the supervisor lit the cigarette before or after he entered the paint shop, whether there was a pile of mail on the dashboard of the truck, whether there was any snow or ice on the ground on the day in question, and the like. Here we are not dealing with sets of real facts, or even the set of perceived facts, but with a set of *retained facts*—the reconstruction of the event after some period of time. Many factors can influence the congruence between perceived and retained facts, some of which we will detail below.

Finally, in testifying, the witnesses are asked to reconstruct the event for the arbitrator, and in doing so, they attempt to communicate to the arbitrator their recollection of the event. Here we are dealing with yet a fourth set of facts: *communicated facts.* As I shall indicate below, the arbitrator interacts in important and often nonobvious ways to assist in transforming retained facts into a different final set of communicated facts.

Let us discuss each of these four sets of facts in turn to get a sense of how each arises and may be transformed into the succeeding set. I must stress at the outset that I am reporting on research results—albeit fine examples of empirical research, but subject nevertheless to the criticism that they do not reflect what

actually occurs in the real world when people do indeed observe an event, try to remember it, and later testify about what they saw or heard. I don't think this should deter us from the examination, however, since the research results suggest the correspondence of real facts to communicated facts is remarkably poor. Moreover, recent work by Sanders and Warwick (1980), which I will report on below, suggests that the validity of the research is really quite good.

Turning to the set of real facts, we can point to certain aspects of an event which, independent of the nature of the witness, can influence the ability of the witness to report accurately. Some of these are obvious and reflect common sense. The more time a person has to look at a face, for example, the more reliable the person will be in recognizing that face from among others and in recalling specific details. Frequency of the event is another aspect. The more times a person observes an event, the more likely he is to report the details accurately. Salience of the event is another common-sense aspect that plays a role in accurate recall. If there is something special or unusual about an event, you are much more likely to attend to it and its surrounding details than if the event is commonplace. For example, if a grievant at the hearing is wearing a yellow shirt with a purple tie, you will be likely to remember and perhaps comment on this. On the other hand, even though you have looked at the telephone countless times, it is unlikely that you can recall which letters are associated with each of the ten digits or, even more telling, which letters are missing. Significantly, although one might argue that a face of a racial type other than that of the witness is different and the witness would be more apt to attend to these details, just the reverse occurs. Whites are relatively poor at identifying black as opposed to other white faces, and vice versa. Moreover, it is not surprising that what counts as a highly salient aspect of an event often differs for men and women (Powers et al. 1979).

Less obvious is the relative ease with which a type of fact is recalled. Is the witness being asked to remember the height of an individual, his weight, the speed of an automobile, the details of a conversation, or the location of the pickets outside a factory? Different types of facts are not equally easy to perceive and recall, though it is difficult to set down any firm rules.

In 1895 Cattell asked his students a variety of ordinary questions whose answers they might be expected to know—for ex-

ample, "What was the weather a week ago today?" He concluded, "It seems that the average man cannot state much better what the weather was a week ago than what it will be a week hence." He found that students divided about equally on whether a horse stands with its tail to the wind (it does) or whether apple seeds point away from the stem (they don't), and that they were consistently low in estimating weight or time, while high in estimating distance.

More recently Marshall (1969) asked Air Force personnel to estimate the speed of a moving automobile. They knew in advance that they would have to provide this information; yet estimates ranged from 10 to 50 mph, when in fact the car was moving at only 12 miles per hour. Bookhout et al. (1975) staged an assault by a distraught student on a professor in front of 141 witnesses. While the attack lasted only 34 seconds, the average time reflected in the sworn statements from witnesses was 81 seconds—an error of nearly two and one-half times. Finally, Johnson and Scott (1976) had subjects for an experiment, who were waiting in a room, overhear a violent argument nearby. Suddenly one of the arguers came into the subjects' room and then left, having spent about four seconds with them. Male subjects estimated the duration to be seven seconds, while females reported the time as 25 seconds. Clearly, witnesses tend to greatly overestimate the duration of an event. Estimates of height, weight, and color also vary widely, but not consistently in one direction. One must conclude, however, that reliability is very low.

More variable, and perhaps more crucial to an accurate set of perceptual facts, are what I will call witness factors: those aspects of the witness that influence the initial construction of the event in memory. I will discuss but a few.

The first of these involves the stress felt by the witness when perceiving an event. The general tendency, first noted in 1908 by Yerkes and Dodson, is that strong motivational states such as stress facilitate learning and, hence, recall up to a point, after which additional stress causes a deterioration. In short, perception is most effective at some moderate level of arousal. The difficulty, however, lies in identifying what this moderate level is for a given witness *and* whether the witness was enjoying this level during the observation of the incident at issue. Moreover, certain categorical facts, such as the race of a participant in an incident, is more likely to be remembered under heavy stress

than is a fact with internal structure, such as the participant's phone number. One result of increased stress is the narrowing of focus by the witness. Work by Easterbrook (1959) suggests, for example, that if there is one aspect of an incident that is particularly salient, such as a gun, a video portapak for recording activities, or unusual attire, this may receive most of the witness's attention to the detriment of many other details.

A second witness factor that plays an important role in witness perceptions is what I will call social expectations. Simply put, these are stereotypes an individual holds—fairly or not—about a social group or social behavior. Generalizations, such as "Germans are dogmatic," "Blacks are promiscuous," "Scots are thrifty," "British are up-tight," "Academics are intelligent," and "Arbitrators are . . . ," are often widely accepted, often grossly inaccurate, but frequently relied upon.

A classic investigation of this phenomenon is that of Allport and Postman (1947) who showed a subject a picture that contained many details. Relevant is the fact that one of the individuals in the picture was a black man dressed in a three-piece suit facing a white man, casually dressed but gesturing with one hand and carrying a straight razor in the other. This first subject was asked to describe the picture to a second, the second to a third, and so on until the sixth subject described the picture to the experimenter. The majority of the sixth subjects, drawn from many walks of life, reported that the black man was brandishing the razor, threatening the white man.

Another factor that plays a role in reliability is the witness's expectations based on past experiences: if it is usually one way, it probably is this time. As Allport and Postman comment, "Things are perceived and remembered as they usually are. Thus a drugstore situated in the middle of a block . . . moves up to the corner of two streets and becomes the familiar 'corner drugstore.' A Red Cross ambulance is said to carry medical supplies rather than explosives, because it ought to be carrying medical supplies. The kilometers on the signposts are changed into miles, since Americans are accustomed to having distance indicated in miles" (p. 62).

In a later experiment, Bruner and Postman (1949) showed subjects an arrangement of 12 playing cards—12 aces from all four suits—and asked for a report. After glancing briefly, most subjects reported that they saw three aces of spades. In reality, there were five aces of spades, but two had been colored red.

Some subjects, aware of this deviation from their expectations, reported the colored aces as "purple" or "rusty black." Clearly, the subjects' behavior "can be described as resistances to the recognition of the unexpected or the incongruous" (p. 222).

As a final factor in witness perception, we can consider personal bias, truly a difficult aspect to assess. If the witness has a low opinion of women, a female grievant may be seen as negative rather than neutral; if the witness feels hostility toward the employer, he will be less likely to perceive an event in an objective way.

Hastorf and Cantrill (1954) showed a film of the hard-fought 1951 Dartmouth-Princeton football game to students from each campus and asked them to note any infractions (there were numerous) and their nature. Princeton students saw Dartmouth players make more than twice as many infractions as their own team, and the Dartmouth infractions were seen as more flagrant. Dartmouth students saw the frequency of infractions as about equal, but with the Princeton violations being more flagrant. (Incidentally, Princeton won.) To cite but one final example of personal bias, Allport (1958) showed a display of photographs of women's faces to a group of male subjects with the instruction that they rate them on positive feelings toward each. Some time later, the same photos were shown to the same subjects for evaluation, but with the added condition that the ethnic background (e.g., Jewish, Italian, Polish, British) was indicated for each. The results were strikingly different.

Moving on, we now want to consider the third construction of the event, the retained set of facts. One might assume that the set of facts available after a period of time is influenced only by a general loss of memory. After all, there is ample evidence that recall of detail deteriorates rapidly with time. Shepard (1967), for example, tested subjects for recognition of pictures after intervals of two hours, three days, one week, and four months. While many subjects evidenced a 100 percent recognition after two hours, the average was 57 percent after four months. This is about at the level of chance—simply guessing.

But time is not the only factor influencing retention. Foremost among these others is the postevent information to which a witness is subjected. It is quite common, for example, for witnesses to discuss an event shortly after it has occurred, particularly if the incident is recognized as significant. What was initially perceived by a witness as a casual gesture may well become

a threatening one if fellow witnesses have seen it that way. I have heard an early witness testify to icy, treacherous, snow-covered walks on the day in question, while a later witness, having heard this testimony, disowned his first-step statement describing a nearly snowless walk to conform.

Loftus and Palmer (1974) had subjects watch a series of film clips of car collisions and then asked them a series of questions, one of which concerned the speed of the moving car. For one group, the question was, "How fast was the first car going when it smashed into the second?" For the other group, the verb "smashed" was replaced with "hit." A week later the two groups were asked another series of questions, one of which was, "Did you see any broken glass?" Twice the number of subjects whose original question about speed included the word "smashed" reported glass, compared to those whose original question included "hit." (There was no broken glass.) Almost any object can be (and has been) introduced into a set of facts, particularly if it is consistent with the witness's overall reconstruction of the event. Even facts at variance with the reconstruction will be integrated with sufficient motivation (e.g., the broken-glass case above).

Of course, in most of these cases, the arbitrator has no way of knowing what information has been provided to a witness following an event, or in preparation for the hearing, and under what conditions. Loftus et al. (1978) suggest:

> "In general, longer retention intervals lead to worse performance; consistent information (provided post event to the witness) improves performance and misleading information hinders it; and misleading information that is given immediately after an event has less of an impact on memory than misleading information that is delayed until just prior to the test [testimony]" (p. 67).

Interestingly, the introduction of postevent information can influence a witness's subjective reaction to an event: noisy events can become quiet; violent events can become retained as relatively placid; passive participants can be recalled as aggressive. In addition, nonverbal cues to the beliefs of one party may influence a witness: the length of a gaze, the degree of confidence evidenced by one witness, or the demeanor of the person taking the information have all been shown to contribute to the retained reconstruction of an event. Finally, just as a high frequency of an event can usually insure a more accurate recollection, the more often a witness is asked to recount his version of

an event, the more confidence he gains in the "truth" of his version.

From the above it should be clear that the experimental research indicates that eyewitness errors are prevalent; anecdotal accounts suggest that real-life eyewitness errors occur more often than not. Unfortunately, we do not know yet the extent to which this and similar research actually mirrors what happens under actual, real-life circumstances.

On the one hand, the experimental error rates may reflect a greater willingness of witnesses to make judgments in research situations than under conditions of a true incident—for example, in the company manager's office or even in a police station. The fact that one agrees to be a witness usually entails the commitment to spend additional time in court, and certainly the problem of living with fellow employees on a day-to-day basis, whether or not the person you identify is ultimately found guilty. Under experimental conditions, no such involvement is felt. In addition, in a real situation a mistake can cost another dearly; in the experimental condition, the only effect is the level of significance reported in the result section of the forthcoming paper. Finally, there is a long precedent for witnesses to avoid testifying in actual cases, sometimes by conveniently forgetting what they saw. Such a position would not be appropriate in an experimental situation. In short, there is every reason to participate in the experimental situation, and this may contribute substantively to the high rate of errors.

On the other hand, one might take the position that the incidence of errors is as high or even higher in the real as opposed to experimental situations. The level of anxiety created in a real situation might lead to impaired perception and/or recollection, while this is highly unlikely in the experimental paradigm. Second, the number of influencing variables in a real situation may combine to bias the perception of the witness; for example, the very presence of a large automatic revolver has been shown to detract seriously from the ability of witnesses in robbery situations to recall general physical characteristics of the thief. Experiments are designed to reduce to a minimum any extraneous variables. Finally, witnesses in real situations surely appreciate that their testimony is crucial to the outcome of any given proceeding. Why else would anyone bother asking them to testify? Consequently, they might very well attempt to provide a thorough account of what they saw or heard, filling in with plausible

details that they couldn't quite remember beforehand. No witness under oath and before colleagues wants to admit that he can't remember which door the grievant entered by, whether the phone call from the supervisor came before or after the grievant had left, or what exactly the grievant said as he threw the key down on the desk and stalked out of the room.

It seems clear that there is a serious need for a careful examination of the relationship between the type and frequency of errors in experimental conditions and real situations. Unfortunately, at the moment we do not have the information to draw any conclusions on this issue, with the exception of a very recent paper by Sanders and Warwick (1980) which does present the results of an experiment in which all the judges viewed the act of cheating on a scholarship examination. Half of the judges were told the cheating was just part of the experiment and were asked detailed eyewitness questions; the other half were led to believe that the cheating was real and unanticipated, and they were asked the same questions, having been told that if they could identify the cheater in the lineup shown to them, they would go with the experimenter to the dean of the college, confront the cheater, and participate in his removal from the competition. There were no important differences in *any* aspect of the ability of the two groups to remember any details of the situation nor in their ability to identify the cheater. This is, of course, not conclusive, but it does suggest that empirical research may have a high predictive value. If so, one must be even more skeptical of relying on the accuracy of single eyewitnesses testifying on details.

We now turn to the fourth and final set of facts—the facts communicated by a witness to the arbitrator. There are two parts to this final transformation: what set of facts the witness attempts to communicate, and what reconstruction of the event the arbitrator makes of them.

There are at least three aspects of witness interrogation that play a role in what facts are presented. First among these is the type of retrieval requested of the witness. In general, if a witness is asked narrative questions ("Tell us what happened"), the report is more accurate but with considerably less detail than if he were asked for a yes/no answer ("Did you see the picket line?"). Clearly, more errors occur when witnesses are forced to decide on details than when they decide which details to provide. Psychologists seem to agree that if both completeness and

accuracy are sought, the narrative approach to questioning should come first. This is particularly relevant in light of the previous discussion in which we noted that postevent information could alter the retained information. Suppose, for example, that a witness decided his recollection of a conversation between the grievant and his superior would be in a narrative form and he is then asked, "Did you smell alcohol on the grievant's breath?" If he did recall this, but had neglected to mention it in his narrative report, he can fairly report it now. But if the witness has been initially asked, "Did you smell alcohol on the grievant's breath?" he is certainly now likely in a subsequent narrative account to recall an earlier consideration of alcohol and include it now as a fact.

The way a question is put to a witness is also crucial in determining what fact is elicited. I have already mentioned research that showed that the use of "smash" in questioning witnesses to an automobile collision creates broken glass when none existed. Relevant here is the fact that the estimate of the speed for the "smashed" subject was more than 25 percent higher than for the "hit" subject! Similarly, if you ask a witness "How tall?" or "How heavy?" or "How large?" instead of "How short?" or "How light?" or "How small?" you are establishing a different frame of reference for the answer. Loftus (1979) reports that she asked about the frequency of headaches in two ways: "Do you get headaches frequently and, if so, how often" and "Do you get headaches occasionally and, if so, how often?" The "frequent" respondents reported an average of 2.2 headaches a week, while the "occasional" respondents had only 0.7 headaches weekly. To ask "How often did he bring food to the inmates? Every day? Once a week? Once a month?" sets up different expectation for an acceptable answer from "How often did he bring food to the inmates? Daily? Several times a day? Continuously?" Though such questions might not be objected to during a hearing, they are clearly *leading* in a very subtle way.

Or consider the alternate ways of asking about a stack of mail: "Did you see any letters on the desk?" or "Did you see a bunch of letters on the desk?" or "Did you see the bunch of letters on the desk?" The first question leaves open the existence of letters, more or less a bunch. The second implies that there was a bunch of letters and there is good reason to think they were on the desk; it does not, however, commit the questioner to their being there. The third form, using "the," requires the response

to deal with the questioner's commitment to the presence of a bunch of letters on the desk. If the advocate "believes" the letters to be there, the witness who answers "no" is taking an opposing position. Even if the third question were used but objected to, the implication of the letters being there has been made.

In addition to the above issues concerning the type of question asked, and the words used to introduce certain inferences by the listener, one hears questions which seem quite straightforward but are deceptively complex, and hence the answer elicited is potentially misleading. This might be even more the case when the witness is relatively inexperienced in dealing with arbitration hearings. One instance reported to me concerned the management counsel questioning the union shop steward. He asked, "Is it not true that the proposal is inconsistent with past practices?" to which the witness quickly replied "No." If the questioning had stopped there, or turned to another topic, the impression would be left that the proposal at issue was consistent with past practice. However, the advocate, for whatever his reasons, pursued the questioning with "Was the proposal consistent with past practice?" to which the witness gave, again, a confident "No." The point here is not that witnesses, particularly inexperienced ones, are likely to give conflicting and false testimony, but that it is very difficult to determine from a single question, certainly a question which has several negatives or which has an imbedded conditional clause (e.g., "Was there any —if you can recall whether or not you were there on the day— mail lying on the table when you arrived at work?"), whether the witness has fully understood what information the advocate intends to elicit.

The third aspect of witness interrogation involves the identity of the questioner, in particular the degree of status and authority he enjoys. Marshall (1969) found that when narrative reports of an incident were presented in front of a high-status person, the reports were consistently longer, although their accuracy did not differ. Marquis et al. (1972) looked at a different but related issue: To what extent does a supportive questioner lead to a more accurate or complete report by a witness? Interestingly, they found that although a suggestive questioner—one who nodded affirmatively, smiled, leaned toward the witness—did create a more favorable and positive attitude on the part of the witness toward the interview, accuracy and completeness did

not change significantly as a function of the questioner's demeanor.

Let us now turn to the second part of what is communicated by a witness to an arbitrator. Here we are concerned with the perceptual filter imposed by the arbitrator on the entire presentation. Both the verbal and nonverbal performance of a witness play an important role in which data are actually internalized by the arbitrator as the facts from which he or she must now reconstruct the event. I shall look at nonverbal factors first.

Nonverbal Factors

Nonverbal communication is best viewed as characteristically augmenting or perhaps modulating the verbal message. The speaker is making an important positive point and shows a smile, leans forward, and gestures widely with his hand. The point is silently emphasized by his body language. There are, of course, examples we might point to where nonverbal communication is greatly at variance with the verbal message; these, however, seem to occur in cases where the speaker is under considerable stress or suffers from certain psychological difficulties. Relevant for our purposes here, however, are those cases where the verbal and nonverbal messages are somewhat in conflict—for example, the speaker who is testifying on an important factual point and at the crucial moment looks down or away, suggesting perhaps to the hearer a lack of sincerity; or the witness who presents the details of an industrial accident in which the grievant was injured, but who has a smile, perhaps really a smirk, throughout the entire testimony; or the grievant, discharged for habitual tardiness, who testifies that he had a second job that sometimes finished late, that this job was necessary for him to meet the expenses of his wife and family, but who appears at the hearing dressed in a three-piece suit, Gucci shoes, and a Cartier watch; or the witness who asserts repeatedly under oath that he did not light up a cigarette in the paint shop, contrary to earlier testimony, but who chain-smokes throughout the hearing and whose fore and middle fingers show yellow nicotine stains.

It is probably safe to say that one can seldom make any definite generalizations about these and hundreds of other conflicting situations that arise in a hearing or, for that matter, in our everyday social intercourse. We often ignore the conflicts, particularly under the pressure to act or respond; or if we do take

note of them, we quickly make some decision with respect to how they fit into the emerging or former picture of the person we are dealing with and then go on about our business. Unfortunately, it is all too easy to permit ourselves to draw conclusions that are based on inaccurate information, or inaccurate stereotypes.

A variety of studies have been carried out involving what aspects of nonverbal communication are more indicative of the speaker who is trying to conceal information. The most notable is that by Ekman and Friesen (1969) who have studied what kinds of body movement are more allied with the misinforming verbal message. If there is any conflict, they contend that observers are likely to catch the "true" message by attending more to the body than to the head and face cues. (This, of course, might be difficult at a hearing, particularly when the arbitrator is involved in note-taking.) Facial movements, analogous to speech, are more consciously controlled and will "leak" less information than will other parts of the body. They suggest that the legs and the feet are the most informing limbs, and conclude:

> "The availability of leakage and deception clues reverses the pattern described for differences in sending capacity, internal feedback, and external feedback. The worst sender, the legs/feet, is also the last responded to and the least within ego's awareness and thus a good source of leakage and deception clues. The best sender, the face, is most closely watched by all, most carefully monitored by ego, most subject to inhibition and dissimulation, and thus the most confusing source of information during deception; apart from micro expression it is not a major source of leakage and deception clues. The hands are intermediate on both counts, as a source of leakage and in regard to sending capacity and internal and external feedback" (p. 100).

The main point I wish to make is that not only do we find some conflict between the perceived verbal and nonverbal message and often do not recognize why we feel that something is "wrong," but we usually forge ahead and draw a conclusion. Let me use an extreme example to make my point. Krout (1942) studied a variety of emotions and the conventional postures that different cultural groups assume to convey them. He claimed, for example, that Americans are relatively unlikely to show humility in any guise (whether this is true today I leave unaddressed), but suggested that should they seek to do so, they might utilize a slight downward tilt of the head and a lowering

of the eyes. Chinese, on the other hand, would join hands over the head and look down (signifying "I submit with tired hands"), Congolese might stretch the hands toward the person and strike them together, Sumatrans might bow while putting the hands between those of the other person and lifting them to the forehead, while Botokans often throw themselves on their backs, roll from side to side, and slap the outside of their thighs. Whatever the culture, there are greater or lesser differences that may be totally uninterpretable, or interpreted as one might a strictly American gesture. A belch after a good meal in Japan, for example, signifies the diner's great satisfaction; an American hostess would make a very different inference.

To get a feeling of how verbal and nonverbal communication can create dissonance, one need only go to a French movie in which the dialogue is a specially taped version of the script in English read by native English-speakers. Although the English words are timed and even shaped to fit the lip movement of the French actors, they do not accord with the total body gloss as represented by facial expressions, gestures, and posture. French actors, for example, are seen gesturing in the tight restricted French manner while seeming to say English words that require broad loose gestures. Observers often feel amused or irritated, but the case of the imbalance is so subtle that few are able to identify the source of their irritation.

Far more subtle, though yet crucial, cues arise when the speakers are Americans but from differing subcultures or social groups. Eye contact between two white middle-class Americans is fairly well defined: Speakers make contact with the eyes of the hearer for about a second or two, then look away as they talk, periodically returning to reestablish eye contact, then moving away again, and so forth. The hearer, however, ordinarily keeps his eyes on the speaker, ever ready for the return of eye contact to assure the speaker that he is a good listener. If the hearer is looking away when the speaker attempts recontact, the speaker assumes the hearer is disinterested and will often pause until contact is reestablished or will terminate the conversation. One needs only to try to carry on a conversation with another person who is wearing dark glasses to appreciate the nature of the cues given off by the eyes.

Davis (1975) and LaFrance and Mayo (1978), among others, suggest that the eye behavior patterns differ in important ways among the subcultures of native Americans. For example, peo-

ple maintain less eye contact in poor black families than in middle-class white families, but with no less respect for the speaker nor less attention to the content of the conversation. In some cases, black adolescents have been observed to reverse the pattern of who looks at whom, when, and for how long. Whereas white middle-class children are taught to "look me in the eye when I'm talking to you," black and Hispanic American children are often instructed to look down in the face of authority. This age gesture is taken within these groups as a sign of deference, not a furtive avoidance signal. The point I am making is that an eye-contact pattern may simply be one that is different from that of the speaker and little significance may be fairly attributed to it. It may mean that the speaker is lying through his teeth and is anxious about the possibility of being caught doing it; equally, it might reflect the social norms prevalent in the subculture of the speaker; or it might signify something else. In any case, it is highly unlikely that the arbitrator can find out which of these obtains.

As a final point on the influence of eyes in nonverbal communication, Argygle (1975) writes of research by Hess in which he observed that when people look at something that is pleasing to them, their pupils dilate measurably; conversely, when they regard something that is displeasing or repugnant, their pupils constrict. Curiously, people appear to respond to pupil size when they interact with each other conversationally, albeit at an unconscious level. Hess showed a display of photographs, including two of the same pretty model, to a group of male subjects. However, in one of the photos, the pupils of the model had been enlarged through a retouching process. The response of the male judges, as indicated by the increase in their own pupil size, was more than twice as positive to the picture of the girl with the dilated pupils.

Smiling, a sign of pleasure and contentment in Anglo culture, is not appropriate under conditions of duress. We do not expect to find a student smiling during a particularly difficult examination or a witness smiling when he is being cross-examined and clearly being caught in contradictory testimony. Yet smiles under both sets of conditions would not be surprising if the student or witness were Hispanic. Americans from Puerto Rico, for example, frequently smile under situations of considerable anxiety and embarrassment, whereas their Anglo counterparts would be expected to frown or perhaps flush and weep. I at-

tended one hearing where the witness, a police chief from a relatively well-to-do town, testified with an expression that ranged from a sneer to a smile. The content of his testimony was relatively bland; the facts, according to the arbitrator later, were not crucial to the issue to be decided. Yet the cross-examination questions and the arbitrator's questions were pointed and even hostile. The arbitrator commented later that "there was something 'dishonest' about the witness," even though he could not put his finger on it.

Verbal Factors

The verbal performance—how the witness presents his account of an incident—is perhaps even more influential as a determinant of how the arbitrator will "hear" the facts. Again, the variables are many and I will mention only a few.

The effect of the speed at which someone speaks is stereotypically captured by the aphorism, "Beware of the fast talker." As folklore dictates, the fast talker is trying to con you, trying to sell you a bill of goods, much like the barker at a circus or a used-car salesman. Curiously, however, several recent research efforts (e.g., Miller et al. 1976) have demonstrated that fast talkers are more persuasive than their slow-talking counterparts. This was found to be true even when the topic was on the dangers of drinking coffee and the credibility of the speaker was varied by telling one group of judges that he was a locksmith and the other than he was a biologist. Thus, the "beware" cited above might better caution the arbitrator to consider if he is being persuaded to believe the fast-talking witness. Why this phenomenon should be the case is unclear, although the most frequent explanation appeals to the well-established doctrine that added effort to process and comprehend a message enhances the believability of a speaker.

A second aspect of verbal performance is the particular dialect spoken by the witness. Whether or not any bias is acknowledged by a given listener, educated English speakers consistently rate speakers of a nonstandard (noneducated) dialect as less intelligent, less friendly, and, most important, less trustworthy and less honest (Fraser 1975). Of course, this is not an obligatory conclusion, but how is one to know if a dialect difference is, in fact, subtly biasing one's view of a witness? It was not by chance that the Dodge commercial of several years ago arranged for the

southern sheriff to speak as he did to engender a certain antagonism in northern TV viewers. Nor is it fortuitous that the late Martin Luther King, Jr., chose one English dialect for his major civil rights addresses, quite another for his preaching to fellow black Americans. Each served its purpose, but had he reversed the dialect, he would have lost respect and enjoyed less success.

O'Barr (1976) and his colleagues at Duke have worked for several years to determine the effect of yet another aspect of witness language performance. He suggests that two poles can be identified: the style of the powerful and the style of the powerless. The powerful style reflects direct assertions, little equivocation, few hesitations, and brevity, while the powerless style includes frequent hedge words (sort of, kind of, about), meaningless filler words (mmmmm, you know, I guess), vague intensifiers (very, really), and terms of personal references (very good friend, Mrs. Smith). The common effect of all of these stylistic features is reduced assertiveness. Although such language style has often been equated with "women's speech," O'Barr and his colleagues note that this is a false conclusion. Indeed, many women do tend to use this style, but it is used by both men and women who occupy a low social status—the poor, the uneducated, the unemployed.

In a series of experiments (O'Barr 1976), actual court transcripts were altered to reflect either powerful or powerless features (everything else being unaltered). The subject jurors consistently found both men and women witnesses expressing themselves in a powerful style more credible than those speaking in a powerless style. These differences in style are often very subtle and go unnoticed in ordinary conversation or at a hearing, but research of this sort suggests that the speaker of powerless language may start with a handicap, independent of his veracity or recall.

In another series of experiments, the effect of hyper-correct speech on jurors was examined. Although a courtroom or hearing demands a sense of formality, the language resulting from the inexperienced or anxious witness may become rather stilted and unnatural. For an ambulance driver with little education to refer to an unconscious accident victim as "semi-comatose," for him to refer to someone slightly injured as "not in a very dire condition," or to comment that the accident happened "very, very instantaneously" were all shown to contribute to a diminished level of credibility. Again, the features are subtle and often not consciously attended to.

My list of potential influences on the most sensitive arbitrator does go on, but I will not. I do wish to point out once again that each feature of verbal or nonverbal performance may not always be present, and when they are, there may be little or no unwarranted effect on the arbitrator. But how is one to know?

The Language of Discussion

I now wish to turn to the third and final area of language in arbitration, the language of discussion. I actually have very little to say now beyond what is certainly obvious: to write a good discussion, it is necessary to know for whom you are writing and then to choose your structure and style accordingly. I cannot presume to determine to whom a decision ought to be addressed, although the advice of Aristotle in his *Rhetoric* seems appropriate for all occasions: "Style to be good must be clear, as is proved by the fact that speech which fails to convey a plain meaning will fail to do just what speech has to do. . . . clearness is secured by using the words . . . that are current and ordinary."

In reading dozens of arbitration decisions, I have found very few that seem to violate general canons of logic and style, although the following excerpts would belie this claim (quoted with no editorial changes):

> "The Union feels that if the grievant is reinstated he will become an excellent employee and that he had just been married two weeks before and was suffering from a sickness that young, newly married men have when they are tired out, feet drag, and lose all pep . . . and this soon leaves them after the honeymoon is over." (Case of an employee discharged for sleeping on the job.)
>
> "An employee who successfully passed his probationary period then failed in his performance could never be removed for incompetence once established [sic] is presumed to continue until the contrary is established. The union claims that the 30 day suspension is too severe and warrants a modification of the 30 day suspension penalty, that the punishment is too severe and want the suspension set aside, and that the remedy sought exoneration of all charges. . . . It is recommended by the Arbitrator that a 30 day suspension is a corrective and proper disciplinary action for his ineptness and poor conduct on late case of the dead deer." (Case of a grievant who was discharged for failure to do his duty to investigate a report of an injured animal.)

Perhaps the authors of the above ought to suffer the remedy told of an English chancellor who in 1595 decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the

document—all 120 pages of it. He then ordered that the author should have his head stuffed through the hole and then be led around to be exhibited to all those attending court at Westminster Hall.

In the foregoing, I have attempted to indicate how the language of the grievance, the language of the decision, and particularly the language of the hearing may influence the arbitration process. That each of the language aspects discussed here will not be present in a given hearing is certainly obvious. However, I hope it is equally apparent that many will be and may contribute to an accurate understanding of the case and the rendering of a fair decision.

To conclude, let me draw on the well-known adage that the judicial process deals with probabilities. To the extent to which this is an accurate appraisal of the arbitration process, you who are arbitrators are betting men and women, betting that you can gather the accurate facts, determine what was and is now meant by the parties, and fashion the best possible decision in a timely manner. I submit that with language playing such a vital role, any movement of the probabilities in your favor is to your advantage as arbitrators, to the advantage of the parties, and to the advantage of arbitration in general. Let me leave you with the suggestion that a more critical sensitivity to language and its role in the arbitration process will have immediate payoff.

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CHAPTER 3

THE DECISIONAL THINKING OF JUDGES AND ARBITRATORS AS TRIERS OF FACT

EDGAR A. JONES, JR.*

I.

It has seemed appropriate to the Academy that we mark the twentieth anniversary of the Supreme Court's *Trilogy,* establishing arbitration as a unique federal forum for labor-dispute resolution, by undertaking to examine what judges and arbitrators may have learned in their respective roles which may be of value to each other's understanding of decision-making, particularly as triers of fact in labor-dispute situations. It is important to do so because of the rapid evolution of disputes that are of overlapping and common concerns to judges and arbitrators. We hope to start a process of better understanding of collective bargaining, including grievance handling, among the judiciary, and we are confident of better educating ourselves about our common professional responsibilities as triers of fact. Judges and labor arbitrators increasingly are coming across each other's footprints in the records before them. Courts and arbitrators now hear cases in various stages procedurally and substantively in their respective forums that have arisen out of identical circumstances and which directly or indirectly involve such matters as discrimination (race, sex, ethnic, religious, etc.), the duty of fair representation by unions, and the obligations created by various statutes such as the National Labor Relations Act, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the like, as interpreted and enforced by regulatory administrative agencies.

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Interesting questions occur about the nature and kinds of decisional thinking that go into judicial and arbitral resolutions of these disputes. Some are:

> Do some or all of these problems, professionally viewed, look different to judges than they do to arbitrators?
>
> Are different thought-processes involved in their procedural or substantive resolution when judges think them through to decision than when arbitrators do?
>
> Do judges and arbitrators react differently to the commonly experienced necessity of saying the "yes" or the "no" in situations in which the reconstruction of disputed events—"the facts"—cannot be done with assurance of accuracy?
>
> Do they cope differently with uncertainty in the face of the necessity of decision?
>
> Do the trial judges and labor arbitrators, as triers of fact, think decisionally in different ways than do appellate judges?
>
> Are there functional differences among these three sets of decision-makers—trial and appellate judges and labor arbitrators—stemming from significantly different perceptions of the responsibilities involved that evoke (or should evoke) different responses to identical circumstances?
>
> Do triers of fact, or judges and arbitrators, differ as decisional thinkers, some functioning intuitively, others cerebrally, in their approaches to the conduct of hearings and the resolving of the disputes submitted to them?

These questions and others like them have been explored in four study groups for the past several months, in Chicago, Los Angeles, New York, and Washington. The original design was to bring together a district judge, a circuit court of appeals judge, two arbitrators (one a lawyer by education, one not), and a union and a management representative. The usual vagaries of life somewhat upset the routine, but all four groups worked industriously and with some enjoyment. Each study group was supplied with a syllabus of fact situations prepared by four stout-hearted members of the Academy (Alleyne, Britton, Levin, and Murphy) in each of several problem areas commonly encountered by federal judges and arbitrators; broadly covered were problems of procedure, discrimination, fair representation, unfair labor practices, and safety.[1]

Kalven and Zeisel, in their study *The American Jury,* remark "what the American law has found to be an endlessly fascinating topic: the decision-making of judges."[2] But those judges who

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[1] *See* Chs. 4–7, *infra*

[2] Kalven and Zeisel, The American Jury 11 (1966).

have preoccupied legal writers and others have almost always been appellate judges. It is puzzling that this undoubted interest has not long since resulted in extensive examinations of the decisional thinking and conduct of the considerable variety of triers of fact that function in the adversary setting of our justice system. There are the federal and state trial judges who in bench trials, now more numerous than jury trials in both civil and criminal proceedings, perform their reconstructive tasks without the aid of a jury. There are other triers in various regulatory agencies, like those that administer our labor laws, the five members of the National Labor Relations Board, themselves triers of fact once-removed, and the 100 administrative law judges who are its first-resort triers of fact. And, of course, there are hundreds of labor arbitrators throughout the country deciding many thousands of disputes each year in a final and binding manner. What rich and untapped lodes these are, laden with social information about decision-making and disputes; yet they remain relatively untouched in the culture around us by the curiosity of researchers!

This afternoon and tomorrow afternoon there will be four challenging papers and panel discussions of some of the decisional problems encountered alike by courts and arbitrators relative to unfair labor practices, safety issues, discrimination, and fair representation. Throughout these two days we are hoping to open areas of interest and concern for your further reflection. That then is essentially a statement of the rationale and format of our program.

II.

My other undertaking at the threshold of our discussions of decisional thinking is to draw attention to some underlying aspects of the functioning of triers of fact.

Our inquiry commences in the constant shadow of one unyielding, always pressing reality of which each trier of fact, whether judge or arbitrator, is constantly mindful. That is *the necessity of decision.* Fortunately, it is a hurdle very often readily taken in full sprint without pause. But how triers think decisionally will not begin to be grasped unless one first comes to grips with the psychology of the undecided case. Having already defied sporadic attempts at decision—at the desk, in the bathroom, at the airport, on the airplane (before and after martinis) —this record has now attained the durable proportions of un-

pleasant omnipresence. Uneasy recognition, springing from prior experience, acknowledges its considerable promise for dislocating the stride and rhythm necessary to clear those other decisional hurdles that can be seen ahead (the hearings have already been held).

This brings us to a second reality that is also well known to experienced triers of fact as a recurrent, albeit unwanted, phenomenon. Curiously, it has remained unmentioned in the extensive literature about how judges decide cases. This is *the dilemma of irresolution.*

When these two realities in the life of the trier of fact come together, the necessity of decision in tension with the dilemma of irresolution, that conjunction presents an increasingly unpleasant situation for the trier thus beset; at the same time it is an intriguing one for those who are interested in understanding the decisional thinking of judges and arbitrators.

This is not the case, however, of the irresistible force meeting the immovable body. The irresistible force—the necessity of decision—will not be denied; the decision must and will be made short of the resignation or recusal of the trier of fact. The dilemma of irresolution is a transient condition.

But how does that change transpire? How does a trier make the difficult passage from doubt and uncertainty to conviction about what happened and the consequent decision?

It is 50 years since Judge Jerome Frank unsettled the thinking about the thinking of judges in his book, *Law and the Modern Mind.* Then in 1949 he published his *Courts on Trial.* It was Frank —attorney, law professor, federal administrator, federal court of appeals judge—more than any other of our legal writers who emphasized "the transcendent importance of the trial judge"[3] in the administration of justice as the court of first instance, the trier of fact, who establishes the history of the dispute. In our governmental system of justice, the federal and state appellate courts, intermediate and supreme courts alike, must exercise their duty of review in each case relative to a trial or hearing record made either by or under the aegis of a trier of fact. Appellate courts in civil litigation do not casually undertake to rewrite that record by reinterpreting the transcript of testimony presented before the trier of fact. Yet it does occur, and when

[3]Frank, Courts on Trial 271 (1949).

it does, the conceptual fulcrum for overturning the trier's findings is the phrase, "substantial evidence," thus: "the decision of the trial court [or the Labor Board, or the arbitrator] is not supported by substantial evidence in the record taken as a whole."[4]

Yet, to paraphrase Pilate, what is evidence? This is how Judge Frank would have answered Pilate:[5]

> "The facts as they actually happened are . . . twice refracted—first by the witnesses and second by those who must 'find' the facts. The reactions of trial judges or juries to the testimony are shot through with subjectivity. . . . [T]he facts as 'found' by a trial court are subjective.
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> . . .
>
> "Considering how a trial court reaches its determination as to the fact, it is most misleading to talk as we lawyers do, of a trial court 'finding' the facts. The trial court's facts are not 'data', not something that is 'given'; they are not waiting somewhere ready-made, for the court to discover, to 'find'. More accurately, they are processed by the trial court—are, so to speak, 'made' by it, on the basis of its subjective reactions to the witnesses' stories. Most legal scholars fail to consider that subjectivity, because, when they think of courts, they think almost exclusively of upper courts and of their written opinions. For, in these opinions, the facts are largely 'given' to the upper courts—given to those courts by the trial courts."

Yet even so perceptive an observer of the trial courts as was Frank did not recognize the existence and profound decisional import of the dilemma of irresolution that triers of fact encounter from time to time and not infrequently in deciding whether to say the "yes" or the "no" to the claimant. That dilemma has its source in the commonplace among experienced triers of fact that persons who witness or participate in events, and then later become embroiled in a dispute of some sort about the events, must be regarded as potentially unreliable reconstructors and recounters of what has happened.

Initial perceptions, storage in memory, later recalls, re-sortings and re-storages in memory, and finally their ultimate recounting under stress as testimony in an adversary proceeding, comprise the successive stages of witnessing in each or all of which there may occur a loss or distortion of the capacity to testify accurately. No scientific method has yet been devised to

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[4]*See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 Syracuse L. Rev. 635, 645 (1971).

[5]Frank, *supra* note 3, at 22–24.

extract coherence from the jumbled state of mind of an honest witness. Triers of fact know all of that. They well realize that they have no superhuman, radar-like scanning apparatus with which they can reconstitute the unreliable accounts of witnesses into reliable coherence; triers are locked into the same infirmities of the human situation as everyone else. They must do their work as effectively as they can within the limitations that unreliability imposes.

We may say that there are three sets of "facts" or circumstances that may be said to radiate from each litigated dispute.

The first set comprises what we may call *the honest-to-God facts.* It is what actually did happen, the circumstances out of which arose the dispute. As unsettling as its acknowledgment may be, this earlier known-but-to-God reality is frequently—many would say usually, some would say always—unreconstructible with the assurance of accuracy. It is essentially unknowable in the sense that it cannot be objectively verified. That is a basic trier truth that is central to an understanding of decisional thinking of triers of fact. It is also quite unsettling for many triers to accept as an accurate portrayal of their states of mind in frequent decisional situations; so also may it be for the disputants and their advocates. Unsettling as it may be, reality it remains.

The second set of "facts" we may call *the perceptual facts.* It is comprised of the trier's evolving and changing perceptions of the existing situation as it unfolds during and after the hearing and up to the moment of execution and submission of the decision. It includes the trier's views of the nature and quality of the activities of the respective disputants as they portray how it *was* prior to and during the dispute, and how it *is* as they conduct themselves during the hearing. This second set of "facts" also includes whatever perceptions may occur to the trier about the social significance of their activities in their communities.

The third set of "facts" we may call *the facts as found.* It is the trier's final reconstruction of what he says had happened. It may or may not conform to the first set, *the honest-to-God facts.* Neither the trier nor anyone else on this earth is ever likely to know if it does or does not. This third set of "facts" is the trier's supposition, a montage of hoped-for rationality and best guesses, a collection of likelihoods that must remain hypothetical because it will rarely be subject to verification. It is quite unlikely that this construct of the trier will later ever be confirmed or disproved by postdecision events or discoveries.

As Chief Justice Roger Traynor of California has observed with customary felicity:[6]

> "The problem is that the facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past back to life. The judicial process deals with probabilities, not facts, and we must therefore be on guard against making fact skepticism our main preoccupation. However skillfully, however sensitively we arrange a reproduction of the past, the arrangement is still that of the theater. . . . The most we can hope for is that witnesses will be honest and reasonably accurate in their perception and recollection. . . ."

In the third of his lectures on "The Nature of the Judicial Process," assessing the role of the judge as legislator, Chief Judge Benjamin Nathan Cardozo asserted that in "countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps."[7] That evidently continues to be a valid empirical statement of the experience of appellate judges who sit on the state and federal courts and perform the functions of our courts of last resort.[8] The law that is "so clear," however, may only be so viewed because in each of those many cases a trier of fact as the forum of first instance has already established the essential foundation on which must be built the decisional conclusions and which then also becomes the basis for assessing their validity. That foundation, of course, is assembled from the trier's findings of "fact." Far more often than not, those findings must be drawn from a welter of conflicting testimony. So it is an equally valid empirical observation that, to use Cardozo's numeric, in countless contested proceedings—arbitrations and trials—the reconstruction of events becomes so enmeshed in conflicting testimony and contention that a person who did *not* experience some measure of doubt about what the reality of it all must have been would simply not be functioning in a rational manner.

Yet no matter the extent of the difficulty in thinking about how to resolve a litigated dispute, the trier confronts the necessity to reconstruct the events from which the dispute has emerged with the predominant thought, at least initially, of "what happened?"

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[6]Traynor, *Fact Skepticism and the Judicial Process,* 106 U. of Pa. L. Rev. 635, 636 (1958).
[7]Cardozo, *The Nature of the Judicial Process.*
[8]Clark and Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition,* 71 Yale L.J. 225, 270 (1961).

There are two aspects of "what happened," and we would expect an experienced trier to be sensitive to each. First, of course, is the obvious concern to put together as rational a reconstructive account, one that is as close to the past reality as is possible, of the conduct both of the disputants and of the other persons and institutions who have become involved in this dispute that has been brought before the trier.

The second aspect of "what happened" involves the relational and social contexts of the dispute. How may what they did be said to affect their own continuing relationship and, in turn, those around them who are affected by it? How might their conduct be evaluated? This latter line of inquiry raises the import of the near-term and the long-term political, economic, psychological, and moral factors that may appear to the trier to be implicated by the alleged conduct and by its impacts on those directly and indirectly caught up in the dispute.

While it may be helpful to separate these aspects of "what happened" for purposes of analytical identity, it is obvious that they must constantly intermingle; the perceptions of their relative significance are likely to shift about in the trier's actual thought-processes as the hearing proceeds and as the reconstruction of what happened gradually takes shape in the trier's mind. The growing sense of how the events probably occurred, of who said and did what, continuously changes the trier's assessments of the role of each involved and of the social setting in which the events occurred. Recognition of this kaleidescopic phenomenon that occurs in the linear course of a trial or a hearing is why an experienced trier is wary during a proceeding of leaping to conclusions prematurely.

It is helpful to try to identify the general decisional situations that are encountered by triers of fact. There are four, each of which will at one time or another be experienced as a hearing proceeds, and in some difficult cases a trier will run through all four of them before deciding the case.

First, there are situations in which *there is no doubt in the trier's mind either about what happened or of how the dispute should be resolved,* and this regardless of whether doubt might be experienced by anyone else.

Second, are those situations in which *the trier remains in doubt about what happened but has somehow developed a sense of assurance about how the case should be decided;* perceptions of its relational or social setting may or may not engender a sense of how the dispute might properly be resolved.

Third, are the situations in which *the trier has become convinced about what has happened, but remains in doubt of how properly to resolve the dispute.*

Fourth, are those instances in which *the trier is truly perplexed*—in doubt about what happened, unsure of how a decision one way or another would or should be affected by perceptions of the social or relational setting of the dispute.

Unfortunately, there are no empirical data available that indicate the relative incidence of each of those four situations in the experience of triers of fact; nor do we know whether they are experienced alike by labor arbitrators as by trial or appellate judges; nor how those two kinds of judges may differ one from another. Impressionistic accounts remain pretty much the basic resource for those who seek to understand the decisional thinking of triers of fact. This dearth of information provides the occasion, even the necessity, for public self-reflection by triers of fact.

My own impressions have been formed from experience as a journeyman arbitrator out on the circuit of hearings, as an active member of this Academy savoring collegial conversations with my peers about what they are thinking and doing, and from trial and appellate judges with whom I have discussed these matters.

I have catalogued those four decisional situations in a descending order of their relative occurrence. Thus the consensus I perceive is that there are more trier situations of the first sort than of each of the other three combined. That first situation is the one in which, at some point during or after the hearing, reflection has dispelled whatever doubts may have flickered back and forth in the trier's mind as his attention ranged across testimony, exhibits, and arguments about what had happened and of how the case should properly be decided.

What is most interesting, however, is that in the other three of these four situations, doubt is the uninvited and definitely unwelcome companion of judgment.

The second situation is that in which the trier remains in doubt about what happened, but nevertheless feels he can properly decide the matter. He has met but has overcome the dilemma of irresolution. Accurate reconstruction of the events—at least of those that appear material to the issue—seems unlikely, even impossible, with any assurance of achieving a reasonable facsimile of who said and did what, in what sequence, and with what significance. But there arises at some point in the

course of the trier's decisional thinking, from some source, a sense of assurance of what the proper decision should be. In whole or in part, this sense may be the conscious or unconscious product of the trier's intuition, however that mental process of the trier may have been programmed by education and experience. It may also owe its genesis, in whole or in part, to the trier's perceptions of the relational dimensions of the dispute: what will be the foreseeable effects of this or that finding of fact, or of this or that decision, on the interests and relationships of the disputants and of those others directly or indirectly caught up in their dispute?

The third situation is that in which the trier feels satisfied about what has happened, but is nonetheless irresolute about how to decide the case. This may move the trier to thinking more consciously about those judgmental elements that might be drawn from his perceptions of the relational dimensions of the dispute and perhaps from the broader social environment in which function the disputants and the others involved. Are there considerations of public policy that may move the otherwise irresolute balance of mind toward an inclination to decide in one way or the other? At the core of the trier's dilemma—and a hard and undigestible lump it is—preventing that state of irresolution from becoming chronic is the necessity for decision. How may the trier's judgment then be formed solely from a record that prompts irresolution, unless by broadening the focus of decisional thinking to include relational and, if still necessary to break the deadlock, societal factors?

And how much more is such resort necessary and foreseeable in the fourth situation which, fortunately indeed, I am led to believe is relatively rarely experienced (although I have known it)? That is the painful situation in which the trier cannot figure out what truly happened, or what to do about it. What is she to do?

We have at this point, then, identified the four general decisional situations experienced by triers of fact and have found three of them to involve the trier with the necessity to cope with problems of doubt and uncertainty, her will to decide enmeshed in the dilemma of irresolution.

This dilemma seems to plague experienced and inexperienced triers alike, even though the former may have learned to live with it (or efface it) with a countervailing measure of self-patience. Persistently prodding the irresolute trier of fact—

always, impatiently, unpleasantly—is the fretful, stubborn necessity to reach a decision within certain time constraints.

In contemplating this irresolution phenomenon, there is a certain immediate disinclination to accept irresolution as a recurrent and significant fact of a trier's life. There is, if you will, a certain amount of balking at the notion that an intelligent, experienced judge or arbitrator actually does, or even could, have recurrent encounters with irresolution. It almost seems to be viewed at first to be so counter-occupational as to call into question the very competence of such an irresolute decision-maker.

There is also a certain degree of misplaced, even ingenuous, confidence in the ancient legal idea of "burden of proof" as an instrument for overcoming decisional irresolution. If the trier is pestered by irresolution, why all he has to do is invoke the rationale of the burden of proof to avoid any further fretting over the case. Yet one should pause right there. To conclude that the burden has not been satisfied is itself a judgmental act. What finally prompts it? Just plain exasperation? Failure to work out a reconstruction with which one's conscience may live? Surely it is obvious that the legal rubric is not a mechanical formula that closes off further reflection by the trier. Once a trier has heard, observed, and read a welter of conflicting assertions about what has happened, and how it should be viewed, what are the ingredients of judgment that *now* prompt the conclusion that the burden of ultimate persuasion has not been borne, or has been borne, by the party who is required to bear it or fail? How does that judgmental act differ qualitatively from the inquiry: "Shall the answer be 'yes,' or 'no' to the claimants?" Is it not evident that whatever may be the combination of judgmental factors that may combine to prompt a trier to answer the latter question one way or the other are also implicated in resolving the burden inquiry itself?

May it be said that the durability and pervasiveness of reliance on the concept of burden of proof manifest a felt need by triers of fact in an irrational situation to achieve rationality in their decisions? The burden reasoning is a rationale, after all, and there is a certain common-sense appeal to the notion that the moving party ought to be able to make out its case or fail. Is not resort to the burden rubric, in a sense, a rebellion against the irrational incoherence of a trial or hearing? Does it not withdraw the trier from the effort to achieve justice in the circumstances?

Yet do we not also require of our triers their best efforts to reach a rational decision, in contrast to an arbitrary one based on impulse rather than reason?

Since that last assumption is obviously so, a double irony emerges. The first irony is that the invocation of the burden of proof rationale itself may mask from the trier the actual subterranean reasoning, be it "intuition" or some below-the-level-of-awareness analytical process, that prompts the trier's negative to the claimant. To that extent, the trier's reasoning is sheltered both from the corrosion of self-criticism and from reversing review. Skeptical appraisal is smothered beneath that apparent—but not real—process of rationalization. The second irony is that an impatient invocation of the "burden" rationale by a vexed trier as an escape from irresolution may actually frustrate an impending but untimely forestalled rational resolution of the dispute, despite continuing doubt about important details, by shortcircuiting it. Common experience suggests that persistence in mulling over the record, irksome though it may be while doubt remains, has often resulted in breakthroughs of insight that make possible rational dispositions of cases on their merits.

In our culture, the conscience of the trier, conditioned by centuries of community and professional expectation, demanding rationality in decision-making, is offended at the self-perception of coin-flipping sorts of guesswork or the manipulations of bias in decisional thinking and justification. Professional criticism constantly reinforces that expectation, deploring any perceived lapses from the rational processes of decisional thinking, condemning them as "unprincipled" or "irrational."

Thus is it common for courts to assess an arbitrator's award to determine if it appears "unfounded in reason"?[9] It is said to be "the duty of the courts to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement."[10] An award is enforced because the arbitrator's determination "was not irrational."[11] One court would uphold an arbitrator's findings of fact if it is even "a barely colorable justification for the outcome reached."[12] Another

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[9] *Teamsters* v. *Coca-Cola Co.*, 613 F.2d 716, 718, 103 LRRM 2380 (8th Cir. 1980).
[10] *Detroit Coil* v. *Machinists*, 594 F.2d 575, 579, 100 LRRM 3128 (6th Cir. 1979).
[11] *Board of Education* v. *Hess*, 49 N.Y.2d 145, 400 N.E.2d 329, 331 (1979).
[12] *Andros Compania Maritime, S.A.* v. *Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978).

court is willing to settle for "any rational way."[13] A federal district judge, "frankly confused by the arbitrator's reasoning," vacates an arbitrator's award because it "lacked fundamental rationality."[14] Another judge, aghast, explains that "The Court does not believe that an honest intellect could reach the result" reached by this arbitrator.[15]

That ingrained sense of need to achieve rationality makes particularly uncomfortable the grip of irresolution about the details that comprise the events of the dispute. There is, I suggest, an equally ingrained response mechanism inclining irresolute but rational triers to widen the scope of decisional thinking toward what they may accept as a rational decision. That leads them, as I see it, *first,* to an assessment of the overall situation of the disputants in terms of how potential solutions that might resolve this dispute may alternatively affect them, and *second,* to an inclination to adopt that resolution among the options which seems most rational, given the continuing doubts about the prospect of accurately reconstructing the circumstances.

Before exploring that idea further, we should observe yet another irony that typically emerges at this point in discussions of the dilemma of irresolution. This reach for rationality in the process of overcoming the trier's irresolution, by conscious effort or instinctively, however it may be, is itself perceived by some to be "unprincipled," an arrogation of power to order the lives of others. That concern is surely misplaced; we are dealing with triers rationally attempting to resolve doubts about the accurate reconstruction of the events. These thought-processes come into being in the effort to find a way out of the evidentiary maze of loose ends so as to arrive at a decision that may be regardable as "rational" *first* by the trier in conscience, *second* by the trier in anticipation of the judgment of his peers, and *third* by the peers themselves. Surely that is the antithesis of arrogance.

How then may one reasonably expect a trier to cope with the dilemma of irresolution when encountered? Essentially, as I conceive it, the necessity of decision in a situation of irresolution

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[13]*Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969).

[14]*Empire Steel Castings Inc.* v. *United Steelworkers,* 455 F.Supp. 833, 836 99 LRRM 2728 (E.D.Pa. 1978).

[15]*Mistletoe Express Service* v. *Motor Expressman's Union,* 443 F.Supp. 1, 6 (W.D.Okla. 1975).

produces a mental process of what we may think of as scanning. Sometimes this scanning process occurs quite consciously, but more often, as I sense it in myself and others, it moves at the lowest level of conscious awareness or below it. Whether we see it as intuition or analysis, it is an acute mental process. Thus it is not uncommon for triers of fact to remark how they have puzzled unsuccessfully over what seemingly ought to be connectable loose strands of circumstantial evidence that are related to *something* in the record, but which nonetheless remain stubbornly resistant to being rationally tied together. This uncomfortable state of mind may persist for an extended period; one turns away to work on other matters, perhaps for a stretch of days, only to awaken some morning abruptly to realize that all of those frustratingly dangling ends somehow have become connected; the "yes" or the "no" has become obvious.

In this scanning process, as I see it, the mind works in a much more sophisticated and complex manner than computers have yet been programmed to accomplish, but in much the same manner. It calls up and sorts through and assesses all the direct and indirect utilities and disutilities that appear to be implicated by the alternative conclusions about what might have happened, and of what may be the various courses of reasoning available whereby to dispose of the dispute. As this decisional scanning process seems to be experienced, in one sequence or another, orderly or at random, perhaps variously in differing settings, the mental process inventories and evaluates the positive and negative interests at stake. That is to say, it reacts to the evident pronounced strengths or weaknesses among the following interests, ceasing the search entirely when conviction supplants doubt along that spectrum of thought. In order of priority they are, *first,* the disputants themselves; *second,* others who are, or will evidently be, affected by the dispute and by whatever may be the alternative ways by which it may be resolved; and *third,* the persons, institutions, and social processes that comprise the surrounding community—in short, the social context of the dispute.

This three-dimensional scanning process of inventorying and evaluating, I believe, tends to deflate and overcome the significance of the felt areas of doubt and indecision. This it does, as I conceive it, by filling in the gaps of irresolution with what are themselves justifiable acts of judgment that are fashioned from the perceptions of the trier of the benefits and detriments—the

utilities and disutilities—to be anticipated by the various resolutions that seem possible, given the alternative reconstructs of what happened.

Perhaps this description—some might call it a model—is more poetic than scientific (it surely is not the latter), but I believe it is realistic. Interestingly, however, there is some recent theoretical support of my inferences. In their 1979 book, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment,*[16] Professors Irving Janis and Leon Mann extracted from the extensive literature on effective decision-making seven major criteria which they believe can be used to determine whether decision-making procedures are of high quality. They deem it "plausible" to assume that decisions that satisfy these seven "ideal" procedural criteria will have a better chance than others of attaining the decision-maker's objectives and of being adhered to in the long run.[17] Although the authors do not focus at all on the decision-makir g of judges or arbitrators, it is interesting to consider the extent to which triers of fact would be apt to adhere to these seven "ideal" procedures. My own sense is that a trier of fact who does *not* encounter the dilemma of irresolution in resolving a dispute is quite unlikely to follow any of the seven procedures; yet the trier who is caught in the enervating grip of irresolution is very likely to resort in some manner, however casually or thoroughly and whether above or below the threshold of awareness, to at least six and perhaps (at the point of remedy) even to the seventh. Janis and Mann set the criteria forth as follows:[18]

> "The decision maker, to the best of his ability and within his information-processing capabilities,
> "1. thoroughly canvases a wide range of alternative courses of action;
> "2. surveys the full range of objectives to be fulfilled and the values implicated by the choice;
> "3. carefully weighs whatever he knows about the costs and risks of negative consequences, as well as the positive consequences, that could flow from such alternatives;
> "4. intensively searches for new information relevant to further evaluation of the alternatives;
> "5. correctly assimilates and takes account of any new information

[16]Janis and Mann, Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment (1979).
[17]*Ibid.*
[18]*Id.*, at 11.

or expert judgment to which he is exposed, even when the information or judgment does not support the course of action he initially prefers;

"6. reexamines the positive and negative consequences of all known alternatives, including those originally regarded as unacceptable, before making his final choice; [and]

"7. makes detailed provisions for implementing or executing the chosen course of action, with special attention to contingency plans that might be required if various known risks were to materialize."

Of the significance of the seven criteria, the authors assert that, "Our first assumption is that failure to meet any of these seven criteria when a person is making a fundamental decision (one with major consequences for attaining or failing to attain important values) constitutes a defect in the decision-making process. The more defects, the more likely the decision maker will undergo unanticipated setbacks and experience postdecisional regret."

It seems reasonable to expect that more decisions will be reached in the process of overcoming the sense of irresolution by being responsive to the competing interests of those most directly involved in the dispute than of those less directly affected by it. (An inherent difficulty, certainly, is that those interests themselves must be identified and assessed in this same setting of inadequate information.) It would seem thus that most doubts would be resolvable—that is, final decisions realized—within the parameters of that first of the three dimensions of concern, that is, limited to the disputants themselves. Even this first dimension, however, is once removed from the confines of the precise issue that was initially submitted by the disputants for the "yes" or the "no" of final decision.

It seems reasonable to assume that most, if not all, triers of fact would readily subscribe to the proposition that they are duty-bound by statute, contract, or commission of office to restrict themselves to deciding the precise issues submitted to them by the disputants. For that matter, all would likely agree that no writ has been entrusted to them as triers of fact to move as they will through the equities of situations, dispensing "Justice" as seems most appropriate to them in the circumstances. Constraints of doctrine and precedent exist for courts; constraints of contract, custom, and expectation exist for labor arbitrators. Those constraints are expected by both groups, no less than their peers and critics, to tether their judgment closely to the case at hand and to do so rationally.

If all of this circumscription is universally accepted, as assuredly it is, how could a trier of fact be justified in broadening the focus of decision to take into view the impacts on the existing and future relationships of the immediate disputants? Or broader yet, the effects on those who may indirectly but significantly be affected by one decision or another? Or broadest of all, of how values of the surrounding communities of interests—industrial and social—are apt to be advanced or retarded by one decision or another among the various options whereby the submitted issues might be decided?

But there is a third stubborn reality in addition to the *necessity of decision* and the *dilemma of irresolution.* That is the *thrust for rationality* in deciding disputes. In our insistence on rationality, we demand that the trier *not* resort to tea leaves, coinflips, tarot cards, ouija boards, or the roll of the hot and cold dice. Where then lies the rational way for the trier out of the dilemma of irresolution? The central thesis here is a truism: the trier must, one way or another, *think* his way out of it by resorting to whatever resources may rationally be available. This is not, therefore, a trier arrogating the role of omniscient Providence. This is an indecisive but intelligent person who must in any event say the "yes" or the "no" to a claimant, a trier of fact who feels compelled to be rational in the process, one who is groping for a rationale of decision that may be acceptable as fair and reasoned alike to personal conscience, to professional peers, and, the trier hopes, to the disputants.

The more that sophistication develops in regard to the processes for finding facts in adversary proceedings—the existence and effects of conflicting and inadequate testimony and exhibits —the more should we see developing a willingness to think through the implications to the decisional thinking of triers of fact (and appellate tribunals) and to the justice systems within which they function, of the ineradicable presence of uncertainty that encumbers their efforts in many cases to reconstruct the events from which each dispute has emerged and to decide the dispute rationally.

CHAPTER 4

DECISIONAL THINKING

CHICAGO PANEL REPORT*

ALEX ELSON, CHAIRMAN

Introduction

Our mission was to study the decisional process. What made the venture unique was a pioneer effort to pool the knowledge and experience of judges, advocates, and arbitrators as to how decisions come into being and how they are shaped by the institutional framework within which each of the participants operates. Our panel included two federal judges with a combined judicial experience of 25 years and many years of prior experience in active law practice; two lawyers with more than 60 years of advocacy in arbitration between them; and two arbitrators with a combined experience of 50 years.

At the outset we recognized that we were confronted with an unusual challenge—how to reduce to form and substance the amorphous subject of how cases are decided. There have been some impressionistic efforts to describe the decisional process. One of the most influential papers was the Holmes Lecture of the late Dean Harry Shulman of the Yale Law School, for many years the permanent umpire for the Ford Motor Company and the UAW.[1] But Shulman's excursion into the decisional process was incidental to a broader exposition of labor arbitration. The

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[1]Shulman, *Reason, Contract and Law in Labor Relations,* in Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1956), at 169.

few attempts using empirical research techniques have yielded some results in the field of business decisions, but otherwise have not been impressive. The design of a good research project in this area would challenge the best of researchers and is still to be done.

Aside from considering some of the relevant published materials, our study, for the most part, has been an analysis of specific substantive problems presented in the discussion outline prepared by Ted Jones, and in some judicial precedents. The primary purpose of this exercise was not to determine the correct substantive answers to the cases presented, but to expose differences in approach to problem-solving and the impact of the institutional framework on the decisional process.

Despite busy schedules, our non-Academy members gave generously of their time. We enjoyed many hours of candid, open discussion of an interesting and frequently exciting character. We cannot hope to recapture the full flavor of this experience. What follows is an attempt to summarize the varying perceptions of the decisional process and the similarity and dissimilarity in approach to decision-making by judges and arbitrators.

It should be added that the views attributed herein to the judges and arbitrators on the panel are of a tentative character. They do not necessarily reflect how matters will be decided by them in specific cases that may come before them. The right to repudiate or modify their views herein stated is expressly reserved.

I. The Arbitrator's Perception of the Decisional Process

We begin with the arbitrator's perception of his role. His perception depends on his view of the nature of the collective agreement and what the parties' expectations are of grievance arbitration. Two classic positions have been taken. The first is that the arbitrator functions as a problem-solver and as an essential instrument in completing the collective bargaining process. It is based on the premise that the parties cannot by their agreement anticipate all of the problems that will arise during the term of their agreement. Moreover, in order to reach agreement, contract provisions may be left purposely vague. The role of the arbitrator as the final voice in the grievance procedure is

to fill in these gaps of understanding. Arbitration awards and grievance settlements involve, therefore, not only administering the agreement, but completing the agreement. In the process, the arbitrator may rely extensively on mediation rather than imposing decision on the parties as would a judge.[2]

The opposing position is that the arbitrator's role should be more like that of a judge. This position reflects the view that the collective agreement governs and transcends in importance the general relationship of the parties—that the agreement sets forth the rights and obligations of the parties much as a statute does. The arbitrator accordingly is bound by the agreement and must carry out the parties' intention by giving effect to the language of the agreement. This approach puts the burden on the parties to resolve their fundamental problems through negotiations instead of depending on the skill of the arbitrator.[3]

These differences in basic approach are reflected in a series of issues: To what extent should formal rules of procedure apply? To what extent should exclusionary rules such as the parol evidence rule be applied? Does precedent or stare decisis have a place in the decisional process? What about the role of "due process"? What about the right to reasonable notice, the right to be confronted with adverse witnesses, and the right to be apprised in advance of evidence and argument? Should procedural rules designed to protect constitutional rights of persons accused of crimes be available to protect the individuals

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[2]The leading exponent of this position was George W. Taylor, labor economist and chairman of the War Labor Board during World War II. Taylor, *Effectuating the Labor Contract Through Arbitration,* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings, National Academy of Arbitrators 1948–1954 (Washington: BNA Books, 1957), 20–41. Shulman similarly supported a broad view of the arbitral process, although not as extreme as Taylor's. In his role at Ford, he made his own investigation when not satisfied with a presentation. He freely engaged in ex parte discussions of grievances with all of the interested parties and occasionally mediated disputes. Shulman, *supra* note 1, at 197. These views were reflected by Justice Douglas in the *Trilogy* in this dicta in *Warrior & Gulf:* "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . ." The collective agreement covers the whole employment relationship. *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578–79, 46 LRRM 2416 (1960).

[3]This view was reflected in the first Code of Ethics of the American Arbitration Association which described the office of arbitrator as being of a judicial nature. 1 Arb. J. (1946). Former Senator Wayne Morse, a former member of the War Labor Board, took an unqualified position: "It is my view of arbitration that an arbitrator is bound entirely by the record presented to him in the form of evidence and argument at the arbitration hearing. His job is the same as that performed by a state or federal judge, called upon to decide a case between party litigants." Smith, Merrifeld, and Rothschild, Collective Bargaining and Labor Arbitration (Indianapolis: Bobbs Merrill, 1970).

involved in disciplinary actions? Should the arbitrator receive or give weight to evidence of past misconduct, or evidence secured by search of the person, search of lockers, or obtained by electronic surveillance?

The extensive literature reflecting debate on the nature of the arbitrator's role, some of which we have reviewed, presents a somewhat misleading picture of the realities of the world of arbitration today. Shulman and Taylor spoke from their experience as impartial umpires with tenure. They came into arbitration in the period of its most rapid growth following World War II. The parties were relatively unsophisticated and looked for leadership from experienced, inventive, and gifted labor experts. They not only tolerated, but welcomed the problem-solving approach.

But the bulk of arbitration decisions at that time and today are the product of ad hoc arbitrators. Arbitrators called in to decide particular cases, with few exceptions, limit their role to decision-making. Today, even in the more permanent types of arbitration arrangements, arbitrators function primarily as decision-makers. The parties are far more sophisticated and in many mature relationships know what they want from the arbitration process. Current collective agreements reflect several generations of development and have fewer ambiguities.

The view of the arbitrator members of the panel is that an arbitrator should function in accordance with the parties' expectations. We have found that with few exceptions the parties want a decision. They have between them exhausted the possibility of settlement. They come to arbitrators to decide the hard cases they are unable to resolve on the merits, or for some meaningful "political-strategic" reason where a decision by the arbitrator can better serve an institutional need of one of the parties than a settlement on the merits.

Occasionally, arbitrators have been brought into situations where the grievance procedure has broken down and the parties cannot get off dead center. Here the parties, to get rid of a backlog of grievances, will expressly authorize mediation in addition to arbitration. With willing parties, the two functions can be combined successfully.

Since the parties know in a great majority of cases what they want, the arbitrator's role should be guided accordingly. He is, as is so often said, a creature of their contract. The parties have not signed a blank check when they agree to arbitration. The

arbitrator's decisional authority is placed within bounds. The parties generally set limits on arbitral authority in the collective agreement. The most common provision expressly states that the arbitrator "should not add to, subtract from, or vary the terms of the agreement."

Such contractual restraints on arbitral authority are frequently referred to by arbitrators in awards rejecting contentions inviting them to consider matters outside the collective agreement. A reference to the contractual limits is not merely a crutch for an award. Most arbitrators are acutely sensitive to the fact that it is the agreement which is controlling and will go with the agreement where its meaning is unambiguous even though the resulting award appears to be harsh.

There is a substantial range of arbitral discretion in the interpretation of agreements when a disputed provision of the agreement is ambiguous or where the agreement is silent. But even in such cases the arbitrator is not free to shoot from the hip. To the maximum extent possible, his award must find support in the agreement, from established principles of contract construction or from such established sources as the collective bargaining history or the past practice of the parties.

The most effective restraint on abuse of arbitral authority is the expendability of the arbitrator. This is a unique aspect of arbitration. The arbitrator is chosen on a case-by-case basis, for a period of time, sometimes euphemistically described as permanent. The selection of the arbitrator, his performance, and his award must be acceptable to the parties.

Acceptability is an essential protection in a system of private law that confers finality to awards, and the parties have properly regarded arbitrators as expendable. Arbitrators are acutely aware of their expendability and realize that they will be judged by their performance. Although the acceptability standard is widely accepted, some serious misgivings are expressed later in this report by one of the panel members (see page 83, *infra*).[4]

Another brake on arbitral discretion is judicial review, but the scope of review is exceedingly limited by the *Steelworkers Trilogy*.[5]

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[4]*See The Impact of Acceptability on the Arbitrator,* in Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), Ch. IV.

[5]*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97, 46 LRRM 2423 (1960). It should be added, however, that recent cases indicate a trend toward expanding the scope of review as the fair-representation concept involves greater judicial

Another limitation affecting the decisional process is the growth of external law affecting labor relations. While arbitration continues to be an area of private law, the collective agreement no longer states all the terms applicable to the employment relationship. Accordingly, the arbitrator's decision may not be the last word. The rapidly expanding body of relevant external law includes the Labor Management Relations Act, the Wage and Hour Law, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, ERISA, ADEA, and, for the host of employers who qualify as federal contractors, the entire regulatory apparatus of OFCCP through Executive Order 11246. The debate on the proper role of the arbitrator in trying to reconcile his role as interpreter of the contract with external law has now gone on for over a decade.[6]

Alexander v. *Gardner-Denver*[7] has played a special role in this debate. In that case the Court decided to implement both the national labor policy favoring arbitration and the policy on civil rights. It permitted an employee claiming employment discrimination to pursue both his full remedy under the arbitration clause of the collective bargaining agreement and his cause of action under Title VII in a de novo proceeding in the federal court. The Court held that an arbitrator has authority to resolve only questions of contractual rights.

The Court, although not according the arbitration award preemptive status, held that it need not be completely ignored, but might be considered and weighed by the trial court. In a footnote it set forth the following factors relevant to the weighing process:

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participation. See cases cited in Appendixes I and II attached. See also *Detroit Coil Co.* v. *Machinists Lodge 82*, 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979); *Amalgamated Clothing Workers* v. *Webster Clothes*, 612 F.2d 881 (4th Cir. 1980). For a comprehensive and insightful discussion of judicial review since the *Trilogy*, see Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1978), 29.

[6]Howlett, *The Arbitrator, the NLRB, and the Courts*, in Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 67; Mittenthal, *The Role of Law in Arbitration*, in Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), 42. But *cf.* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in Proceedings of the Twentieth Annual Meeting, *supra* this note. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 97; St. Antoine, *Discussion—The Role of Law in Arbitration*, in Proceedings of the Twenty-First Annual Meeting, *supra* this note, 75, at 82; St. Antoine, *Judicial Review*, *supra* note 5.

[7]*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

(1) The existence of provisions in the collective bargaining agreement that conform substantively with Title VII, (2) the degree of procedural fairness in the arbitral forum, (3) adequacy of the record with respect to the issue of discrimination, and (4) the special competence of the particular arbitrator.

The Court went on to say that, where the arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight: "This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."[8]

Gardner-Denver rekindled the debate as to whether arbitrators should attempt to interpret and apply external law. The views expressed range from one extreme to the other.

The arbitrator may have no choice if the agreement specifically includes references to relevant statutes. But barring such provisions, our view is that arbitrators should limit themselves to the task specified by the arbitration clause—the interpretation and application of the agreement.[9] This conforms to the parties' intent. It also reaffirms the essential holding of the *Trilogy* which emphasized the arbitrator's expertise in industrial relations and the law of the shop. It also recognizes that many arbitrators are not lawyers and have no special competence in interpreting federal statutes and court decisions.

But even though most arbitrators try to stay aloof from external law, the decisional process has been substantially affected by such cases as *Gardner-Denver* and also by the *Collyer* and *Spielberg* doctrines of the NLRB considering the respective roles of the Board and of arbitrators in unfair labor practice cases, especially in cases involving the refusal to bargain.[10]

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[8] *Id.*, at 59.

[9] When implementation of the agreement is in direct violation of federal or state law or would in the light of such statutes be impractical or against the interests of the parties, the arbitrator may be well advised to refer the matter back to the parties unless it is clear that an award is essential to the parties. See discussion *infra*, p. 77).

[10] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971); *Spielberg Manufacturing Co.* v. *NLRB*, 112 NLRB 1080, 36 LRRM 1080 (1955). In substance, the NLRB has deferred taking action on complaints of unfair labor practice and refusal-to-bargain cases, where the arbitration remedy is available, and will give weight to the award if the following criteria are met: (1) prompt submission to arbitration proceedings which are "fair and regular"; (2) agreement to a binding award; (3) the arbitration decision is not clearly repugnant to the purposes of the Act. Recent decisions of the Board have sharply restricted the application of the *Collyer* deferral doctrine in alleged violations of Section 8(3) of unlawful interference with employees' Section 7 rights. *General American Transportation Corp.*, 228 NLRB 808, 94 LRRM 1483 (1977); *Roy Robinson Inc.*, 228 NLRB 828, 94 LRRM 1474 (1977). These decisions reflect the impact of *Gardner-Denver* on the

One of the chief advantages of arbitration has been the finality of awards. This factor is essential to expeditious resolution of disputes. If, despite an award, a grievant may relitigate his grievance in another forum, the parties' system of private law is frustrated. The arbitrator probably best serves the parties if he confines his award to an interpretation of the agreement, but conducts the hearing in a manner that will meet the criteria of the NLRB and the Supreme Court.

The need to comply with these criteria has influenced the decisional process. The parties as well as the arbitrator must keep these criteria constantly to the fore especially where the collective agreement contains provisions similar to statutory provisions such as clauses barring discrimination because of union activity, or because of race, ethnic origin, sex, or age. To achieve finality, an adequate record is necessary. This may require a stenographic record. Special care must be taken to observe procedures safeguarding the grievant's right, and the complaint which parallels the statute must be referred to in the evidence and in the award. The award is not likely to be the final word if the parties and the arbitrator fail to observe these criteria. The decisional process may suffer in increasing formality—but there may be no other choice.

II. The Judges' Perception of the Arbitration Process

Let us turn next to the judges' perception of the arbitration process. There are important similarities in the judicial and arbitral processes. Both arbitrators and judges operate within constraints of an institutional character. Both are engaged in adjudication. As stated by Lon Fuller, "adjudication is a process of decision in which the affected party ["the litigant" or "the grievant"] is afforded an institutionally guaranteed participation

Board. *Gardner-Denver* has also had its impact on the courts as well. In a recent decision of the Ninth Circuit, the Board was barred from honoring an arbitration award absent evidence that the issue of a discharge of a discriminatory character under the Taft-Hartley Act was submitted to or considered by the arbitrator. *Stephenson* v. *NLRB*, 550 F.2d 535, 94 LRRM 3234 (9th Cir. 1977). *Cf. Servair, Inc.* v. *NLRB*, 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979). *See also Suburban Motor Freight, Inc.*, 247 NLRB No. 2, 103 LRRM 1113 (1980) where the NLRB refused to defer to arbitration awards if unfair labor practice issues were not raised by the arbitrator, and *Sea Land Services, Inc.*, 240 NLRB No. 147 (1978) where it was held no deference is to be given grievance settlements short of arbitration.

which consists in the opportunity to present proofs and arguments for a decision in his favor. Whatever protects and enhances the effectiveness of that participation enhances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity."[11]

Courts are limited in their discretion by statutes and by stare decisis. Arbitrators are limited by the collective agreement which not only sets forth substantive limits, but by its very terms defines and limits the role of the arbitrator. Published awards provide a body of precedent from which certain arbitral principles are distilled, but, because of the infinite variety of collective bargaining agreements, do not provide a basis for decision comparable to the common law. In interpretive cases, when a prior award has interpreted the identical contract clause in a similar factual context, most arbitrators would give the prior award stare decisis effect.

The court's power in the interpretation and enforcement of contracts is far greater than that of arbitrators. This brings to the fore the cliché that has done some harm—that judges construe contracts strictly, while arbitrators play fast and loose with them. Lon Fuller concluded that the cliché was untrue and that the generalization should be reversed. He cited cases that demonstrated, in his words, "a willingness by courts to add to or subtract from the language of contracts that would seem strange indeed in labor arbitration." He went on to say, "The reason for this difference is not far to seek. . . . It [the contract] is the charter, not only of the parties' rights but of his powers as well. The courts, on the other hand, have a commission broader than the enforcement of contracts. They have, accordingly, claimed the power to interpret contracts broadly in terms of their evident purpose and to disregard certain kinds of provisions deemed unduly harsh."[12]

The judges on our panel have little difficulty in accepting the narrow scope of review prescribed by the *Steelworkers Trilogy.* They acknowledge the basic thesis of the Supreme Court that the parties have bargained for the expertise of the arbitrator and that awards should accordingly be enforced so long as the arbitrator based his conclusion on the collective agreement. Differ-

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[11]Fuller, *Collective Bargaining and the Arbitrator,* in Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1962), at 25.
[12]*Id.,* at 14–15.

ences in perspective have been disclosed in the discussion of specific cases in the discussion outline. A case which gave rise to extensive discussion is stated in the outline as follows:

> "In the course of a reduction of work force due to a recession-caused loss of business, an employer reduced six foremen to bargaining-unit classifications, thereby continuing them at work without interruption in their employment. As part of the same personnel actions, the six most junior employees in the bargaining unit were laid off for lack of work and have grieved. At the outset of the hearing, the Union contests the right of the employer which, in turn, insists upon its contractual propriety. The employer's proffer of proof makes it clear that its finances dictate that if the Union prevails, an arbitral order to reinstate the six laid off bargaining-unit employees will cause six foremen in turn to be laid off. The six supervisors are not present at the outset of the hearing, and the arbitrator is informed that neither party intends to call them as witnesses."

Discussion centered on the issues of due process and fair representation.

It was recognized that, since the foremen became members of the bargaining unit, the union had a duty to represent them as well as the junior employees they displaced. It was also assumed that the employer could be depended upon to advance the strongest case for the supervisors. Apart from the fact that the employer would be interested in defending its decision and avoiding a back-pay award, presumably the employer would strongly desire to retain the more experienced supervisors.

The judges concluded that the arbitrator should give notice of the arbitration hearing to the supervisors and presumably should permit them to participate fully in the hearing with independent counsel if they so chose. A number of reasons were advanced. First, there was a due-process consideration: that the rights of the supervisors would be determined in a hearing in which they would not be present. Second, there was a concern relating to fair representation: whether the union fairly considered the rights of supervisors in filing and supporting the grievance. Third, there was an apparent conviction that notwithstanding the basic principle established by the NLRB that the union is the exclusive bargaining agent, the union cannot be the final judge of what constitutes fair representation. Finally, there were considerations of judicial economy. It was the judges' position that if the case came before them on an action to enforce an award in favor of the junior employees and the employer and

former supervisors opposed it, they might refer the case back to the arbitrator with direction to give notice to the supervisors, if under all the circumstances there was a question whether the interests of the absent employees had not been adequately represented.

The governing issue here is how to balance the statutorily mandated right of exclusive representation given to the union against the due process rights and the statutorily mandated obligation of the union to provide fair representation for all members of the bargaining unit. Here we suspect the difference in the balancing process as between judges and arbitrators arises out of a fundamental difference in their respective perceptions of the arbitration process.

Arbitrators have had the experience over many years in handling grievances challenging company decisions to choose one employee over another in promotions, layoff, recall, overtime, and in a variety of cases involving the interpretation and application of the seniority system. Almost without exception, notice is not given to the successful, nongrieving employee, although in many cases the employee may be present. Under the judges' approach, notice would be required to the nongrieving employee in all of the situations listed. Such a requirement would result in a vast change in the arbitration process. The only parties to the collective agreement are the company and the union. If notice is given, what is the status of the employees to whom notice is given? Are they additional parties? Do they have the right of independent representation? Who should give notice? Does the standard arbitration clause which gives the arbitrator jurisdiction to hear and determine grievances and limits the arbitrator to the interpretation and application of the agreement carry with it the authority to give notice to employees to appear at the hearing presumably with the right to be heard? Manifestly, arbitrators would agree that due-process considerations make it desirable to have all persons affected present at the hearing. The experience of most arbitrators is that the employer does an effective job of representing absent successful employees. One of the primary advantages of arbitration is that it is a relatively simple and expeditious procedure. The arbitrator's primary concern is to avoid complicating the process and burdening the parties with a tripartite dispute, and diminishing the role of the union as the party to the agreement.

The advocates on the panel divided on the issue. Stuart Bern-

stein, a management attorney, endorsed the judges' position. Irving Friedman, a union attorney, dissented. He is not prepared to concede that the union as an exclusive bargaining representative may not make decisions as to the competing interests of the members of the bargaining unit. He recognizes that there is a possibility that political or other irrelevant considerations may play a part, but that the court-implemented fair-representation principles take care of such considerations. He is greatly concerned that the judges' position would seriously undermine, if not erode, the basic exclusive bargaining right of the union and that there must be at least a presumption that the union in deciding between members of the bargaining unit is acting in good faith. He believes that an effective remedy exists within the union's procedure for election of officers as regulated by the Landrum-Griffin Act.[13] His position is more fully set forth in a paper attached to this report (Appendix II).

Another issue arises out of an area of increasing conflict between arbitral and judicial decisional authority resulting in an increasing tempo and sometimes anomalous disposition of fair-representation claims in the courts. Mr. Bernstein has explicated this problem in a paper also attached to this report (Appendix I). His thesis is "that the appropriate judicial disposition of these cases—once the determination of breach of duty of fair representation has been made by the court—is to refer the dispute back to the contractual arbitration procedure for further processing. If the basis of the finding of unfair representation is that the union failed to process the grievance to arbitration, then the union should be ordered to proceed to arbitrate. If the claim is inadequate representation during an arbitration already held—as in *Anchor Motor*—then another arbitration can be ordered, and where appropriate (depending on the nature of the union's breach), the employee to be represented by a lawyer of his own choice, fees to be paid by the union. Since the predicate for the order directing arbitration is that the union has breached its duty, the imposition of the obligation to pay lawyer's fees seems reasonable."

The study panel agrees generally with the thesis advanced by Mr. Bernstein, although, as indicated below, the judges had some difficulty with its implementation. The parties have bar-

[13]Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401-531.

gained for resolution of disputes involving the interpretation and application of the collective agreement by an arbitrator chosen by them. The employer and members of the union rely on this adjudicatory institutional framework. They have a guaranteed right to participate in this forum. To shunt them from a determination of their chosen arbitrator to a judge or a jury is to deprive them of a collectively bargained right. It is our opinion that action of this character is unwise, unsound, and contrary to federal labor policy which places a high premium on effectuating the collective agreement.

The disagreement over implementation is bottomed, perhaps, on differing views of the determination of the unfair-representation question. The Bernstein position is that the unfair-representation and contract-breach issues are separate. As to implementation, during the course of our discussion the judges observed that an unfair-representation claim against an employer under *Vaca* v. *Sipes*[14] cannot be maintained if the underlying grievance is without merit. Thus the court in such a case considers and decides whether the grievance is meritorious in the course of deciding the unfair-representation case. What the effect of this determination is or should be if the matter is referred back to arbitration was not fully explored in our discussions, but it is likely that the determination would have a preclusive effect. Perhaps implementation of Mr. Bernstein's proposal would require a reformulation of the standard of liability in an unfair-representation action.

Another approach is, that in referring a case back to arbitration, the court would reserve jurisdiction of the lawsuit pending the arbitrator's award. At that point, if the grievant is upheld, the court would apportion damages against the union and employer in accordance with the *Vaca* v. *Sipes* formula. The court might even direct the arbitrator to make a recommendation as to damages (see Appendix I).

Mr. Friedman disagrees with Mr. Bernstein's suggestion that, under certain circumstances, the union should be required to provide an attorney chosen by the employee at the union's expense. His position, elaborated in his paper (Appendix II), is that unions which seldom use attorneys for themselves should not be required to pay for attorneys for employees. Instead, an

[14] *Vaca* v. *Sipes*, 386 U.S. 171, 186, 64 LRRM 2369 (1967).

employee could be represented by a self-chosen union member or official more likely to understand the institutional concerns. The employee should not be given an advantage unavailable to other employees, particularly where the interests of the grievant are in conflict with those of other employees.

Although this issue of providing an attorney was not fully explored in our discussions, we would expect that the judges on our panel would support the Bernstein view. The arbitrator members are somewhat more sympathetic with the Friedman view, at least with reference to the small unions with limited funds and with a tradition of using lawyers only on a limited basis. The differences in the viewpoints expressed may be largely explained by the difference in perspective and experience and an understandable tendency on the part of the judges to place a high premium on due-process considerations, including a concern that if the union has breached its duty of fair representation, the employee should not be required for a second time to rely on the union and leave open the possibility of a second fair-representation suit.

The study panel considered many cases included in the discussion outline. Our primary interest was to determine whether there were fundamental differences in approach between judges and arbitrators to the procedural and substantive issues presented. For the most part we found few differences. Some of them reflected differences in experience arising out of operating within very different institutional settings. We list some of the other issues discussed, not necessarily in the order of their importance.

1. The judges, involved daily in extensive pretrial discovery, were of the opinion that more use could be made of discovery in complicated fact cases. The arbitrators and the advocates took the position that discovery was burdensome and unnecessary in most arbitration cases. The grievance procedure leading to arbitration provides an opportunity for the parties to learn about the case. The advocates also pointed out that frequently they were not retained until shortly before the arbitration was scheduled for hearing.

2. There was considerable discussion about the extent to which judges and arbitrators should play an active role during a hearing or trial. As one of our judge members put it: "When I was selected to serve as a judge, I felt that I was to preside over as objective a search for the truth as possible." There was gen-

eral agreement that a completely impassive posture was inconsistent with the search for truth. It is difficult to generalize on the degree of participation. Much depends on the quality of the advocates and the extent of preparation. Assuming competent advocates, interrogation by judge or arbitrator should be deferred until after a witness is fully examined. When the parties appear to be fully prepared and have made complete presentations, extreme caution must be exercised in determining whether it is necessary to open up issues that may have been deliberately avoided for reasons best known to the parties. In this respect, because of the continuing character of labor-management relations, arbitrators in particular must exercise restraint. However, an active role by the arbitrator in a disciplinary case does not pose the same potential for mischief as in a sharply contested contract-interpretation case. Even the most competent advocates may overlook a fact or circumstance that may be crucial to an understanding of the case. Eliciting facts, as such, under such circumstances may be fundamental to the search for truth.[15]

Another aspect of participation relates to appearances. A judge or arbitrator who actively intervenes because of the inadequacy of representation of one side may unwittingly create the impression that he has prejudged the case in its favor. There is also a danger that overintervention may unconsciously carry over into the decisional process.

3. An interesting discussion arose concerning the issuance of an award that may be mandated by the collective agreement but frustrated by the operation of external law. A case that presented this issue was set forth as follows:

> "The employer and the union have had a collective bargaining agreement for years in which seniority is accumulated and administered in layoffs and recalls by departments. The plant has a majority of female workers overall. But the warehouse department is all male and one or two other departments are predominantly male. The employer sells some of its products in Department of Defense post exchanges and commissaries, and is thus subject to affirmative action contract compliance procedures. Upon a complaint by a group of women about the inaccessibility of the warehouse for them, the

[15]Special problems arise when advocates place a higher priority on winning a case than on the impact on the continuing management-labor relationship. See Chapter 3, *The Quality of Adversary Presentation in Arbitration: A Critical View*, in Proceedings of the Thirty-Second Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1979).

Department of Labor orally suggests that the company adopt plantwide seniority; no formal order has issued to that effect, but explicit references have been made to the possibility of cutting off the DoD outlets for failure to engage in affirmative action. The employer applied plantwide seniority to allow a woman to bump a departmentally senior male in the warehouse; it also laid off several women who were departmentally senior but junior to women retained on a plantwide basis. The laid off women have threatened to sue the union for lack of fair representation in not pressing their grievances in reliance on their departmental seniority. The union has brought those grievances before the arbitrator on their behalf, and the employer pleads its necessity to comply with the Department of Labor 'suggestions.' "

The arbitrator's role is to interpret and apply the collective agreement. Under the seniority provisions of the agreement, it is clear that the arbitrator is required to sustain the grievances. If such an award is entered, there is a strong possibility that in a Title VII proceeding or in a suit for lack of fair representation, the award would be set aside in favor of employees discriminated against because of departmental seniority. The arbitrator may better serve the interest of all concerned by deferring decision until a formal order or opinion is issued by the Department of Labor. If the parties are thereafter unable to reach a resolution of the problem, this may be one of the rare occasions in which the arbitrator should attempt mediation. At any rate, if an award is issued, the arbitrator should make clear the existence and importance of the relevant external law and defer the effect of the award for a period of time or remand the case to them so that the parties may cope with the problem.

4. Another area of slight difference involved the attorney-advocate acting as a witness in an arbitration case. The advocates and the arbitrators were of the opinion that such testimony should be received and weighed along with the rest of the record. Their experience was that such testimony was not uncommon. Attorneys of the parties are not infrequently involved in the negotiation of the collective agreement at issue and therefore are in a position to present relevant collective bargaining history. The judges' initial reaction was negative in light of the experience of the courts with respect to attorney-witnesses.

5. Another area of discussion concerned the issue of procedural arbitrability particularly if it relates to the implementation of time limits in the grievance procedure. Time limits are essential to assure that a prime objective of the grievance procedure,

expeditious resolution of the dispute, is achieved. In the close cases where deadlines are missed by days, arbitrators tend to avoid literal application of time limits. They do so in the belief that the labor-management relationship will thereby be enhanced and that substantive due process for the grievant will not be frustrated.

The judges prefer that awards be disposed of on their merits unless it is patently clear that the arbitrator will exceed his jurisdiction in doing so. This attitude is consonant with the direction of the Supreme Court that "Doubts should be resolved in favor of coverage."[16]

The attitude of the advocates is in the process of change. If an aggrieved employee is deprived of a hearing because of the failure of the union to process his grievance within the time limits of the agreement, the end result may be litigation to vindicate his right to fair representation.[17]

Such an outcome may in the end be more costly to the parties than a hearing on the merits, regardless of how the arbitrator decides the case on the merits.

III. The Decision to Arbitrate: The Advocates' View

One of the most important functions an advocate performs for a client is sizing up a case, attempting to predict the outcome in arbitration. The advocate, accordingly, plays a crucial role in the decisional process. What factors does he consider, and how successful is he in making predictions? What factors, extraneous to the merits of the case, play a role in his decisional process?[18]

Mr. Bernstein summarized his views as a management attorney as follows:

"The primary consideration in advising an employer whether to defend or settle a grievance headed for arbitration is the advocate's estimate of the probable outcome. In this respect, arbitration is no different than a lawsuit.

"There are other considerations unique to arbitration, but the starting point is the perennial question—what are my chances?

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[16]*Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 2, at 583.

[17]*See Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975).

[18]See *Comments* by Bernard W. Rubenstein, union attorney, and Anthony T. Oliver, Jr., management attorney, on *The Quality of Adversary Presentation*, *supra* note 15, at 47–62, in which there is a discussion of the advocates' role in the decisional process.

"In responding to this question the advocate obviously projects himself into the role of the arbitrator.

"In making the anticipatory decision, the advocate must get a sufficient feel for the case so as to be able to make a valid judgment, often without being able to undertake the detailed investigation and interviewing required in actual preparation for hearing. The client may give what he believes is the full story. A little probing usually reveals some critical feature is held back —either willfully or through ignorance of what is relevant. Often the employer action is so clearly defensible or so obviously wrong that the answer is easy. At times it is apparent that there are subtleties which require further probing before a judgment can be made.

"It may be necessary to interview potential witnesses, have the employer study past practice, or examine notes on prior negotiations before a fair appraisal can be made.

"But, the employer usually wants a quick, even if relatively uninformed, judgment. His inquiry often comes as he is ready to meet or prepare an answer at the last grievance step, and if he is totally off base, this may be the best place to settle. Here, unless the case is a complete disaster, the advice usually is to press on and 'as we get into it further, we can always change our mind.' Sometimes it is easier to settle after the union has decided to go ahead, the arbitrator is selected, and the date set.

"In any event, once the facts are as well in hand as reasonable preparation will permit, the question remains—how will it come out?

"Perhaps the reason so many advocates believe they would make good arbitrators is that they are constantly judging their own cases. Their decisional processes are probably no different from those most arbitrators would articulate—but with one exception. The arbitrator rarely takes himself into account when describing how he decides cases; the advocate anticipating a result almost always takes into account the characteristics of the particular arbitrator.

"The advocate may have a very clouded crystal ball, but he does indulge in the notion that some arbitrators are better for his side than others on difficult contract interpretations; that some are poor employer risks on discharge cases, while others are reputed to be so employer-oriented that when their names are suggested by the union, one may reasonably be suspicious of the desire to prevail. This notion of what particular arbitra-

tors are likely to do in particular situations is a factor both in selection of the arbitrator and evaluating the probable outcome once selected.

"In any event, given a fair grasp of the facts, including such relevancies as past practice, bargaining history, and degree of even-handed application by the employer, most advocates, union and management, are rarely surprised by the arbitrator's decision. There are, of course, close ones that you hoped to win, but lost. But there are the close ones you win when the odds you quoted were against you.

"All in all, the system is fair and works well, even if an unsophisticated employer may believe you can never win an arbitration, and even if there are some occasional decisions that are beyond rational explanation. This exception does not prove the rule—it proves there are either some poor arbitrators or some poor advocates.

"But winning in arbitration is not everything. Rarely in a lawsuit will the parties have a continuing relationship, but always in the arbitration setting. A sure winner may be dropped and a sure loser carried through to arbitration because of the continuing and complex relationship of the work environment.

"A winner may be dropped or a loser taken on because the employer has won too many—all justifiable—and the union or employees are losing confidence in the process.

"There are some issues which could be won in arbitration but which should be kept in doubt. Sure winners of this type usually mean sure trouble in the next negotiations. Many out-of-classification transfers and out-of-seniority layoffs fall into this category. It may be preferable to settle these on an ad hoc basis than push to victory.

"Conversely, losers may be taken on to back a supervisor's decision or to teach a lesson to a supervisor who may believe the employer always gives in. Both employer and union may be in the position where an adverse decision of the arbitrator is more acceptable than a settlement of the parties.

"The advocate tries to give an answer broader than the question, what are my chances, before advising whether or not to arbitrate."

Mr. Friedman summarized his views as a union attorney as follows:

"The union attorney often enters the grievance procedure after the union has already decided to arbitrate the grievance.

His function begins with an analysis of the case; he evaluates past practice in the particular plant, general arbitration precedents, and the available evidence. If the arbitrator has already been chosen, the lawyer will engage in one of the favorite games of all advocates—trying to predict what this arbitrator will do in this kind of case. If the arbitrator has not been selected, the lawyer has the harder task of being totally objective—he attempts to predict how the ideal arbitrator will decide, and, in this process, becomes the arbitrator himself, attempting to decide the case on the merits and on the evidence as it is then available to him.

"At this point, if the union's case appears weak, the lawyer will probe in his client's discussions to discover why the union has brought the case so far. The lawyer may find that the union has misunderstood a contract provision, or that it has not taken into account unfavorable past practice or unreliable evidence. In such cases, the lawyer has obviously made an arbitral decision, and he will counsel that the case be settled or withdrawn. The union may agree, and that is the end of the case. If the union disagrees, the lawyer with some additional probing, may recognize that the union is under a political necessity to arbitrate. Perhaps the issue is one that the membership insists must be arbitrated. The grievant may be a long-service employee to whom the officers or members want to give the fullest protection; or the issue may be one which the union firmly intends to win in arbitration or, if it loses, take to the next contract negotiation.

"The union attorney is less often consulted about cases that the union does not want to arbitrate. He will usually first hear about these cases in the form of unfair representation proceedings, before the NLRB or in a §301 suit. In the situations where the attorney is consulted before the union's final decision, he must evaluate the merits of the case from the viewpoint of a potential arbitrator. Since he must also be alert for any indications of unfair or arbitrary action, he places himself in the position of a judge or NLRB representative, and in such a role decides whether the grievance has been handled properly. If he feels that the grievance does have merit, or that there may have been some irregularity in the handling of the grievance, the lawyer will in effect become the grievant's advocate, to urge that the case be arbitrated, or perhaps that it be returned to an earlier step of the grievance procedure for further investigation

and processing. A weighty factor in many decisions to arbitrate is the desire on the part of the union and its attorney to avoid a suit for denial of fair representation.

"The lawyer preparing a case for arbitration makes a further series of decisions. He directs the marshaling of evidence; he guides in the selection or rejection of witnesses; he makes decisions as to the inclusion or exclusion of arguments and evidence. Along with the union representatives, he must make decisions about using or rejecting approaches that may endanger the basic union-management relationship. He draws on the experience of his union officials for applicable history, for the evaluation of union witnesses, for instruction as to likely company witnesses and their strengths and weaknesses. Often he will even learn from the union officials useful information about opposing counsel and the arbitrator. In this entire process, the attorney and the union have been making a series of decisions. In the ultimate presentation, the arbitrator hears a case that has already been shaped by the collective skill and experience of the union lawyer and his clients, who are usually knowledgeable, articulate, and shrewd. Even while the arbitrator patiently observes the apparently rough battle between the union and the company, his experience will teach him that what he is seeing is the product of two well-prepared adversaries. When he overrides angry objections, when he admits evidence that one party or the other earnestly argues will threaten the very structure of the plant, the arbitrator is aware that he is presiding over an exuberant play in which the cast are the classic villain and hero, and in which the setting is industrial democracy. And the arbitrator will also sense that many lesser decisions, at every stage of the grievance procedure and the preparation by the respective advocates, have preceded and have prepared the way for his ultimate decision in the case.

"The union attorney and the company attorney of course usually have a major part in selecting the arbitrator. It goes without saying that both attorneys are out to win; they screen the lists of AAA or FMCS, each lawyer hoping to find an arbitrator whose inclinations are favorable to his side of the case; and in this somewhat unseemly process, each hopes that as a last resort the selected arbitrator will be fair-minded. Selection of the arbitrator is a part of the decisional process, in my view, the worst part because the potential for economic pressure upon arbitrators, or the appearance of it, inevitably detracts from the credi-

bility of the entire process. The systems that exist today for selection of arbitrators lend themselves to abuse; the existence of arbitrary, sleazy private rating services that purport to evaluate arbitrators would not otherwise be possible. Labor, management, and the many outstanding professional arbitrators deserve a better, more objective system of selection to eliminate partisan control over selection. Thus, I disagree with the position expressed by the majority of my panel that the 'expendability' or the 'acceptability' of the arbitrator acts as an effective restraint on arbitrators. I believe that 'expendability' tends to stunt the exercise of independent judgment and imagination."

IV. Reaching a Decision

At the heart of the decisional process is the question—why and how does a judge or an arbitrator reach a particular result?

This question does not often arise in cases controlled by facts. The fact-finding process is relatively clean-cut and not difficult, except for issues of credibility which can be exceptionally challenging. We found that judges and arbitrators applied the same criteria in determining the credibility of witnesses. Nor is there any difficulty in understanding the decision process when judge or arbitrator is applying clear and unambiguous terms of the agreement. Here, however, the area of discretion may vary as between judge and arbitrator. The judge has both legal and equitable jurisdiction. If the decision which would result from literal application of the agreement is unjust, there is an array of doctrinal approaches that may be used to temper the result. The arbitrator, in contrast, is limited to interpretation and application of the agreement. The end result is that his award may be harsh, but there is not much he can do about it. The example which follows is based on an award of one of the arbitrators.

The case involved a utility located outside of Chicago. The grievant had been employed for 23 years, all of his working career, in various positions, principally in operating and maintaining the electrical relay systems of the company. He grieved the refusal of the company to process his promotion to Senior Test Relay Engineer because he had no degree in electrical engineering. The grievant was acknowledged to be highly competent. He had satisfactorily performed most of the duties of Senior Test Relay Engineer—and had trained and assisted other employees who held degrees in electrical engineering.

The contract provided that the company "has sole responsibility for developing and applying all selection criteria. . . ." The requirement of a degree in electrical engineering had been in effect for 20 years. The only issue of fact was whether that requirement was reasonable. On the basis of the record reflecting the many technological changes which have occurred in the utility industry resulting in a highly complicated system, and the key character of the job in question in the company, the arbitrator was convinced he had no choice except to conclude that the requirement was reasonable and to deny the grievance, overlooking the ironic fact that Thomas Edison, after whom many electrical utility companies are named, was not a college graduate.

If the foregoing case had been presented to a court, the result may have been different. In addition to inherent authority to determine whether the contract has been reasonably interpreted, the court has broad equitable powers. The judge enjoys the important advantage in that his decisions are subject to appellate review. In a case where an unjust result is compelled because of stare decisis consideration, he can write an opinion deploring the compelled unjust result which may have an impact in securing a reversal of a line of precedents.

There are two classes of cases where an arbitrator has substantial range of discretion: (a) discharge and discipline cases, particularly in the review of penalties, and (b) resolution of interpretive issues involving ambiguous provisions of an agreement—or where the agreement is silent.

A considerable body of "industrial jurisprudence" or "common law of the shop" has evolved over the years, helping to guide the arbitrator as he interprets and applies that elegant but vague phrase "just cause" in a specific discipline case.

In resolving interpretive issues when the language is ambiguous, the arbitrator, in addition to considering the collective agreement and the rules of contract construction, may look to and give weight to past practice in the plant—or custom in the industry. He may also consider collective bargaining history. But in the end he must make a choice between alternative interpretations.

What governs that choice in close contract-interpretation cases? There may be rational and to some extent objective guidelines, such as the workability of the award. The arbitrator should not impose on the parties an impractical or absurd rule.

But what about factors such as general principles of equity, personal notions of social justice, or personal value preferences? To what extent do they enter into decision-making?

The classic statement almost always cited in discussions of decision-making is that of Justice Cardozo, taken from his lectures "The Nature of the Judicial Process": "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge."[19]

The late Judge Jerome Frank in his book *Law and the Modern Mind* expounded the same thesis but in more blunt terms: "The judge really decides by feeling and not by judgment, by hunching and not by ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case."[20]

Both of these views were expressed years ago. They were considered bold statements at the time they were uttered. Today it is taken for granted as a result of the widely publicized research of psychologists and psychiatrists that the outlook of a man, and his general approach to problems, is the product of many factors. These include the impact of his family, his environment, his formal and informal education, and, indeed, his entire experience.[21]

Jerome Frank's words, the "intuitive sense of what is right or wrong," translates into the common term "gut reaction." Lawyers with extensive litigation experience are especially sensitive to this factor. They will give it substantial weight, particularly in deciding whether to litigate or settle.

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[19]Lecture IV, 167.

[20]Frank, Law and the Modern Mind, at 104.

[21]A more extreme position was expressed by the late Professor Harold D. Lasswell, a noted political scientist, whose major scholarly interest was in applying principles of Freudian depth psychology to political leadership and political events. He would certainly dissent from any idyllic view of the analytic approach to decision-making. Commenting on judicial decision-making, Lasswell dismissed the analytic approach as simply a "rationalization" or substituting "for the record" an explanation of "motivation acceptable to the ego" for the purpose of "hiding from one's self" the actual libidinal reasons for one's acts. Robert A. Leflar, *Honest Judicial Opinions,* Northwestern U. L. Rev. 722 (1979). The Lasswell thesis, however, distorts the Freudian approach. It fails to give sufficient recognition to the strong narcissistic drive to act in ways "acceptable to the ego." Although we may at times behave in ways we do not fully consciously comprehend, we do struggle with the evidence in the record to arrive at what we consider a proper decision because any other course could not be reconciled with one's perception of oneself as a professional. *See also* J. Woodford Howard, Jr., *Role Perceptions and Behaviour in Three U.S. Courts of Appeals,* 79 J. Politics 916 (1977).

If the issue is one where there is a range of arbitral or judicial discretion and if the result sought is manifestly unjust, by whatever standard one applies, a strong technical case will not assure a successful outcome. The advocate should not become so involved in the adversary process that he becomes blind to the equities.

The following case involves an award in which the equities played an important role.

The grievant was dismissed under a provision of a collective agreement listing the circumstances under which an employee's seniority could be terminated. One of these circumstances was absence from work for two days without notifying the employer. He was dismissed on the day following the expiration of the two-day period. He was notified of his dismissal upon his return after a week's absence.

The grievant was 56 years of age. He had worked at the plant for 25 years. In the first year of his employment, he was involved in an industrial accident as a result of which he lost several fingers on one hand. At the time he was promised a job for life if he could do the work. His record was satisfactory, and he had no prior history of absenteeism. He claimed he was ill and had called in to the plant on the second day of his absence. On the basis of the entire record, the fact issue was resolved against him. Nonetheless, the arbitrator reinstated him to his job and imposed a suspension for his failure to call in.

The contract provision was subject to several interpretations. Although there was no language expressly mandating dismissal, the provision was susceptible to such an interpretation, or to the interpretation that there was a range of discretion in management. The record disclosed another case of an employee with far less seniority than the grievant, similarly absent for two days, but in his case management made a successful effort to contact him and permitted him to return to work.

The company explained its action on the basis of the essential character of his job. Its action, however, clearly established that it did not interpret the contract as mandating dismissal. In choosing to rely on the evidence of inconsistent application for the decision, it is obvious that the arbitrator was strongly influenced by the equities. The chance that a 56-year-old man with a physical handicap could find a job in today's labor market was minimal. Moreover, in industry generally, an unexcused absense of a long-term employee for two days is a basis for discipline but not for dismissal.

Most cases, of course, can be disposed of without substantial difficulty. The facts and applicable law or contract provisions point to only one sound resolution. In those cases where the decision is clear but the result harsh, the temptation to resort to dicta is very strong. Arbitrators must exercise the greatest restraint. The dictum in a particular case may play havoc in ongoing disputes unknown to the arbitrator. Indeed, the continuing relationship between the parties is a constant dominant factor. A strong case could be made for awards without supporting opinions. Such awards would insure that there would be no impact beyond the case at hand. But it is too late to reverse the established tradition of supporting opinions in this country, and of course there are compelling reasons for that tradition.

The cases that present the most difficulty, of course, are those where the arbitrator or judge can find a rational basis for deciding the case either way. It is futile to try to generalize about how decisions in such cases are reached. One would like to assume that there will be careful review of the record and the applicable agreement, a scrupulous review of the facts, a weighing of alternate theories, and a sorting out of all extraneous factors that may bias the result. It would appear that it is common experience of judges and arbitrators to reach a tentative conclusion and to test this conclusion by a written opinion. If the opinion does not stand up, the process is repeated. In the end, a decision is made and we go on to the next case.

Appendix I

Breach of the Duty of Fair Representation: The Appropriate Remedy

Stuart Bernstein

An area of potential conflict between arbitral and judicial decision-making responsibility has become apparent through the increasing tempo and sometimes anomalous dispositions of fair-representation claims in the courts.

The thesis of this comment is that the appropriate judicial disposition of these cases—once the determination of breach of the duty of fair representation has been made by the court[1]—is to refer the dispute back to the contractual arbitration procedure for further processing. If the basis of the finding of unfair representation is that the union failed to process the grievance to arbitration, then the union should be ordered to arbitrate. If the claim is inadequate representation during an arbitration already held—as in *Anchor Motor*[2]—then another arbitration can be ordered, and where appropriate (depending on the nature of the union's breach), the employee to be represented by a lawyer of his own choice, fees to be paid by the union. Since the predicate for the order directing arbitration is that the union has breached its duty, the imposition of the obligation to pay lawyer's fees seems reasonable.

Even if the plaintiff employee has brought action against only one of the parties,[3] or if one of the parties has been dropped

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[1]For the purposes here, the standard for determining whether the duty has been breached is irrelevant; this assumes that whatever the test, a finding of unfair representation has been made.

[2]*Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 91 LRRM 2481 (1975) concerned the union's representation of employees before a joint committee—a body appropriately described by Benjamin Aaron as more akin to an extension of the grievance procedure than to arbitration. The typical collective bargaining agreement using the joint-committee device provides for neutral arbitration in the event of a joint-committee deadlock. A court could require use of the neutral arbitration step where the decision involved in the judicial proceeding was that of a joint committee.

[3]*Kaiser* v. *Teamsters Local 83,* 577 F.2d 642, 99 LRRM 2011 (9th Cir. 1978).

from the action because of a statute of limitations,[4] or if appeal is untimely as against one of the parties,[5] under its equitable powers a court could effectively direct arbitration.

This proposition has been forced upon me by the uncomfortable awareness that treating a fair-representation suit as an action at law for damages has the potential for placing both the question of breach of the duty and propriety of the employer action to a jury.[6]

In a lucid moment, the Supreme Court observed in praise of arbitrators that "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed."[7] If the ablest judge cannot do that, then what can be expected of the jury?

Since the primary source of the fair-representation duty is statutory, there seems to be no conceptual way of keeping the determination as to its breach from the courts. But at least that should be left to the able judges the Supreme Court had in mind, who perhaps might be expected to exercise some restraint as to what the duty entails,[8] and not to a jury.

But the question of the employer's alleged breach—typically a claim of wrongful discharge—need not be and ought not be decided by either court or jury. The breach of the fair-representation duty is independent of the employer's contractual violation. The union may negligently miss time limits, or the union representative may do a woefully inadequate job of representing an employee at a hearing even where the employer action in discharging the employee is completely proper.[9] The propriety of the employer action might affect the employee's remedy

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[4]*Smart* v. *Ellis*, 580 F.2d 215, 99 LRRM 2059 (6th Cir. 1978).

[5]*Miller* v. *Gateway Transportation Co.*, 103 LRRM 2591 (7th Cir. 1980).

[6]*Minnis* v. *UAW*, 531 F.2d 850, 91 LRRM 2081 (8th Cir. 1975); *Smith* v. *Hussmann*, 103 LRRM 2321 (8th Cir. 1980); *Foust* v. *IBEW*, 572 F.2d 710, 97 LRRM 3040 (10th Cir. 1978), *rev'g* as to punitive damages, 99 S.Ct. 2121, 101 LRRM 2365 (1979).

[7]*Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 46 LRRM 2416 (1960).

[8]*See, e.g., Cannon* v. *Consolidated Freightways*, 524 F.2d 290 (7th Cir. 1975), overruling a decision of the trial judge who found a breach because the union failed to raise the defense that the sobriety rule upon which discharge was based was improperly promulgated where the employee admitted he knew of the rule and was given a second opportunity to comply after the consequences of failure to comply were explained to him.

[9]In *Foust* v. *IBEW*, *supra* note 6, the court recognized the difference between the union's alleged breach of the fair-representation duty and the alleged wrongful discharge. Unfortunately for the point being made here, this was done through the vehicle of approving instructions to a jury in a case involving only the union, which then awarded $40,000 in actual and $75,000 in punitive damages. The Supreme Court later reversed as to the punitive damages, 99 S.Ct. 2121 (1979).

against the union, but should be irrelevant to the issue of union responsibility. For what the employee has lost when his case is not presented or is unfairly presented is the opportunity to have his grievance fairly argued to and decided by an impartial arbitrator, and this he is entitled to even if it is ultimately determined he was discharged for just cause.

This is not to suggest that a union has, or ought to have, the duty to arbitrate every grievance. But the benefit of the doubt should be given the employee, and the close ones ought to be arbitrated. This is certainly preferable to subsequent litigation.[10]

When the employer agreed to limit his common-law right to terminate the employment relationship at will and agreed to terminate or discipline only for just cause, he did not agree that just cause would be determined by a judge or jury. His bargain created no right in the employee to be vindicated in the court.[11] "Just cause," in this context, is a concept developed out of the common law of arbitration and is peculiarly dependent on the arbitration process for its nurturing and growth. It does not belong in court and certainly not before a jury. Contemplate framing standardized jury instructions on the infinite variety of factual situations lying behind a discharge or suspension for "just cause." It is here more than in any other area of grievance resolution that the experience and competence of the arbitrator is needed. But it is the discharge cases—the just-cause cases—that generate the vast majority of court suits on the fair-representation issue.

What stands in the way of the proposition asserted here—that when there is a judicial determination of the breach of the duty of fair representation the dispute be directed to arbitration or a second arbitration with independent counsel—is the *Vaca* v. *Sipes* dictum. The Court had found no breach of duty in that case in the union's refusal to process a grievance to arbitration. That

[10]Employers occasionally find themselves in the awkward position of hoping the union will arbitrate rather than drop a grievance when the lawyer for the affected employee phones the employer and suggests that if the union doesn't arbitrate, the employee will litigate.

[11]The employer in *Anchor Motor* argued to the Supreme Court that if arbitration awards were not accepted as final, "employers . . . would be far less willing to give up their untrammeled right to discharge without cause and to agree to private settlement procedures." *Supra* note 2, at 570. What is suggested here is that where there is a finding that the union breached its duty of fair representation in presenting the grievance to the arbitrator, there is no "final award," but the remedy should be to arbitrate again, not let the court or jury decide the issue put to the arbitrator in the first instance.

should have been sufficient to end the matter. But the Court could not resist telling us what would have happened if a breach had been found. The Court observed that if in fact Owens, the employee, had been improperly discharged and an action had been brought against the employer rather than the union, the employer's only defense would have been the union's failure to resort to arbitration; but if that failure was itself a violation of the union's statutory duty to the employee, there would be no reason to exempt the employer from "contractual damages" he would otherwise have had to pay. "The difficulty lies in fashioning an appropriate scheme of remedies."[12]

This is what the Court said in exploring that "difficulty":

> "Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and union to arbitrate the underlying grievance. It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damage may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issue may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief."[13]

These broad comments cast apart from a factual setting really beg the question. The employer has not granted broad contractual rights to the employee entitling him to "contractual damages" in the sense used by the Court. With respect to the issue of the power of the arbitrator to grant "damages" (back pay?) attributable to the union's breach, why not? As long as the Court was indulging in dicta, it might have held that this was within the authority of the arbitrator in a circumstance where the court directs arbitration because it has found a breach of the union's duty. There is no apparent reason why a court, after a finding of breach of the union's duty, could not empower the arbitrator to allocate the back-pay award, if one is found to be appropriate,

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[12] *Vaca* v. *Sipes*, 386 U.S. 171, 196, 64 LRRM 2369 (1967).
[13] *Id.*, at 196.

between the employer and union in accordance with the formula set out in *Vaca:* "The governing principle, then, is to apportion liability between the employer and union according to the damage caused by the fault of each."[14]

In the last point raised in *Vaca*—that the arbitrable issues may have been substantially resolved in the course of trying the fair-representation issue—the Court denies its own recognition of the relative inexpertise of judges to make such determinations, overlooks the possibility that juries may be called upon to make the decision, and tends to confuse the separate questions of fair representation and employer breach.

The danger inherent in broad dicta apart from a specific factual setting is illustrated by the results of a recent Ninth Circuit decision, *Clayton* v. *ITT Gilfillan.*[15] The court reached a decision which it acknowledged "produces an anomaly," but the court believed it had no choice after *Vaca* and *Hines.* The action was the usual one against the union and company for unfair representation and wrongful discharge. The union had processed the claim through the grievance procedure, made demand for arbitration, and then withdrew the request. The trial court found the employee had failed to exhaust the internal union review procedures through which he could challenge the decision not to arbitrate, and dismissed the action against the union. The court also held that this barred the employee's action against the employer. The court recognized the awkward result: "In an action from which the union has been dismissed, ITT [the employer], to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's [the employee's] grievance." The court of appeals concluded that despite the anomaly, this is how it had to come out because of *Vaca* and *Hines.*[16]

The trial court's decision was sensible, realistic, and should

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[14]*Id.,* at 197.

[15]104 LRRM 2118 (9th Cir. 1980).

[16]A similar result was reached in a recent decision of the Seventh Circuit in *Miller* v. *Gateway Transportation Co.,* 103 LRRM 2591 (1980). The trial court had granted summary judgment in favor of the union and employer. The plaintiff, the discharged employee, appealed the dismissal of his suit, but his appeal against the union was dismissed by the court of appeals as untimely filed, leaving only the appeal against the employer before it. The court found there were genuine fact issues as to both the claim of unfair representation by the union and improper discharge by the employer, and that summary judgment was therefore improper. The case was remanded for trial. Thus, in the trial court, the employer will be required to defend not only the propriety of the discharge, but the fairness of the union's representation, while the union is out of the case completely.

have been affirmed. The employer should not be responsible for defense of a claim of the union's breach. The union ought to be an indispensable party on the fair-representation issue, and until that issue is disposed of, the propriety of the discharge should not be a triable issue before any forum. If the employee has failed to perfect his right to bring suit against the union, he ought not to be able to go after the employer.

The confusion resulting from the overinvolvement of courts and juries in the process is sharply illustrated by *Smith* v. *Hussmann Refrigerator.*[17]

The fact situation is somewhat complex, but these are the essentials. The company promoted four employees out of seniority order, claiming they had greater skill and ability; the contract permitted such promotions. Senior employees grieved, and the union processed their grievances to arbitration. At the hearing the grievants testified; the successful bidders were not invited to attend. The only evidence in support of the successful bidders was testimony by the employer's foreman as to his evaluation of the relative merits of those awarded the promotion and the grievants. The arbitrator granted the claims of some of the grievants, but the award granted more promotions than there were openings. The union and employer held a clarification meeting with the arbitrator at which no employees were present. The final award was still somewhat confusing, but in any event, the original successful bidders attempted to file grievances challenging the clarified award, which the union refused to process.

The original successful bidders filed suit against both the union and the company. Both the claims of breach of contract by the employer and breach of duty of fair representation by the union were tried before a jury which found against both defendants and awarded damages to two of the plaintiffs. The trial court then entered judgment in favor of the defendants notwithstanding the verdict.

In its first decision on review, the court of appeals upheld the judgment in favor of the employer, but reversed as to the union on the ground that the jury could reasonably have found a breach of the duty of fair representation. After en banc hearing, the court issued a second decision one year later, and this time

[17]100 LRRM 2239 (8th Cir. 1979), on rehearing, 103 LRRM 2321 (1980).

reversed the trial court as to the employer and union and reinstated the jury verdict against both. The ground for the change in the decision respecting the employer was that the jury could have found a contract breach in the clarification meeting, where apparently the employer and union had arrived at a resolution of the problems presented by the confused first award, which resolution was adopted by the arbitrator.

Here is a case whose precise facts are so complex that I must confess to still being confused about them even after four readings of the decision; yet it was presented to a jury. The trial judge disagreed with the jury; the court of appeals disagreed with the trial judge and then with itself. The employer, who, as far as can be determined from the reported case, made the right decision in the first instance about the relative abilities of the bidders, is required to pay money damages to those it selected for promotions because the union did not allow them to participate in the first hearing or tell them about the second. The jury was given both issues at the same time, and one certainly had to influence the other.[18]

Why did not the court simply direct a new arbitration of the whole business where the competing employee interests would be given an opportunity to participate. In light of the one-year delay between the first and second decisions of the court of appeals, the argument that the second arbitration would unduly delay the ultimate disposition is not compelling.

It may be that the *Vaca* v. *Sipes* dictum invited this strange result, but it also allows trial courts to direct arbitration. There is constant complaint about the overburdened judiciary. This is one way to ease the workload.

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[18]The employer is in an untenable position before the jury. If he says nothing in support of the union's conduct, he may be giving up a good defense or may appear to agree that the union acted improperly. If he argues that the union acted fairly, he runs the risk that the jury will interpret this as collusion.

APPENDIX II

BREACH OF THE DUTY OF FAIR REPRESENTATION: ONE UNION ATTORNEY'S VIEW

IRVING M. FRIEDMAN

There is no due process in a nonunion plant; any employee can be discharged, disciplined, downgraded, laid off out of seniority, denied a promotion, for any reason or no reason, with or without a hearing. Only with a majority union does the employee enjoy contract provisions that protect his job, and his seniority, with a grievance procedure that culminates in binding arbitration. The courts have imposed upon the majority representative the duty of fair representation, a duty that responsible unions accept without question. Increasingly, however, the courts are expanding the scope of that duty and are affording types of relief which, if unchecked, may severely hamper unions in the performance of their duties by placing upon them heavy burdens involving their financial resources and their time in expensive litigation over individual members when their money and time should be conserved for the benefit of the entire membership. If our object is to protect industrial due process for individuals, we should keep in mind that effective collective bargaining is the essential source of such due process, and any protective remedies should be so selected and limited as to preserve the resources of labor unions to negotiate and to administer contracts.

Originally, the doctrine of fair representation was devised by the Supreme Court to require labor organizations to negotiate for all employees in the craft or class without discrimination because of their race.[1] From that wholly laudable beginning, the concept has gradually been extended to include "arbitrary, discriminatory, or in bad faith" decisions by a labor organization not to take a grievance to arbitration;[2] negligence in the presen-

[1] *Steele* v. *Louisville and Nashville Railroad*, 323 U.S. 192, 15 LRRM 708 (1944).
[2] *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

tation of a grievance in arbitration;[3] failure to make an adequate investigation in a seniority grievance;[4] failure to give notice of arbitration to a grievant; taking a "doomed to failure" approach in the arbitration; failure to make a transcript of the hearing;[5] failure to file a grievance within the contractual time limits;[6] perfunctory presentation by the union attorney;[7] and failure to permit participation by incumbent employees in a seniority arbitration.[8] Moreover, dissatisfied grievants are permitted to have a jury trial, to sue for damages rather than merely to seek reinstatement and back pay, which would be the available remedy in an arbitration.[9] In these cases, the courts insist that they, rather than arbitrators, can resolve the merits of the grievance while determining whether there was a denial of fair representation.

The guidelines provided by the decided cases create considerable confusion, which is particularly a problem since in the preliminary stages of grievance handling, and often even at the arbitration level, unions as well as employers frequently are represented by laymen. Thus, although it is basic law that the courts are not to review the merits of arbitration decisions,[10] the Supreme Court held in *Hines* that the courts are not bound by the finality of an arbitration award if the union prepares or presents its case poorly, deeming this a denial of fair representation. The Supreme Court has held that in taking a position on seniority issues in negotiations, a union is free to exercise a broad range of discretion even when the union's position may be detrimental to the interests of some of the employees, for example, *Ford* v. *Huffman*[11] and *Humphrey* v. *Moore;*[12] similarly, the Court held in *Emporium Capwell Co.* v. *Waco*[13] that minority employees aggrieved by alleged racial discrimination of the employer were required to deal through their union and resort to

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[3]*Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976).
[4]*Figueroa de Arroyo* v. *Sindicato de Trabajudires Packinghouse*, 425 F.2d 281, 75 LRRM 2455 (1st Cir. 1970), *cert. den.*, 400 U.S. 877 (1970).
[5]*Thompson* v. *IAM Lodge 1049*, 258 F.Supp 235 (E.D.Va. 1966).
[6]*Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975), *rehearing den.*, 528 F.2d 912 (1975).
[7]*Holodnak* v. *Avco Corp.*, 381 F.Supp 191, 87 LRRM 2337 (D.Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975).
[8]*Smith* v. *Hussmann Refrigerator Co.*, 100 LRRM 2239 (8th Cir. 1979), *on rehearing*, 619 F.2d 1229, 103 LRRM 2328 (1980).
[9]*Minnis* v. *Automobile Workers*, 531 F.2d 850, 91 LRRM 2081 (8th Cir. 1975); *Cox* v. *C.H. Masland & Sons*, 607 F.2d 138, 102 LRRM 2889 (5th Cir. 1979).
[10]*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[11]*Ford* v. *Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953).
[12]375 U.S. 335, 55 LRRM 2031 (1964).
[13]420 U.S. 50, 88 LRRM 2660 (1975).

the procedure, even if they were dissatisfied with their representative and with the grievance procedure. Yet in the *Hussmann Refrigerator* case, the court of appeals found a union guilty of unfair representation because it arbitrated a seniority issue without in effect providing a mechanism for the dissident employees to litigate their own cause. Which will it be—majority representation, or a proportional representation system in which the exclusive bargaining agent shares its authority with minority groups?

In *Vaca* v. *Sipes,* the Supreme Court cautiously expanded the *Steele* definition of unfair representation, but the courts in succeeding cases, such as those discussed above, have significantly expanded the doctrine while invariably citing *Vaca* to make it appear that *Vaca* is still the test. Local union stewards and officials, who usually are laymen working full time on their factory jobs, are expected to find their way through an increasingly harsh and complex body of law as they administer grievances of their members. If the courts continue to expand the limits of fair representation, they should at least return, in terms of remedy, to the concept that arbitration, rather than a court or jury trial, is the preferred means of adjusting grievances. The courts, too, should keep in mind that every union member has access to internal political remedies through the election processes to correct inadequacies of its officers, and that the Landrum-Griffin Act protects the rights of employees to democratic elections of officers. The members of a union can use their elections to remove officers who handle grievances and arbitrations ineffectively, just as the members remove officers who negotiate a poor contract.

In *Vaca,* the Court recognized that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved."[14] It is submitted that an order to arbitrate or to rearbitrate should be the standard remedy applied by the courts in the absence of a strong showing that it will not be adequate. One of the objections to an order to arbitrate is that an aggrieved employee may also be entitled to damages against the union if the grievance is found meritorious. But this could be provided for; the court, in ordering the case to arbitration, could reserve jurisdiction for the purpose of adjudicating damages under the *Vaca* formula if the arbitrator

[14]*Supra* note 2, at 196.

upholds the grievance. Another objection is that under the time limitations in many labor agreements, the unions may no longer be free to invoke arbitration. This, too, poses no real problem. The courts could hold that such provisions cannot stand in the case of a denial of fair representation, just as the Supreme Court held in *Hines* v. *Anchor* that the contract provision for finality of an arbitration award could not stand because of the denial of fair representation. In this way, the principle that arbitration is the remedy that Congress expressly preferred for resolving industrial disputes is followed;[15] and the concern voiced by the Supreme Court of preserving union assets for collective bargaining[16] will be effectuated.

In this way, too, when an employee in a plant covered by a union contract has been denied fair representation, the end result of litigation will be to afford him fair representation: nothing more and nothing less. The purpose—or effect—should not be to distort the relationship of the parties to the labor agreement, nor should it be to create an undue advantage for that employee over other employees in the plant or the union. Remedies are unrealistic and inconsistent with our scheme of collective bargaining if they substitute damages in place of remedies such as reinstatement with back pay, normally available through arbitration; if they compel the use of outside attorneys in the process; if they create separate representation for minority or dissenting groups of employees; or if they substitute the opinion of a jury or judge for that of an arbitrator. The employee who has been denied the benefit of a hearing before an arbitrator should be awarded a hearing before an arbitrator, not a trial before a court or jury. If the employee has lost a job without just cause, or if the employee's seniority has been abridged improperly, the ultimate relief should be the award of the job with appropriate back pay, or the correct seniority status, and this should be accomplished by returning the case to the arbitration process for resolution.

Thus, I am in substantial agreement with Stu Bernstein that unfair representation cases should end up before an arbitrator rather than a jury.[17]

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[15]LMRA §203(d), 29 U.S.C. §173(d).

[16]*See Electrical Workers* v. *Foust*, 442 U.S. 42, 50–51, 101 LRRM 2365, 2368 (1979); *Vaca* v. *Sipes*, *supra* note 2, at 197.

[17]I disagree with Stu Bernstein's suggestion, unless it is limited to extreme situations, that in unfair-representation cases the union should be required at its expense to provide an attorney chosen by the employee. Many unions rarely use attorneys in

As noted by Stu Bernstein's perceptive paper on this general topic, *Smith* v. *Hussman Refrigerator Co.*,[18] recently decided by the Eighth Circuit, raises especially troublesome questions. The court was presented with a claim by certain employees that their union had failed to represent them properly when it processed and won a grievance that caused their displacement by other employees. Four unsuccessful job bidders had grieved, claiming that they had equal skill and ability and more seniority than the employees that the company had selected, and thus were entitled to certain jobs under the contract. The arbitrator awarded the jobs to two of the grievants. Because of ambiguities in the award, the company and the union met and agreed to a clarification which was approved by the arbitrator. The two displaced employees attempted to file grievances, but the union refused to process them. The Eighth Circuit reinstated a jury verdict for plaintiffs, citing among possible grounds on which the jury might have held for the plaintiffs that the union's strict adherence to the principle of seniority could be considered arbitrary, as it disregarded the merit factor also included in the contract; and that the union had failed to invite the plaintiffs to the arbitration hearing to defend their interests. This decision has serious implications that threaten the concept of majority representation.

Several Supreme Court decisions have recognized that a union must have flexibility when faced with competing interests of employees. In *Ford Motor Co.* v. *Huffman, supra,* the Court found that a union must have broad authority in negotiating agreements, noting that "[T]he complete satisfaction of all who are represented is hardly to be expected." In *Humphrey* v. *Moore, supra,* the Court applied this principle to administration of the

arbitration, either because of the expense involved or because of a belief that union officials who understand the shop situation and the collective bargaining agreement can better represent the interests of the aggrieved employee and the union. Unions that do not ordinarily use attorneys in their arbitrations should not be required to finance attorneys for employees as a result of suits for unfair representation. Instead, the complaining employee should be represented in the arbitration by a union member or official selected by that employee. Such a representative may be more likely to understand the institutional concerns that are necessarily a part of the grievance and arbitration procedure, as well as the particular concerns of the employee. Providing the aggrieved employee with an attorney may give that employee an advantage unavailable to other employees in the arbitration process, particularly where the interests of the grievant are in conflict with those of other employees. Where the union ordinarily uses an attorney, that attorney should represent the grievant unless there is a showing of conflict.

[18]100 LRRM 2239 (8th Cir. 1979), *on rehearing,* 619 F.2d 1229, 103 LRRM 2328 (1980).

contract as well, so long as the union acts in good faith. The *Hussman* case, although citing *Humphrey* v. *Moore,* seems contrary to the spirit of that decision. The Court's implication that the employees, whose jobs the grievants were seeking, be allowed to participate in the process, is contrary to the principle of majority representation that forms the basis of national labor policy. The court would inject an additional party into the voluntary dispute-settlement mechanism, necessarily interfering with its effectiveness. The court would, in effect, rewrite the arbitration agreement of the parties by substituting an unworkable proportional representation system in place of majority representation. Such interference in the collective bargaining process undermines the goals of national labor policy. The Supreme Court's decision in *Emporium Capwell Co.* v. *Waco, supra,* which upheld the discharges of a group of minority employees who sought to bypass the grievance procedure, supports the policy of limiting the role of dissenting employees in the collective bargaining process. Dissenting groups have an avenue for input through the political processes of the union, and the Landrum-Griffin Act protects their rights in that regard. The Supreme Court said in *NLRB* v. *Allis-Chalmers Mfg. Co.:*[19] "National labor policy has been built on the premise that, by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislature both to create and restrict the rights of those whom it represents.' " (Quoted in *Emporium Capwell, supra,* at 63.)

If this basic policy is to continue to define the role of a majority representative, *Hussman* is an unfortunate deviation that must not be followed.

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[19]388 U.S. 175, 180, 65 2449 (1967).

CHICAGO PANEL DISCUSSION

Chairman Elson: Those of you who have been coming to the meetings of this Academy must conclude that arbitrators are, indeed, a very introspective lot. For 32 years we have covered almost every aspect of labor arbitration. It's not surprising in the light of this history that this process of self-examination and group analysis should finally focus on the decision-making process, and in particular on how decisions are reached. By contrast, the judiciary does not seem to have the same need. Individual judges, including some of the celebrated, have written about the decision-making process and reflected on the subject. But I know of no comparable group effort on the part of the judiciary to come to grips with this type of problem. It's interesting to speculate on why arbitrators have this strong need to probe the decision-maker's mind and judges do not. Part of the reason may be because of the finality of awards. Arbitrators seldom know the parties' reaction to their decisions. The judges, on the contrary, are seldom left in the dark. Their decisions are the targets of appeals, lengthy briefs, and arguments. Even the Supreme Court finds its decisions dissected at great lengths in law reviews and the press. It may be assumed that conscientious arbitrators and judges strive for perfection. One can only conclude that the institutional framework of the judicial process perhaps gives the judges a stronger sense of inner security.

Panel Member Bernstein: In Title VII cases, the arbitrators and the courts seem to work independently of each other. To the extent they look at the same fact situation, they tend to look at them in the same way.

Now the area where we did get down to serious differences was in the fair-representation area. And the reason is, with the development of the law since *Vaca* v. *Sipes* and *Hines,* which in effect recognized that the union has a statutory duty of fair representation, the issue of whether or not an employee has been accorded that fair representation, either in a decision not to arbitrate or in the presentation in the arbitration, is subject to litigation—to review by the courts—because that duty is ultimately based on a statute and not on the agreement. But it carries along with it also the issue of whether or not the employee has been accorded justice by the employer.

So the twin questions of the duty of fair representation and

the merits of the employer's action become intertwined in the courts. This means, in effect, that the court is acting as a judicial review system. This is an appellate review, in effect, of the arbitration decision or of the decision to arbitrate. What has happened recently in the developments in this area is that these twin questions, which really are analytically separable, have become intertwined to the point where in the decision-making process the courts will present both issues to a jury: Has the union violated its duty of fair representation? If so, has the employer fairly treated the employee in the action which is the subject of the litigation?

The courts ought to stay out of this area. I must say that Judge Tone and Judge Will are on one side of this, and Mr. Friedman and I are on the other. Our general thesis is that the courts ought not to be reviewing arbitration decisions, and that if the court does decide that the union, in fact, has violated the duty of fair representation, whatever that may be, the case ought to go back to the arbitration process itself with certain safeguards, about which Mr. Friedman and I disagree.

The whole issue of fair representation has introduced such a host of complexities, including tripartite arbitration, representation of dissident groups, conflicting interests among employee groups, that here, I think, is where the decisional process in arbitration and the judicial decisional process really come in conflict.

Panel Member Friedman: The decisional process starts long before the case gets to the arbitrator. It starts when the foreman fires the worker or when he refuses to honor what the individual thinks is his seniority. The decisional process goes on when stewards decide how to present the grievance in the grievance procedure, and it goes on all the way up to the level at which the arbitrator finally hears a case. If the case has been well prepared and has been handled well in the grievance procedure, the arbitrator gets a case which has been very much refined and clarified. As complex as the case may sound to the arbitrator, he is hearing a case that has really been distilled as much as lay people can do in a process of this kind. Because union stewards and foremen, personnel directors and international representatives, are lay people, the law as developed in fair representation creates an especially troublesome concept. The union finds itself more and more making a decision as to whether or not to advance a case to the next step of the grievance procedure, or whether or not

to take the case to arbitration. The union finds itself more and more considering whether or not the decision it makes may subject it to a suit for unfair representation. That, I think, diminishes the amount of time and interest the union can pay in making its decision based upon the true merits of the case. I think that is unfortunate. It is especially a problem because the courts have created what is more and more a labyrinth of rules —sometimes conflicting rules—which are exceedingly difficult for the union and, I think, as well for personnel officers of companies to fathom and to find their way through.

The doctrine of fair representation as originally enunciated by the Supreme Court simply was a doctrine that required a union to negotiate fairly for all members of the class without discrimination based on race. From that entirely laudable decision, the concept has gradually grown and is really starting to mushroom in recent years to include arbitrary action, discriminatory bad-faith action (whatever those words mean), negligence in the presentation of a case in arbitration, failure to make an adequate investigation, failure to give notice of an arbitration to a grievant, failure to file a grievance within contractual time limits, perfunctory presentation by the union attorney, and failure to permit participation by dissident or minority employees in the process.

The trend has also been that more of these cases become jury cases, that the remedy more and more becomes damages rather than the back pay and reinstatement which would be available in an arbitration. And more and more the courts, in spite of the strictures of the *Trilogy*, are taking it upon themselves to determine the merits of a grievance at the same time they are determining the question as to whether or not the union acted fairly toward its member. Are we moving from the concept of a majority representation to a concept of parliamentary or proportional representation? I think if you just visualize where this can go, it can make not only arbitration but contract negotiation an impossible, confusing morass.

Panel Member Cohen: I think we are all aware of the fact that we are sometimes called upon to apply harsh terms of a collective bargaining agreement, or a statute which the judges may feel is terribly inequitable, and, in fact, we sometimes apply terms of a collective bargaining agreement which we feel are counterproductive to both parties and don't serve any useful purpose even for the victor; the victor is the victor but is being

defeated, given the terms of a particular grievance. I say that it hurts. It offends our sense of equity, our sense of our proper role in terms of our value system; yet we make those decisions.

Why do we make those decisions? I think we make those decisions because those are the decisions that are consistent with our sense of self, with our role perception as professional decision-makers. I think all of us have had cases where our value system was offended.

Insights into decisional thinking may be extremely complex. We need to raise the hard questions. We may never have all the answers. So what? This is not the only area of human experience where we continue to raise questions and where we do not really have all of the answers and, indeed, may never have. But certainly the effort is exciting and worthwhile, and every bit of new insight can only be helpful to further the process.

Judge Will: There is a fundamental difference between the role of the arbitrator and the role of the judge. Alex Elson said we spent no time on the difference between problem-solver and decision-maker. I would suggest to you that that's the basic difference between the role of the arbitrator and the role of the judge. Ninety-five percent of the cases that are assigned to a district judge never go to a decision, never go to a trial. We are engaged in problem-solving, resolving controversies without a hearing, without a trial, without a decision, in 95 percent of the cases. To that extent we are more mediators, I suppose, than we are arbitrators. So there is a fundamental difference in the role of the judge and the role of the arbitrator to the extent the judge participates in resolution of controversy on a nondecisional basis in the overwhelming majority of the cases which he has assigned to him.

When you get to the decisional process, however, I suggest that there is not a substantial difference in the ultimate objective, or even in the technique. There is a difference in the procedures. You don't have the pretrial procedures in arbitration that we have in legal cases. And there are some reasons for that because, as has been described earlier, there is a considerable pretrial process which has been gone through in the whole grievance procedure before you get to arbitration; this is not present at the court level.

On the other hand, I really believe our pretrial process helps to facilitate the orderly ultimate proceeding at a hearing or a trial because we make the parties stipulate all the uncontested

facts and we don't listen to evidence about facts that are not in dispute. We make them get their exhibits all lined up in advance. We make them identify their witnesses and make them available, if necessary, for deposition and so forth. Some of that, of course, takes place in the grievance process. But it doesn't, to the degree it happens in the courts, take place anywhere near as comprehensively in grievance as it does in pretrial.

I know the arbitrators have problems. There's a difference between expendability and independence. It is a factor in the decisional process; it is a factor in the procedural process. No question about it. I don't have to be liked. I would be happy to be liked by the lawyers who appear before me, and their clients. But I don't have to be liked. Respected? I don't have to be respected, although I would like to be respected. I do not have the problem of getting business by satisfying, so far as possible, the people whose controversies I attempt to resolve. That's what expendability does. On the other hand, I am subject to review which the arbitrators, by and large, do not have. I think this all levels out; we both try to do justice and we both try to reach the right result.

Is there any difference in the process by which we do it? This morning I listened to Ted Jones talking about the difficulty of finding facts, the problems of recollection. I will tell you, he's absolutely right. The least reliable way to reconstruct history is to listen to people who were there tell about it. You'd better start looking for documents or measurements, scientific evaluations, length of tire marks on the road—something objective. Because you will get the same transaction or the same episode reconstructed in such a divergent fashion from different people, it will be difficult, indeed, to come to any objective conclusion as to what the facts really were unless you find some objective facts which don't suffer from the frailties of human recollection. But that's true of arbitrators and judges alike. We both have the problem of trying to get some idea of what really did happen.

We have talked about irresolution with respect to decisions and factual determination first. I agree. Sometimes it takes you 30 seconds to resolve it, and sometimes it takes you much longer. But at some point you have to resolve it. Having resolved the facts, you then try to put them together, given the law or the contract or whatever it is you're dealing with, into what appears to be the just result. There isn't much point in talking about whether decisions are made by intuition or analysis,

whether they are subjective or objective. The fact is they are both, and they vary in degree depending on the case. I don't know any judge who starts out like the mother who made decisions all the time, and when she was asked how she could make decisions so fast, she said, "Why not? What's right's right."

I don't think judges start out knowing what's right in a given case. Nor do I think arbitrators start out knowing what's right in a given case. I think they do attempt to make an analytical evaluation of the facts, apply them to the contract or the law or apply the contract or the law to the facts, and then arrive at what appears to be the just or right result.

We all suffer from the fallibility of being human beings. Only God knows what is really right, except for His Mother. On earth we can do justice only by being absolutely integrative of a fair procedure. Justice is a product of due process, of a fair proceeding.

I once sat at a luncheon in Yugoslavia with a justice of the supreme court in Yugoslavia, and I said to him, "Mr. Justice, this may be an impertinent question, but I'm very interested, indeed, as to what is the principal problem of being a judge, or the processes of justice, in a one-party, authoritarian society. Do you have to worry about what the government or the party thinks when you decide a case?"

And he said, "No. That really has not been a great problem to me. I was a trial judge in Zagreb for a long time and now I'm on the supreme court. I have had a pretty good chance to look at the law in operation in Yugoslavia. That's not really the problem. I don't think I have ever consciously, maybe unconsciously but not consciously, decided a case on the basis of whether or not Tito would like the decision."

So I said, "That's very interesting. What is the principal problem of justice, of being a judge, in Yugoslavia?" He said, "It is the difficulty of having the public understand the absolute necessity of maintaining the integrity of the procedures."

I said, "You could say that in Chicago!"

Judges and arbitrators both have limitations on the extent to which they can reach what they may intuitively and subjectively feel is the right result. I have concluded that the limitations on the arbitrators' and the judges' powers to reach the right result are not that much different, although I think judges have a little more flexibility. I'm not at all sure that part of it isn't the fact that we do have review of our decisions. I think if I were an

arbitrator, I might be a little more cautious in reaching the result, although I'm not sure of that, because I'm really compelled, so far as possible, to do justice, given the facts and the law as I find them. Sometimes I'm frustrated.

As for fair representation, I have tried some of these cases. I don't know how you can decide a *Vaca* v. *Sipes* case or a *Hussman*-type case and not get into the subject of whether or not the unfair representation resulted in an unfair result. How do you decide whether there was adequate representation without looking at whether or not the result was unfair? No court is going to reverse an arbitration decision just because the employee didn't get adequate representation even though the employee won. That has to be the silliest exercise of all. So you inevitably get into the question of whether or not there was a just result. When you determine there was an unjust result, what is the sense of sending it back for further arbitration so the arbitrator can now, with adequate representation, come to the conclusion as to whether or not there was a just result?

What I must say to you as arbitrators is: What is your responsibility with respect to the ruling of the jury or the ruling of the judge that this was an unfair result? Do you just ignore it? Pay no attention to it at all? A tribunal consisting of a judge and a jury has listened to the evidence, heard the law, decided the case. Now, are you going to start from scratch and conclude that the jury or that judge, having heard all the evidence, having considered the law, is to be ignored? Pay no attention to it? Or is there some kind of stare decisis? Are you bound by it? Is it res judicata? It's really the same parties. Historically in the United States, that would constitute what's called res judicata, which means, it has been decided. The issue has been decided. It is no longer justiciable, no longer debatable.

I have no desire to decide any more cases than absolutely necessary. All of us have a limit to our judicial decisional capacity, and it's tough enough to decide cases. But the fact of the matter is, you cannot decide an unfair-representation case without deciding whether or not the result was right. Once having decided that, I don't know where that leaves the arbitrator the second time around. You want to have another crack at it? Blessings on you!

Judge Tone: I agree that almost all of us who judge are attempting to fulfill the role we perceive for ourselves and the expectations of society in that role. I think that applies not only

to judges, it applies to juries. Occasionally a jury decides a case according to its notion of how it ought to come out, ignoring the principles the judge prescribes. But most frequently, based on my experience, a jury understands it is bound by procedural and substantive rules and tries to follow the rules. It's not uncommon, for example, for a jury to find a criminal defendant not guilty when the defendant has not taken the stand. It seems to me that most laymen, looking at that situation without any instruction on the approach they're supposed to take, would think if the defendant is unwilling to take the stand and say he's innocent and tell his story, there must be something wrong; he must be guilty. Typically, jurors don't take that attitude.

That's just an illustration, I think, of the strengthening of one's role perception when placed in a position of decision-making responsibility. So I think that Professor Lasswell and Judge Frank have grossly overstated their case. Of course our predilections have something to do with how we approach questions. Obviously we are creatures of our experiences and our environment.

One of the problems, I think, of one who is trying to perform his decision-making function in an analytical and objective manner is waiting until he has all the information he is supposed to get before he reaches a decision. In the courtroom of the Supreme Court of Illinois there is inscribed on the wall opposite the judges' bench, where they can all see it, the Latin words which, translated, mean "Hear the other side."

There is a human tendency toward prejudgment that I think all decision-makers have to fight off. There is, first of all, in some of the best of decision-makers a strong ego and a considerable self-confidence, a confidence in one's own judgment and intellectual powers. I think judges and arbitrators have to remember that there is more to come. Part of the instinct toward prejudgment we have to fight off, I think, is anxiety. Those of us who have to make decisions approach all but the easiest cases with some anxiety about whether we're going to have difficulty in reaching the right result. That leads us to seize on the opportunities to get started solving the problem as early as we can. I think that we all would profit by fighting off that tendency as long as we can. It is, of course, necessary to make tentative decisions during the course of consideration of a case. Even during the course of reading briefs, it's necessary for appellate judges to make some subsidiary judgments along the way in order to allow the analytical process to proceed.

Turning to another subject, should the judge or arbitrator raise issues that are not touched upon by the parties? There seems to be a difference of opinion. There is some sentiment to the effect that if the lawyers on both sides have seen fit to stay away from a particular issue, due respect to the adversary system and to their judgment, perhaps, indicates that the decision-maker should stay away from it. The problem with that is that at some point the decision-maker has to be satisfied with the integrity of his decision, and if the issue the parties have chosen to ignore seems to him to be a critical one, somehow or other he has to face up to that and do something about it. It's much better to realize it, I should think, at a time when the parties can deal with it themselves rather than after the case is over and in the course of the decision-making process. Sometimes the decision-maker doesn't stumble on the issue himself until the record is closed and, if there are written submissions, until briefs are written. Then there is the problem of whether to call for the views of each side on this issue or to go ahead and decide it without taking it back to the parties. The best procedure usually is to get the views of the parties on the issue they have not addressed.

One comment about the *Vaca* v. *Sipes* problem: Judge Will correctly points out that the judge who is hearing an unfair representation case can't avoid getting into the merits of the controversy. I take it that if it's clear that the underlying grievance was without merit, the plaintiff cannot prevail. But perhaps some kind of an intermediate ground that would allow the contractually guaranteed arbitration to proceed is a possibility. I think it would require varying what I understand to be the rule laid down by the Supreme Court in *Vaca* v. *Sipes,* and certainly the rule as understood by the lower court decisions that follow it, which is that if the underlying grievance has no merit, that's the end of the matter regardless of the unfair-representation issue. I suppose we could have changed the rule to require an inquiry into whether there is probable cause to believe the underlying grievance has merit. If it were decided in those terms, at least the decision of the court on that issue would not have preclusive effect. But I agree generally with Judge Will. Once the matter gets into the court, it's pretty hard for the court not to decide the substantive issue, and it really doesn't make much sense from the standpoint of decisional economy for the court to decide it and then send it back to arbitration to be decided again.

I suppose that when the inadequate representation is the performance of the representative of the grievant, the arbitrator is pretty much in a position of a judge trying a case in which one side is inadequately represented. I guess in that situation judges often feel they ought to step in and see that justice is done and ask some of the questions that ought to be asked. Sometimes, in fact, the inadequately represented litigant ends up with better representation than the other side in such a situation. But the arbitrator, I should think, could often cure that difficulty if he detects it in that situation.

(Second Day)

Panel Member Cohen: In one of my early cases I recall that I reinstated the grievant who was discharged. Some six or seven months after the award was received by the parties, I had occasion to have another case with the attorney for the company who, before the hearing, said, "Weren't you aware of the fact that in that case some six months ago in which you sustained the grievance and reinstated the grievant, the union was just as interested in getting rid of him as the company was?" I said, "I'm very distressed at one level because I thought I had good radar and my radar should have picked it up. But even if it had picked it up, my award would have been the same." I think what I am saying is that most of us are extremely conscious of the fact that the potential for this exists and that the grievant has the right to every consideration of his position. If the arbitrator feels a good case is not being put in by the union, he, of course, becomes more active than he usually likes to be because he feels he has the responsibility to uphold the interest of the grievant even if the union doesn't want to do so and isn't doing so adequately.

Judge Will: I don't subscribe to the proposition that either an arbitrator or a judge is just a skilled referee who is supposed to see to it that the legal combatants fight fairly, or the nonlegal combatants fight fairly, and then at the end of the fight render a decision as to which one won. I think our job is to preside, so far as possible, over a rational search for the truth. Under those circumstances, I think it's a responsibility for an arbitrator or a judge to let the combatants present their cases and ask their questions. But after they have finished—and I wait in my proceedings until they have asked all the questions—and if I think

there were questions that should have been asked and weren't which are relevant either to my determination, if it's a bench trial, or which will help the jury, then I will interrogate a witness. I've never asked a question which I thought would help one side or the other. I must confess that's one of the things that bothers me about this business of stepping in to help the inadequate representative. But you can ask questions which have been unasked and which are, in your judgment, relevant and make a contribution to this effort to find out what the truth is. I do not subscribe to the ancient concept that a judge or an arbitrator should be seen but not heard. But my ultimate position is: Please, as arbitrators, don't let the inadequate, unfair-representation case go to a decision because I'll end up getting it! You can do us a lot of good if you will see to it that there are no unfair representations in cases you decide. You can do it by playing what I would conceive to be the proper role of an arbitrator or a judge, which is to make the proceedings before you as orderly a search for truth as you can.

Panel Member Cohen: To Judge Will: That Saturday morning when we raised the question of how active the judge or the arbitrator should be at the trial, I was really very inspired by your statement that when you were selected as a judge, you felt you were selected to serve over a tribunal which would engage in an objective search for the truth. I was so inspired that the following Tuesday when I appeared at a hearing before two attorneys whom I had had in the past on several occasions, I found myself getting terribly active. Here I was, by God, going to serve and search for the truth! I could read the expressions on the faces of those two attorneys: this isn't the Marty Cohen we have known.

There are many complex contract-interpretation issues that come before us. And we're a little bit afraid that if we become too active even in what we think is the objective search for the truth, we may be upsetting relationships, agreements, things that have been working—and that's not a bad test of collective bargaining. So we have to exercise extreme caution when and how we raise questions in the interest of the objective search for the truth, especially in contract-interpretation cases. I am distressed, however, by what some of my colleagues indicate when they say that even in discipline cases—where I think the danger of interfering with an ongoing relationship and messing it up is not as great as it happens to be in some of the complex contract-

interpretation cases—it's an adversary proceeding and they don't want to raise questions for fear it will have some impact on how the parties feel about their impartiality. The inspiration that we should engage in a rational search for the truth should not cause us to be fearful of raising a question simply because it might have some impact on the notion of our impartiality.

Judge Tone: You subscribe to the old adage of the British bar: A speaking judge is not a well-tuned cymbal.

Mr. Benjamin Aaron: I would like to reassure Mr. Cohen that there are plenty of arbitrators who generally adopt the view of Judge Will and aren't afraid to intervene. I know I speak for a number of my colleagues in that respect. And I make one comment on the duty of fair representation to dissent to what Judge Will said. If I understood you correctly, Judge Will, you said that it's foolish to say that the trial judge, in a case involving an alleged failure of the duty to represent fairly, should not look at the merits because what's the use of going ahead unless you first reach the conclusion that the grievant, or the plaintiff, has been unjustly treated. It seems to me that really begs the question, which is: Who is to decide whether the grievant has been unfairly treated? The worst possibility, it seems to me, and the one that the parties could not really have contemplated, is that a jury should decide that question.

It may be that Justice Douglas was a little exuberant in *Warrior & Gulf* when he said that the ablest judge lacks the experience and training and the information on the law of the shop to decide as well as an arbitrator. But I submit that in most instances the judges are *not* as capable of deciding these questions as the arbitrators. In most instances it's far better for the court not to get into those questions. I do not go beyond that on the question of whether you simply refer every case back and that damages are never a proper remedy.

Judge Will: I would be happy if I never saw an unfair-representation case, if you arbitrators took care of the situation at the arbitration level. But when I do see one of those cases, it is impossible to decide it on the in vacuo question of whether or not there was adequate representation without looking at the results. It is silly to say a grievant who was inadequately represented and who should have lost on the merits should now go back and have another hearing before an arbitrator so that he can lose all over again and perhaps file another unfair-representation case after he loses the next time. The law has the concept

that once you have had a fair hearing before a fair tribunal, and you have had adjudication, you shouldn't have the opportunity to relitigate the question which you have already litigated. If I understand it correctly, the arbitrators' position and the advocates' position would make the arbitrator a court of appeals from the court of appeals. In other words, if it goes back for further arbitration after adjudication by either a district judge or the court of appeals, then you would have the arbitration proceedings resumed and repeated, and if the arbitrator concluded that the court of appeals or the district court, or both, had been in error, he would then award the grievant reinstatement, back pay, or whatever it is that you're going to award.

Judge Tone: In most unfair-representation cases I have seen, it is impossible to evaluate the unfair-representation claim without getting to some degree into the underlying grievance—into the merits of the underlying grievance. So the question really is: What does the court do with that? One solution would be simply to put a low level of determination on it and say the standard for the court is simply whether there is probable merit in the underlying grievance and let it go at that. But I guess the usual rule is that in order to maintain an unfair-representation claim, the grievant has to show both that there is merit in the underlying grievance and that the representation has been inadequate. You would have to change that substantive formulation in order to have the matter of the merits of the grievance go back to the arbitrator.

I'm very much impressed with the argument that what the parties bargain for is a determination by the arbitrator on the merits of the grievance and that it shouldn't be a court or jury that ultimately decides that. But I do think it's important to remember that we would have to change the formulation of substantive law to get that result.

Judge Will: The whole question of unfair representation requires that you hear the evidence with respect to what happened, including the evidence on the merits. Judge Tone said you might say, "Well, I'm not going to think about the merits except to see whether or not I think there's probable cause." But the fact of the matter is, you will hear all the evidence on the merits before you can determine whether or not there was fair representation because the two are as inextricably intertwined as any two things in life can possibly be. There isn't any sense in talking about whether or not there has been fair representa-

tion or unfair representation if nobody has been hurt by what happened. If you conclude that, as inadequate as the union representation of the grievant was, it wouldn't have made any difference if he had had Clarence Darrow and Alex Elson both representing him because he would still have lost, there's no point in having another hearing on it.

Mr. Lamont Walter: How does decisional thinking differ in situations where you are the sole arbitrator as opposed to where you are on a panel, whether it be an arbitration panel or a three-judge court? Intertwined with that question I think is, how do you test your doubts when you are the sole decision-maker? Do you discuss it with your wife? Secretary? Law clerk? Et cetera?

Chairman Elson: When I serve as chairman on a three-man panel, generally speaking the two other representatives are really partisan members and you can expect them to take the position of their respective clients. You get very little help from consulting with the other two members of the panel in a disciplinary or straight interpretative case. Of course, in interest disputes where you're really involved in the whole process of making a new contract, it's exceedingly helpful to have the assistance of the other partisan members, and you can talk about things much more informally and get their insights.

Panel Member Cohen: I haven't had too many tripartite boards recently. In fact, in most cases the parties are quite eager to waive the tripartite board and stipulate that you shall be the sole arbitrator and make the decision. When I do sit on one, however, in most cases I function as if the tripartite board does not exist when it comes to the actual decision-making process. I decide the case on the merits, knowing both sides are partisans in the kinds of boards we serve on and that somebody will sign on with me. There have been a few rare cases where you wonder if anyone will sign on with you, but you stick with what you think is the proper decision and call your executive session and take your chances.

And I have found a board helpful in very complex cases. In one case involving 19 different craftsmen in a rather substantial layoff, they were most helpful in keeping me from making statements in the opinion that were not completely accurate or might be even mischievous to the parties. I raised many questions with the board. They modified certain statements in the opinion.

Judge Tone: I have served on both the district court and the

court of appeals. In the court of appeals, of course, we don't have the same situation as you have in arbitration because we don't have any partisan members. At least we hope we don't. The judges arrive at their tentative decision about the case independently because they read the briefs before hearing oral argument. Then immediately after oral argument, in our court, they meet and discuss the case, and it's not uncommon to be aided in one's path to decision by arguments or insights of other members of the panel. Usually the three judges who participate in the tentative panel decision are not as thoroughly acquainted with the case as is the judge to whom the decision is assigned for writing ultimately will be. And whoever writes the opinion goes through a process that is very similar, I think, to the process an individual judge goes through when he reaches a tentative decision and sits down to try to explain his reasons. Sometimes in the course of writing he finds he can't support the decision that has been tentatively reached. If that happens, he goes back to his colleagues in one way or another and explains the problem. But there is a great deal of individual thinking, necessarily independent thinking, in the process of decision even on a three-judge court.

With respect to whom, other than judges, we discuss these things with, I discuss the problems of decision with my law clerks. I have never discussed them with my wife or my secretary. I haven't discussed them with my wife because, I guess, I have the feeling I might end up indirectly delegating some of the decision-making authority somehow if I did that. She might arrive at some expectations as to how the case ought to be decided and then I might be subtly, unconsciously, attempting to conform to those expectations. It just seems to me that the parties are entitled to have the judge receive only information and arguments about the case from them, or from an assistant who is part of the official apparatus. So, anyway, I choose to discuss matters only with the law clerks; those discussions are often helpful. I'm sure Judge Will, who has also served on both trial and reviewing courts, will have some more observations.

Judge Will: Well, obviously, I'd rather decide cases by myself than have to participate in a consensus with three judges. And I don't know what I would do if I had eight others I had to wrestle with. In any event, the panel decision is a much more complex process than the individual determination. I think I agree with what has been said here about panel arbitration. It

is really the impartial arbitrator who makes the decision. It isn't much different whether there are two other people on the panel or not.

That may be true in arbitration; it's not true on an appellate court level where you have three people. You do talk back and forth and you do start with a tentative decision; you start with a much more tentative decision than you do at the trial level, I should tell you, because when I start a trial I have no preconceptions as to what the result should be. When I listen to appellate argument, I have already read the briefs and I have read the record of the court below, and the probabilities are that I have a preconception of what the result should be. You have a conference immediately after the oral argument, and you may discover that your preconception is different from that of one or more of the other judges. You have this colloquy which goes back and forth, and somebody finally is assigned to write an opinion. And if that person has a different conclusion than you have, you may have to start thinking about writing a dissenting opinion. But you're likely to wait until the proposed majority opinion comes along to see whether or not you're going to dissent so that you can have the benefit, first, of the arguments which two of the judges at least have found persuasive, and you can also have the opportunity to point out their error if you are still of the opinion that they're making a mistake.

So it's a fairly complex process with a three-judge appellate court panel. I think that is a good thing. While I prefer as a matter of personal convenience to decide a case all by myself and I work very hard and discuss it with my law clerks—but nobody else—the appellate process does get the benefit of the interchange of ideas between three knowledgeable judges who have as much background as is possible to get at the appellate level.

But I want to enter a caveat right here. That is, it's not easy by just taking a look at the record at the appellate level to get the full flavor of what happened at the trial. So you do the best you can. One of the reasons why I think people like Phil Tone are great appellate judges is because they have had trial court experience. I think that's a useful thing to have because you're in a better position to evaluate what happened below if you have been around and seen it happen. The appellate court decisional process is not simple, but I think it's good.

Chairman Elson: I should add, just speaking as an arbitrator,

that I find it's a pretty lonely process—this business of resolving one's own doubts. I will confess that I frequently make an exposition of the case to my wife, but I don't invite her opinions. But it helps me to air what the problem is and to hear what I am saying about the problem, and sometimes in the process of doing that I do get some help. I think one of the big problems in decision-making is just this business of resolving those doubts, and any techniques of that character certainly can be helpful.

Judge Will: You ought to decide the case before you and not some other theoretical or hypothetical or possible future case. When that case really comes, it will have some other facts which you did not even anticipate and which may or may not compel a different result than you have hypothesized, and there's nothing worse that judges can do, including the Supreme Court, than to decide cases that aren't before them. I don't think arbitrators ought to decide anything but what's before them, and I don't think judges ought to decide anything but what's before them. That's difficult enough. I have seen opinions, too—not only by arbitrators but by judges—which threw out a bone to the losers, or which hypothesized about what the result might have been if the facts were different. I think that's a mistake on any decision-maker's part.

Judge Tone: It would not be an overstatement to say that some of the most important determinations of the Supreme Court—or the practical effect of the Supreme Court decisions—have been from dicta rather than from what the Court actually decided. The Supreme Court is greatly given to pronouncements on issues that are not before them. They, as an institution, I think, have departed very substantially from the common law concept of growth of the law through deciding questions that are actually presented.

Panel Member Bernstein: One other thing you do not want in a decision is for the arbitrator to decide that there's a clause in the contract that nobody talked about that he thinks is determinative, but the parties never had a chance to comment upon. That's one of the most grievous errors.

Judge Will: I do not think a judge or an arbitrator ought to decide a case just on the issues which the parties have presented if he or she really thinks there is a material issue that has not been considered. I don't think they ought to decide it on the basis of that issue without going back to the parties. But once

or twice a year my law clerks will come to me and say, "You know, they just missed this whole point which we think is relevant." Sometimes I agree with the law clerks, and sometimes I think they have a point which isn't relevant and we ought to decide the case on the issues which the parties have raised. But where I come to the conclusion that they're right—that the parties have just blown one issue which seems to us to be material—we'll go back to them and ask them to brief it or, if necessary, even to present evidence or affidavits, whatever may be appropriate. But I wouldn't decide the case. That's kind of showboating, it seems to me, and I don't think a judge ought to do that, or an arbitrator either. I would not decide a case on an issue which the parties have not discussed or not considered, but I wouldn't ignore it. If I thought it was relevant or significant, I would go back to them and say, "Okay, you tell me why this is not relevant, why you didn't consider it. And if it is relevant, go brief it or go marshall your evidence or whatever it takes to get that issue before me."

CHAPTER 5

DECISIONAL THINKING

WEST COAST PANEL REPORT*

HOWARD S. BLOCK, CHAIRMAN

Introduction

In a familiar scene from "Fiddler on the Roof," Tevye enters the small town square and encounters a group of men engaged in a heated debate. After listening intently, he nods toward one of the protagonists and states: "I think you're right." Whereupon the adversary retorts: "Tevye, how could you reach that conclusion in view of points A, B, C, D, and E"—explaining each in great detail. After pondering these additional facts and stroking his beard in the process, Tevye responds: "You know, I think you're right!" Whereupon a voice from the rear asks: "How can they both be right?" To which Tevye replies: "You know something, you're right, too."

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*Members of the panel are Howard S. Block, Chairman, Member, National Academy of Arbitrators, Santa Ana, Calif.; Irving Bernstein, Member, National Academy of Arbitrators, Professor of Political Science, University of California, Los Angeles, Calif.; Reginald H. Alleyne, Member, National Academy of Arbitrators, Professor of Law, University of California, Los Angeles, Calif.; Honorable Warren J. Ferguson, United States Court of Appeals, Ninth Circuit (who was unable to continue after appointment to the Circuit Court); Honorable Mariana R. Pfaelzer and Honorable Malcolm M. Lucas, United States District Court, Los Angeles, Calif.; Jerome C. Byrne, Gibson, Dunn & Crutcher, Los Angeles, Calif.; Roland C. Davis, Davis, Cowell & Bowe, San Francisco, Calif.; and R. King McCulloch, Airlines Division, International Association of Machinists, Washington, D. C.

The panel conducted its deliberations during six meetings beginning in October 1979 and ending in May 1980. This report represents general agreement, but it should not be assumed that every panel member endorses every statement or conclusion.

The panel gratefully acknowledges the important contributions made by George E. Marshall, Jr., arbitrator; UCLA Research Economist Paul Prasow, arbitrator; William Levin, arbitrator; and Program Committee Chairman E. A. Jones, Jr., who attended all panel sessions. The Chairman is particularly indebted to Edward Peters, arbitrator, who made available, unreservably, research material on collective bargaining methodology which greatly facilitated the preparation of this report.

Unfortunately, judges and arbitrators (sometimes hereinafter referred to as the "decision-maker," "trier of fact," or "trier") do not have Tevye's broad range of choice. After weighing the competing alternatives, we must reach a single conclusion. Nowhere is the decision-maker's dilemma more brilliantly delineated than in the following excerpt from Mr. Justice Cardozo's classic inquiry into The Nature of the Judicial Process:

> "What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking a legal consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis."[1]

Cardozo's observations focus upon the *decision-making function* from the vantage point of an appellate judge. In addition to deciding cases, the trial court judge and arbitrator also perform a vital *fact-finding function;* the importance of this initial fact-finding function in the judicial process is sometimes overlooked in the general preoccupation with upper court opinions, a point amplified in our discussion on "Decision-Making." The panel's inquiry has centered upon both the fact-finding and decisional aspects of the trier's role.

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[1]Cardozo, The Nature of the Judicial Process (New Haven and London: Yale University Press, 1921), at 10–11.

I. Evaluating Testimony

If witnesses would simply tell the truth, it has been said, congested court calendars could be unburdened and the mounting backlog of unresolved grievances substantially curtailed. Is it for the most part perjury that makes the sharply conflicting testimonial evidence such a common occurrence in contested proceedings? Doubtless, there are witnesses who lie, but we believe that deliberate falsification accounts for a relatively small proportion of the contradictory testimony heard daily by judges and arbitrators. As regards this latter point, several panel members made the observation that the grandeur and solemnity of a federal courtroom probably is more conducive to "truth telling" than the informal setting of an arbitration proceeding.

In our opinion, however, the principal reason for testimonial conflicts is not the result of a reluctance to tell the truth, but is caused by marked differences in the capacity of individuals to *observe, hear, recollect,* and *communicate* external reality. Another factor is the emotional commitment that witnesses have to support testimonial declarations that have been elicited from them, lest their credibility be undermined or demolished. In addition, conscious or unconscious bias may influence their testimony. As a result of such factors, witnesses who testify with great sincerity and conviction, resolved to tell the truth, often are capable of relating only their perceived version of the external circumstances which they observed or heard—meaning, their version of the truth.

This inability to reconstruct witnessed events with reasonable accuracy was underscored by the account of a panel member who related what he described as a humbling experience while driving on a Los Angeles street. A collision occurred directly in front of him; he witnessed it. Yet, moments later, when he related his observations to the police, the investigating officer demonstrated to him, quite convincingly, why his version could not be reconciled with the actual events. It should be reiterated that our panel member was a disinterested observer. As to those directly involved in the collision, consider the potential for expanding the ambit of human error because of the emotional impact inevitably produced by such an occurrence, not to speak of conscious or unconscious motives of self-interest for slanting their testimonial recollection of events.

To some extent, the trier of fact is subject to related human propensities. In Justice Cardozo's words:

> "All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[2]

At least one other major impediment to an objective presentation of all the pertinent facts in a case should be noted. The impact of the adversary system, common to both litigation and arbitration, spurs the contending parties with the single-minded objective of winning the case, rather than furnishing the trier of fact with all the pertinent evidence—evidence, of course, contrary to the client's interests. It is not our purpose to disparage the adversary system. Like Churchill's famous observation about democracy as the worst system of government except for all the others, we baldly assert that the shortcomings of the adversary system are less than those of all other systems of jurisprudence. The core of the adversary principle, cross-examination of witnesses by the contending parties, has received no better defense than the perceptive declaration by Wigmore:

> "The vital aspect is that we are not to credit *any man's assertion* until we have tested *it* by *bringing him into court* (if we can get him) and *cross-examining him.* Now the development of this art of cross-examination, during two centuries, is the great valuable contribution . . . and modern psychological science . . . has shown us something of the hundred lurking sources of error that inhere in all testimonial assertions; and we perceive that our traditional expedient of cross-examination was the main way to get at these sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test [cross-examination] would be to surrender the best single expedient anywhere invented for getting at the truth of controversies." [Emphasis in original.][3]

Since the adversary process featured by stringent cross-examination by opposing counsel is a human process, it cannot be expected to produce invariably a full and complete disclosure

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[2]*Id.*, at 12–13.

[3]John Henry Wigmore, A Treatise on the Anglo-American Systems of Evidence at Trials at Common Law, 3d ed. (Boston: Little, Brown & Co., 1940), Vol. I, at 277.

of all relevant facts. More often than not the trier must decide cases on the basis of incomplete information. As between a judicial and an arbitration proceeding, the established role of discovery in the former is frequently more effective in ferreting out pertinent information than is the grievance procedure in the latter, a point elaborated in our discussion of "Discovery."

In evaluating the problem of conflicting testimony, a principal focus of our examination was the innate inability of witnesses to perceive, recall, and reconstruct events accurately. Despite the pronouncements of adherents to mechanical jurisprudence, no small number, we have yet to devise a simple application of logic, a formula as it were, for separating one version from another when dealing with conflicting perceptions of the same event. All we can do is what judges have done for centuries past, namely, analyze the evidence and argument carefully, apply established guidelines,[4] and then reach a decision recognizing fully that, like physicians and even football coaches, we may be wrong.

Human experience in business transactions has resulted in a preference for the written word over later recollection—a preference reflected in the Goldwynism that: "An oral contract is not worth the paper it's written on." This well-worn aphorism, while not quite legally correct, reveals considerable insight into the decision-maker's reluctance to choose between contradictory testimony when more reliable evidence is available. Written instruments, for example, although seldom free of ambiguity, generally are deemed a more reliable basis for ascertaining intent than recollection of what was said when the language in question was formulated. The trier can, therefore, ordinarily be expected to rely upon documentary evidence when the alternative choice means an evaluation of contradictory testimony.

Probably no criterion of credibility has been treated more

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[4]A standard list of credibility guidelines is set forth in California Evidence Code Section 780, as follows: "... the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: (a) His demeanor while testifying and the manner in which he testifies. (b) The character of his testimony. (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. (d) The extent of his opportunity to perceive any matter about which he testifies. (e) His character for honesty or veracity or their opposites. (f) The existence or nonexistence of a bias, interest, or other motive. (g) A statement previously made by him that is consistent with his testimony at the hearing. (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. (i) The existence or nonexistence of any fact testified to by him. (j) His attitude toward the action in which he testifies or toward the giving of testimony. (k) His admission of untruthfulness."

skeptically, despite benediction by appellate courts, than the criterion of demeanor. The discussion on this point prompted one of the lighter moments of our meetings when Professor Bernstein asked Judge Ferguson, "Can you recognize a liar when you see one?" With characteristic exactitude, Judge Ferguson responded, "No, he's got to talk to me first!" Professor Bernstein observed that, as regards demeanor, what witnesses say is far more important than facial expressions or other body language, a point endorsed by all panel members.

It must be acknowledged, however, that the importance of demeanor as a credibility criterion is sometimes useful as one factor among many in evaluating testimony if considered with appropriate reservation. The limitations of demeanor were highlighted in the following observation of a veteran arbitrator:

> "Anyone driven by the necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill-at-ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers."[5]

In many cases, credibility may decide the outcome; in most, however, it is simply one important element of the decision-making process, the subject to which we now turn.

II. Decisional Thinking

Judges and arbitrators decide cases daily; yet, most of us would find it difficult to raise to a conscious level the complex reasoning processes that guide our choice one way or another. Relatively few legal scholars have undertaken to describe the inner nature of decisional thinking. A most notable contribution is by Judge Jerome Frank, a leading exponent of the school of American Legal Realism. His provocative writings have stimulated considerable discussion and controversy over the past half-century. The field of psychology, however, has contributed the most significant findings concerning the nature of human consciousness at work in resolving complex problems. We ven-

[5]Edgar A. Jones, Jr., *Problems of Proof in the Arbitration Process: Report of West Coast Tripartite Committee*, in Problems of Proof in Arbitration: Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1966), at 208.

ture upon this uncertain terrain, quite aware that many aspects of decisional thinking are not fully understood by researchers. We seek primarily to determine whether general guidelines have evolved in those mental processes which produce, out of conflicting evidence and contradictory arguments, a reasoned decision.

For purposes of this initial discussion, the decision-maker's thought-processes may be divided into two broad categories: (1) analytic thinking, and (2) intuitive insight. It should be noted, however, that in practice there can be no clear separation between these two concepts. They are two aspects of an organic unity, of a total unitary process. They may be separated for purposes of analysis and study, but not in practice, in life itself.

The analytic aspect of thinking—the process most recognized by us—involves an intensive scrutiny of the case record: a step-by-step evaluation of the pertinent evidence and argument, a careful sifting out of the relevant from the less relevant and the irrelevant. This sifting is an ordering process to develop a ratio decidendi, a line of logic leading to the validation or invalidation of a decisional hypothesis. Analytic thinking, therefore, is above all purposeful. One does not study a record aimlessly. The objective is to reach a decision, a goal wholly or partially crystallized in the mind of the trier of fact. This goal is an essential ingredient in the process of weighing the essential facts and resolving issues of credibility.

Intuition (or the "judicial hunch" as Judge Jerome Frank and other legal scholars have characterized it) provides a guiding idea, an operating hypothesis[6] that the trier seeks to prove or disprove by an analysis of the case record. This goal-directedness of the decision-making process, an essential aspect of judicial thinking used by most judges (but acknowledged by few, according to Frank), is described in his seminal work, *Law and the Modern Mind:*

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[6]The following pertinent, if somewhat facetious, definition has been offered: "*hypothesis.* A hypothesis is an assumption, usually made for one of two basic purposes: either to determine by further testing whether it is correct, or to serve as a basis for action in the absence of more certain information. In either case, assumption would be a perfectly good word to use, but hypothesis is somewhat fancier, and sounds 'solider' and more scientific. It is foolish to act on a mere assumption, for instance, but not so foolish to act on a hypothesis. If either the assumption or the hypothesis turns out to have been wrong, however, the crash is about as loud in one case as in the other." James S. LeSure, Guide to Pedaguese (New York: Harper & Row, 1965), at 91.

> "The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. [Footnote omitted.] If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another."[7]

A more detailed general description of the intuitive thought-processes that occur at the conclusion of a trial was expounded more than a half century ago by Judge Joseph C. Hutcheson, Jr.:

> ". . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way. . . . [I]n feeling or 'hunching' out his decisions, the judge acts not differently from, but precisely as the lawyers do in working out their cases, with only this exception: that the lawyer, having a predetermined destination in view—to win the law suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him. . . ."[8]

Bertrand Russell, mathematician and philosopher, has provided another illuminating insight into the intuitive process at work. When frustrated by repeated unsuccessful attempts to write some serious new work, he would place the subject into "subconscious incubation" and let the work go on "underground." As Russell explained:

> ". . . after first contemplating a book on some subject, and after giving serious preliminary attention to it, I needed a period of subconscious incubation which could not be hurried and was, if anything, impeded by deliberate thinking. . . . Having, by a time of very intense concentration, planted the problem in my subconscious, it would germinate underground until, suddenly, the solution emerged with blinding clarity. . . ."[9]

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[7]Frank, Law and the Modern Mind (New York: Anchor Books, 1963), at 108.

[8]Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision,* 14 Cornell L.Q. 274, 278 (1929).

[9]Robert E. Egner and Lester E. Dennon, eds., The Basic Writings of Bertrand Russell (New York: Simon & Schuster, 1961), at 64.

It must be stressed that the intuitive process described by Frank, Hutcheson, and other noted legal realists presupposes a thorough knowledge of the subject and extensive experience with the judicial process. It is this vast reservoir of knowledge and experience that permits the decision-maker to assimilate the facts expeditiously and come to a tentative conclusion which is then tested by a stringent analysis of the case record.[10] Frank's emphasis upon the "dominance of the conclusion" should not obscure the need for a thorough analysis of the case which is necessary to determine whether the "hunch" can be supported by the salient facts in the record. Only after the "hunch" withstands this critical scrutiny will the hypothesis be accepted as valid.

The tentative formulation referred to by Frank and others as the "judicial hunch" is sometimes taken out of context by some critics and misunderstood to mean a premature decision or little more than an unsupported guess. This is a most erroneous view. The "hunch" is the "judicial leap" of a mind trained in the legal or arbitral decisional process. It should also be emphasized that the "hunch" is a prelude to the decisional process, not the conclusion of it. Nevertheless, to minimize possible confusion or misunderstanding because of terminology, we have opted for more descriptive terms such as "operating hypothesis," "guiding idea," or "tentative conclusion" in place of "judicial hunch."

In cases involving uncomplicated fact situations, familiar interpretation problems, or cases that turn on credibility, the decision-maker may be prepared to render a "bench decision" at the conclusion of the case. Extensive experience with familiar subject matter and issues has prepared the decision-maker to assimilate information quickly, reach a tentative conclusion, and analyze it at the conclusion of the hearing or shortly thereafter.

In more complex or unfamiliar cases, a preliminary study of the record, a mulling over of the evidence is the necessary preparation for comprehending the nature of the problem to make possible an intuitive leap, a tentative conclusion, often only dimly sensed at first. The initial study of the record entails

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[10]The concept of intuitive thinking is, by no means, limited to judicial decision-making. It is an integral part of virtually every decision-making process. For an excellent discussion of the use of intuitive thinking in the physical sciences, see Jerome S. Bruner, The Process of Education (Cambridge, Mass.: Harvard University Press, 1963), esp. Ch. 4, *Analytic and Intuitive Thinking;* also, Peter Achinstein, Law and Explanation—An Essay in the Philosophy of Science (New York: Oxford University Press, 1971), at 137–141.

a mental groping for a line of logic, a rationale, which must have a conclusion, a goal in mind. One does not examine the record with the mind a clean slate and then, by syllogistic reasoning, arrive at a conclusion that was nowhere in the mind in the beginning of the sifting-out process. Facts do not automatically associate themselves together into a chain of reasoning without the intervention of human purpose. As Emerson wrote: "Behind the writer there must be a man"—a reasoning mind to decide how the facts relate to each other. Before the decision-maker can weigh the evidence, decide what is relevant and to what degree, and what is irrelevant, he must have a goal, a working hypothesis, however dimly, in mind.

One does not "think" (i.e., employ logic) intuitively. Thinking is a process of ratiocination which best describes analysis and synthesis to reach a predetermined, even if tentative, goal or objective. At the risk of overemphasis, it must be reiterated that in decisional thinking the objective is established by an operational hypothesis, a guiding idea. Hypotheses are tentative conclusions concerning evidentiary relationships derived from the record. One propounds a hypothesis by a qualitative leap, a leap facilitated by a considerable preliminary familiarization with the raw data contained in the case record. The decision-maker, as previously noted, mulls over the record until he is ready to postulate a hypothesis. Once the hypothesis has jelled, then and only then can he meaningfully analyze the record to produce the relevant line of logic in support of his operational hypothesis. Columbia University Philosophy Professor Justus Buchler, in a critical study of methodology, summarizes a basic thesis of Coleridge (a philosopher as well as poet): "The guiding idea [hypothesis], guarantor of unity, dominates the material and fixes the purview of relevancy. In sublime singleness of purpose, it paves the way toward consummation."[11]

From the above analysis, the reasoning process may be summarized into four stages: (1) preliminary study of the record; (2) operating hypothesis or tentative conclusion; (3) analysis of the total case record; and (4) rationale (explanatory justification of the conclusion). In some cases (e.g., those which turn on credibility), the hypothesis may become jelled by the end of the trial or arbitral hearing and then be tested by analysis of the record;

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[11]Buchler (Johnsonian Professor of Philosophy), The Concept of Method (New York: Columbia University Press, 1968), at 48.

in other cases, particularly those that involve an evaluation of complex issues (e.g., a patent case or job-incentive program), a prior intensive study of the record is required in order to formulate a tentative conclusion. Three of the four neutral panel members estimated that, in approximately half of their cases, the tentative conclusion was reached by the close of the hearing. In all instances, the tentative conclusion is subjected to a test of the case record by a factual analysis which ultimately validates the conclusion or compels its rejection. When the hypothesis is considered valid, the relevant particulars will readily link together into a supporting line of logic. If not, the hypothesis must be modified or rejected. If it is rejected, a new tentative conclusion will be adopted which in turn must stand the test of the record.

As previously noted, the major research and theorizing on decisional thinking has been carried out by psychologists (who, incidentally, profoundly influenced Judge Frank). The guiding role of the hypothesis (i.e., intuition) in the decisional process is endorsed by an overwhelming number of psychologists who have studied these elusive concepts. Consider, for example, the following summary description of the reasoning process employed by scientists or others simply seeking a solution to a particular complex problem:

> "John Dewey [*How We Think* (1910)] was perhaps the first psychologist to analyze *the steps in the problem-solving process:* (1) a difficulty is felt, (2) the difficulty is located and defined, (3) possible solutions are suggested, (4) consequences are considered, and (5) a solution is accepted. . . . An early and influential analysis of the *creative process* was that of [Graham] Wallas [*The Art of Thought* (1926)]. The similarity to the analysis of problem solving is apparent. Wallas's four steps were: (1) preparation (information is gathered), (2) incubation (unconscious work is going on), (3) illumination (an 'inspired' synthesis emerges), and (4) verification (the new idea is tried out and elaborated). Later writers and researchers have usually accepted the Wallas framework and attempted to fill it in." [Emphasis added.][12]

It is especially noteworthy that both Dewey and Wallas place the hypothesis (Step 3 in both) before the rationale—that is, prior to "verification" or "consequences are considered."

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[12]Leona E. Tyler, Individuality: Human Possibilities and Personal Choice in the Psychological Development of Men and Women (San Francisco: Jossey-Bass Publishers, 1978), at 198.

While the role of intuition (operating hypothesis) is widely recognized and accepted in the physical and social sciences, it is still regarded skeptically by many, if not a majority of, arbitrators and judges. However, this is not the only area where a disparity exists between what actually occurs and how it is often perceived.

III. Decision-Making

Two principal aspects of the decision-making process in a given case involve: (1) fact-finding—an evaluation of the factual record of the case; and (2) rule determination—establishing the applicable rules or contract criteria:

Fact-Finding

Probably no task is more significant in determining the decision in a case than the trier's fact-finding role. The fact-determinations made at this stage direct the path of decision in one direction or another. Appellate courts place great reliance upon the findings of fact made by trial courts, particularly as regards credibility. For example, Rule 52(a) of the Federal Rules of Civil Procedure prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." An arbitrator's findings of fact, for most practical purposes, are conclusive. Therefore, to comprehend fully the nature of the decision-making process, it is necessary to understand the fact-finding role and, even more importantly, to be aware of its limitations.

The term "fact-finding" does not convey an accurate impression of the raw unevaluated record of the case at the close of the trial or hearing. The facts in a given case are seldom "found" —they must be "extracted," refined as it were, from the often conflicting accounts of fallible witnesses. The trier, with no infallible antenna for determining which version is closer to the truth, must make a choice between these contradictory accounts. The agony of decision in choosing the facts to be credited has been discussed previously in "Evaluating Testimony."

Despite what we perceive to be the crucial importance of fact-finding, most legal scholars in their analysis of decision-making have largely concentrated their attention on the func-

tion of appellate courts, either minimizing or largely ignoring the trial judge's fact-finding function. Notable exceptions in this respect are the works of Judge Frank, which focus upon the decisions of trial court judges and juries.

Judge Frank was particularly sensitive to the problem of flawed memory or observation, unconscious prejudices, and other aspects of human fallibility that are invariably present in reconstructing or interpreting past occurrences. In short, the likelihood of human fallibility renders the fact-finding process one of probability rather than certainty. In *Courts on Trial,* Judge Frank offers this candid analysis of fact-finding:

> "The facts as they actually happened are therefore twice refracted —first by the witnesses and second by those who must 'find' the facts. The reactions of trial judges and juries to the testimony are shot through with subjectivity. Thus, we have subjectivity piled on subjectivity. It is surely proper, then, to say that the facts as 'found' by a trial court are subjective.
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> . . .
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> "Considering how a trial court reaches its determination as to the facts, it is most misleading to talk as we lawyers do, of a trial court 'finding' the facts. The trial court's facts are not 'data', not something that is 'given'; they are not waiting somewhere ready-made, for the court to discover, to 'find'. More accurately, they are processed by the trial court—are, so to speak, 'made' by it, on the basis of its subjective reactions to the witnesses' stories. Most legal scholars fail to consider that subjectivity, because, when they think of courts, they think almost exclusively of upper courts and of their written opinions. For, in these opinions, the facts are largely 'given' to the upper courts—given to those courts by the trial courts."[13]

The trial judge and the arbitrator face the same dilemma in their fact-finding task. However, their relationship to the upper courts is substantially different. The grounds for judicial review of arbitral awards are exceedingly (and deliberately) narrow since the parties accept arbitration as the terminal point of the grievance procedure to attain a final and binding decision. The number of arbitration cases appealed to the courts is minimal—probably less than one-tenth of one percent. Thus, in practical effect, arbitration combines the functions of first-stage triers of fact and courts of last resort. Of course, an intolerable situation to either party not remedied in arbitration can often be reme-

[13]Frank, Courts on Trial: Myth and Reality in American Justice (Princeton, N.J.: Princeton University Press, 1949), at 22–24.

died by a determined position when the agreement is opened for amendments.

Finally, it should be noted that the quest for certainty in the outcome of a contested case will inevitably be thwarted by the unpredictable aspects of the record produced in a fact-finding proceeding and by the interpretation of that record. Therefore, decision-making at the trial or arbitral-hearing stage would be even more likely a venture into the realm of probability than it would be in the upper courts who necessarily rely, to a great extent, upon the trial courts' findings of fact.

Rule Determination

Do trial judges and arbitrators merely interpret and apply an existing body of rules? Or does the nature of their function also include a broader responsibility? This matter has been debated by legal scholars and practitioners for centuries.

The traditional concept of judicial decision-making, as depicted by such common-law pioneers as Coke and Blackstone, holds that the judge does not really interpret the law, but merely finds it. Blackstone referred to the judiciary as "the living oracles of the law" and reaffirmed the concept that its task was solely one of discovery, namely, a search for the applicable rule, which, when applied mechanically, as it were, to the facts resulted in the inevitable conclusion. As for statutory law, legal traditionalists rigidly distinguish between the judiciary, which interprets the law, and a legislative body which, in their view, enacts legal absolutes. Similarly, the traditionalists view the arbitrator as performing a corresponding mechanical task of searching out the applicable contract provision and then measuring it against the facts of the case.

Granted the traditionalist's view that stability in the legal system and in the bargaining relationship are fundamental objectives of our society. And granted also that stability requires the enforcement of established principles and rules—for example, case law, statutes, or terms in a collective agreement—whenever they are applicable. But only the most inflexible advocate of mechanical jurisprudence would deny that the law must *reflect* changes in an evolving society. The word "reflect" is used advisedly because decision-makers primarily reflect—they do not normally initiate—societal changes.

No legal system that attempted to reduce the judicial function

to the bare bones of an inflexible code of absolute legal principles has long survived.[14] As stated by Roscoe Pound:

> "Application of law must involve not logic merely but a measure of discretion as well. All attempts to eradicate the latter element and to make the law purely mechanical in its operation have ended in failure. Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause. 'Whoever deals with juristic questions,' says Zitelman, 'must always at the same time be a bit of a legislator' [footnote omitted]; that is, to a certain extent he must *make* law for the case before him." [Emphasis in original.][15]

Justice Oliver Wendell Holmes articulated the earliest and perhaps the most quoted criticism of mechanical jurisprudence:

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. . . ."[16]

Let us consider a few examples of the foregoing concepts as applied by judges and arbitrators.

In practice, legislators often delegate to the courts what amounts to legislative responsibilities by what is omitted from a statute either deliberately or inadvertently or by resort to deliberate ambiguity in an effort to satisfy special interest groups. Frequently, the legislature enacts laws with very general wording, the precise meaning of which remains to be declared by the courts on a case-by-case basis. Otherwise, legislatures would get so bogged down in details that they could never complete their work. Consider, for example, the role of litigation in the implementation of the Civil Rights Act of 1964. Trial courts across the nation have made sweeping decisions on school integration and employment discrimination issues (to name but a few) that involve basic questions of public policy—decisions for which the Civil Rights Act provides only a very broad mandate. Of course, the courts' rulings on these vital questions interpret the Civil Rights Act, but they also involve an

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[14]Science of Legal Method: Selected Essays by Various Authors, Modern Legal Philosophy Series Vol. IX (Boston: Boston Book Co., 1917), Ch. VII by Roscoe Pound.

[15]*Id.*, at 208.

[16]Holmes, The Common Law (1881), at 1.

important expansion of the law as well. Countless other examples could be cited of judges being required to add to legislative enactment by judicial interpretation. Legislation is often an inescapable part of the judicial process.

As we know, arbitrators also are called upon to bridge the gap of omitted or ambiguous terms as part of their interpretative function. Negotiators of bargaining contracts simply cannot anticipate all the issues that might arise during the term of a one- to three-year agreement that covers the working relationships of hundreds, sometimes thousands, of employees. Most of us are familiar with the following observations of the late Harry Shulman, which bears repeating in this context:

> "No matter how much time is allowed for the negotiation, there is never time enough to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up. Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ. The urge to make sure of real consensus or to clarify a felt ambiguity in the language tentatively accepted is at times repressed, lest the effort result in disagreement or in subsequent enforced consent to a clearer provision which is, however, less favorable to the party with the urge. With agreement reached as to known recurring situations, questions as to application to more difficult cases may be tiredly brushed aside on the theory that those cases will never—or hardly ever—arise."[17]

It is a commonplace that virtually every collective agreement contains a grievance and arbitration provision to deal with both the problems of interpretation that inevitably arise and those situations that the parties may not have anticipated. Arbitrators not only interpret the parties' agreement, they also perform a vital gap-filling role. Indeed, the U.S. Supreme Court, in a landmark case,[18] underscored this arbitral function as ". . . a vehicle by which meaning and content is given to the collective bargaining agreement."

Changes affecting the employment relationship also may require the arbitrator to introduce a legislative element in the decisional process—for example, changes in technology, in prod-

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[17]Shulman, *Management Rights and the Arbitration Process: Reason, Contract, and Law in Labor Relations,* in Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1956), at 175.

[18]*Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580, 46 LRRM 2416 (1960).

ucts produced, and even in the acceptable length of facial hair and beards. A pertinent example of the pressure on the decision-maker to respond to change arises from discipline meted out for chronic alcoholism. Until recent years, alcoholism was viewed as a human failing attributed to a lack of character and deserving of little patience in meting out stern disciplinary action often including discharge. At present, there is virtual unanimity among medical authorities that alcoholism is an illness that should be treated as such—a view gradually gaining recognition in the industrial community, but by no means universally accepted. Today, when an arbitrator is presented with such medical evidence in a discharge case for alcoholism under the typical "just cause" contract provision, the evidence may compel him to deal with the issue as an illness (and often an absentee problem) rather than a disciplinary problem, as in the past.

In summary, decision-making does not simply involve a mechanical application of the facts to a set of fixed rules. As former Michigan University Law School Dean St. Antoine so aptly phrased it: "The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae."[19]

We have focused our attention to this point upon decision-making in its broadest aspects. Now to a consideration of more specific matters, namely, decisional thinking involving questions of procedure, fair-representation issues, and the interaction of NLRB, judicial, and arbitration proceedings.

IV. Decisional Thinking as Applied to Procedural Matters

Arbitral Discovery

The basic objective of arbitral discovery is to achieve full disclosure while avoiding the legal complexities of discovery as practiced daily by "litigators" in law and motion courtrooms. The authority of labor arbitrators to fashion and administer discovery procedures, it should be noted, is now firmly established.[20]

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[19]St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L.Rev. 1137, 1153 (1977).

[20]For an excellent discussion of arbitral discovery, including a proposal for interaction among the three tribunals of labor dispute resolution—the courts, the NLRB, and

"Discovery" in law is an aggregation of procedures for judicially compelled disclosure of information in pending litigation. These remedies have evolved and been liberally administered by courts to compel early and full disclosure at a pretrial stage of prospective litigation (and during trials) of all of the information that may enable the litigants to understand (and thus settle) and the courts more effectively to narrow and then to resolve the issues in dispute. Courts and the legal profession recognize fully that discovery abuses are common. Most notably is this true of the interminable, repetitively filed written "interrogatories" that constitute its most onerous and readily abused procedure, requiring extensive file searches and often disclosures of sensitive or classified information. Discovery practitioners are specialists and have become known, somewhat pejoratively, as the "litigators," in contrast to "trial lawyers," because they do not expect to, and indeed rarely have to, appear in court to try the case. In large part that is because they have all too often become the means for harassment designed—with considerable success—to coerce sometimes unwarranted settlements.

It is widely accepted, at least in theory, that mutual and early disclosure of all that is available and relevant to a grievance is one of the main purposes of the progressive steps of the typical grievance procedure. The objective, of course, is to facilitate resolution of the dispute. Withholding information that should be disclosed impairs both the prospects of settlement and breeds a corrosive distrust of the good faith of the other party and of the effectiveness of the grievance procedure. In the great majority of bargaining relationships, complete and early disclosure is evidently routine. This is so even though there do occur arguments, sometimes heated ones, over what is subject to discovery and what is properly withheld in the processing of particular grievances.

The Supreme Court in *NLRB* v. *Acme Industrial Co.*[21] emphasized the underlying legally enforceable duty of disclosure which arises from the statutory duty to bargain in good faith and

arbitration, see the following series of three articles by Edgar A. Jones, Jr., in the University of Pennsylvania Law Review: (1) *Blind Man's Buff and the Now-Problems of Apocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes,* 116 U. Pa. L.Rev. No. 4 (1968); (2) *The Accretion of Federal Power in Labor Arbitration—the Example of Arbitral Discovery,* 116 U. Pa. L.Rev. No. 5 (1968); (3) *The Labor Board, the Courts, and Arbitration—a Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose,* 116 U. Pa. L.Rev. No. 7 (1968).

[21] *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 64 LRRM 2069 (1967).

is as applicable to unions as to employers in the bargaining relationship. The Court declared:

> "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."[22]

That duty, when cast in terms of good-faith bargaining, is enforceable by the NLRB and the courts. But cast as a duty of disclosure inherent in the progressive steps of the grievance procedure, it is subject to enforcement in the contractual forum by the parties' arbitrator.

The panel is unanimous in concurring that discovery procedures developed for purposes of litigation should not be imposed upon collective bargaining grievance procedures. Even so, there are circumstances when the cooperative spirit of mutual disclosure requires some arbitral nudges to keep it on track. Some courts have assumed, ill-advisedly we feel, that merely because the parties have opted for the arbitral forum, discovery-type remedies should not be available.

A far more constructive approach, in our view, is the flexible attitude exemplified by Justice John Harlan writing for the Supreme Court in *John Wiley & Sons, Inc.* v. *Livingston:*[23] the " 'procedural questions' which grow out of the dispute and bear on its final disposition should be left to the arbitrator." The courts, we believe, when asked to become involved in an arbitral proceeding, should be intent upon encouraging a sequence in which the arbitrator, selected by mutual consent of the parties, is given ample flexibility to fashion such procedural disclosure remedies as seem appropriate in the context of collective bargaining, reserving the judicial superintendence function to assure elemental fairness in the process.[24] Obviously, if the substance of a particular arbitral order is barred by the express terms of the collective agreement or would result in undue intrusion or burden, the court should set it aside or modify it. But the court should exercise the judicial restraint not to set aside arbitral orders that are not expressly precluded by con-

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[22]*Id.*, at 435–436.
[23]*John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557, 55 LRRM 2773 (1964).
[24]Jones, *supra* note 20, at 116 U. Pa. L.Rev. 1236–1243.

tractual terms, but are attributable to an arbitrator's understanding of what is appropriate to the processes of collective bargaining. It is a truism (and a realistic one) that federal and state judges have typically had minimal exposure to labor disputes and collective bargaining prior to their appointments to the courts, as the Supreme Court inferentially recognized in 1960 in *Steelworkers* v. *Warrior & Gulf Navigation Co.*: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."[25]

More specifically, the panel recognized that arbitral discovery normally is limited to the issuance of subpoenas or to the informality of an arbitrator's suggestion of lunchbreak discovery ("May we expect to have that available after the lunchbreak?"). Most arbitrators will issue prehearing subpoenas as a matter of course. As for a prehearing subpoena duces tecum (for the production of documents), however, practices differ. Some arbitrators will not issue a requested subpoena duces tecum without submission by the requesting party of an affidavit (required by law in California) detailing the need and relevancy of the information requested. Other arbitrators will issue a subpoena duces tecum upon request, relying on opposing counsel to raise objections as to relevance or propriety either prior to or at the outset of the arbitral hearing. The characteristic self-restraint of arbitrators, reliant as they are upon continued acceptability to employers and unions alike if they are to hear future cases, may be relied upon to insure their caution in assessing and ruling on the requested issuance of a subpoena duces tecum and other less formal types of disclosure orders.

For example, some arbitrators, asked for a disclosure order during the course of a hearing, will suggest that the parties step into the hall for a discussion in "chambers," inquiring for what purpose the party seeks the requested evidence. Might it be possible to stipulate the substance of what the documents would show or the witnesses would testify to so that they need not be produced? If the need nonetheless requires production, it is likely to be met by an informal request for disclosure by the arbitrator and compliance by the party to whom the request is made. As a union representative observed of a refusal to comply

[25]*Supra* note 18, at 581.

with an arbitrator's request for information, "Who wants to get caught in that crack?"

Thus, the panel concluded that an arbitrator would possess the contractual and legal power to compel disclosure against the resistance of either union or the employer. At the same time it recognizes that the informal approaches to problems of disclosure discussed above could routinely be expected effectively to resolve most discovery problems.

Burden of Proof

In evaluating the evidence, a significant difference of the trial judge approach as contrasted to that of the arbitrator is observable in the application of burden-of-proof concepts. The contrast is of sufficient importance to warrant a separate discussion.

In both criminal and civil litigation, the burden of proof (beyond a reasonable doubt in criminal cases; by a preponderance of the evidence in civil matters) is the principal criterion relied upon by a trial court when ruling on contested matters. To prevail, the moving party must sustain the burden of proof.

In the arbitration of discharge and discipline cases, burden-of-proof concepts are also used, but arbitrators apply them in a much more flexible manner. For example, in discharge cases involving charges of moral turpitude, most arbitrators will require the employer to prove the charge beyond a reasonable doubt because of the severe social and economic stigma which attaches to an employee whose discharge is sustained upon such grounds. Moral turpitude discharge cases offer the closest analogy in the application of burden-of-proof standards by courts and arbitrators.

On the other hand, in virtually all other discharge and discipline cases, arbitrators will impose the burden of proof upon the employer without attempting to define the standard in precise terms. Also, in most of these discharge and discipline cases, arbitrators will generally not base their decisions solely upon burden-of-proof concepts to the exclusion of other factors that deserve consideration. Burden-of-proof criteria applied in a courtroom cannot be baldly transplanted to an arbitration proceeding without glossing over important differences between courtroom litigation and discharge arbitration—differences summarized by UCLA Law Professor Benjamin Aaron, a noted authority on the arbitration process and labor law, in the follow-

ing analysis explaining why the criminal-law standard of proof should have only limited applicability in discharge cases:

> "Those who are prone indiscriminately to apply the criminal-law analogy in the arbitration of all discharge cases overlook the fact that employer and employee do *not* stand in the relationship of prosecutor and defendant. It cannot be emphasized too often that the basic dispute is between the two principals to the collective bargaining agreement, that is, the company and the union. At stake is not only the matter of justice to an individual employee, important as that principle is, but also the preservation and development of the collective bargaining relationship. . . . The case of an employee sleeping on the job, or of the worker accused of punching another man's time card—these and many others are often incapable of proof beyond a reasonable doubt, and the most the arbitrator can say is that more likely than not, the penalty was justified. *How much weight he gives to the doubts that inevitably arise may frequently depend on a variety of considerations having absolutely nothing to do with the amount of proof adduced in the particular case:* the employee's past record, his length of service, or the possibility of severe economic forfeiture resulting from the discharge, on the one hand, or the effect of his reinstatement on the morale of supervisors and fellow employees, or the restraining influence it would have on a joint company-union program for stamping out certain undesirable conditions, on the other. *The one thing we may be sure of is that, if the arbitrator is familiar with the facts of industrial life and understands that his function is creative as well as purely adjudicative, he will not evaluate the evidence solely on the basis of rigid standards of absolute proof or presumptions of innocence.*
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> "There are some disciplinary cases, however, in which the arbitrator is justified, indeed required, to observe the same exacting standards of proof that prevail in a criminal proceeding. These are the instances in which an employee is disciplined for having allegedly committed some act of moral turpitude, such as stealing, engaging in aberrant sexual practices, or participating in subversive activities. Since upholding the disciplinary penalty for these or similar acts permanently brands an employee just as surely as a criminal conviction would, the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt." [Emphasis added.][26]

In sharp contrast to the continuing nature of a union-management relationship, the plaintiff and defendant in most litigation go their separate ways once judgment has been rendered. The trial judge, therefore, need not be concerned with the consequences of his decision upon their future relationship. However, an arbitrator who fails to consider this unique relationship is

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[26]Aaron, *Some Procedural Problems in Arbitration,* 10 Vanderbilt L.Rev. 733, 741–742 (1957).

unlikely to survive the high mortality rates characteristic of the arbitral selection process. Application of burden-of-proof concepts is simply one example of the impact the continuing relationship of an employer and union has upon the decision-making process.

To this point, we have attempted to explain why courtroom burden-of-proof concepts are applied differently in most arbitrated discharge and discipline cases. Burden-of-proof concepts are, however, sparingly imposed and seldom mentioned by arbitrators in most other grievance cases. When presented with contract interpretation issues, the arbitrator's function is to ascertain and give effect to the mutual intent of the parties based upon relevant contract language and other evidence in the record. In these cases, as Professor Aaron noted: "Neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrator as much guidance as possible."[27]

When contract terms are ambiguous, so that their meaning cannot be derived solely from an analysis of the disputed language, it becomes necessary for the parties to present other evidence of intent—evidence of past practice or negotiating history, most typically. Not surprisingly, the recollection of partisan witnesses is often sharply conflicting as to discussions that occurred in prior negotiations or as to the establishment of a binding practice. Nevertheless, when an arbitrator finds it necessary to base his findings upon custom or prior discussions, he is extremely cautious about expressing his decision in terms of the burden of proof. Most arbitrators attempt to avoid the use of so-called lawyer's language because their opinions are written primarily for practitioners.

One final point concerning burden of proof deserves our attention. An analysis of judicial decisions suggests that the burden of proof can be a much more flexible rule of evidence than is generally realized. For example, in a leading Title VII case, *Franks* v. *Bowman Transportation Co.*,[28] involving retroactive seniority, the U.S. Supreme Court appears to have shifted the burden of proof based upon equitable considerations. In that case, the federal district court held that the company had discriminated against certain black applicants by denying them

[27] *Id.*, at 742.
[28] *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 12 FEP Cases 549 (1975).

truck-driving jobs because of their race, but the district court rejected petitioners' claim for retroactive seniority to the date of their initial applications for employment. The Court of Appeals for the Fifth Circuit affirmed on the retroactive seniority issue. In reversing the court of appeals and remanding the issue to the district court, a majority of the U.S. Supreme Court ruled in relevant part:

> ". . . petitioners here have carried their burden demonstrating the existence of a discriminatory hiring pattern and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. [Citations omitted.] Only if this burden is met will retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members."[29]

In short, once petitioners proved a discriminatory hiring pattern, the High Court shifted the burden of proof to the employer by requiring that, at the time members of the class again sought the jobs previously denied them, the burden would be placed upon the employer to prove that one or more of the applicants were not in fact unlawfully discriminated against, either because there were no job vacancies at the time of their applications, or because they lacked the required skills, or because of some other nondiscriminatory reason. Only by satisfying this burden of proof could the employer deny retroactive seniority to individual class members. This is simply one example of the resourcefulness displayed by courts across the nation in implementing civil rights legislation.

Precedent

How should an arbitrator respond when asked to dismiss a grievance upon the grounds of res judicata? The applicable principles in courtroom and arbitration proceedings differ, although the underlying rationale is often invoked by arbitrators.

Although judicial doctrines of res judicata and stare decisis are not binding upon arbitrators, nevertheless, arbitrators frequently apply the same principles in their consideration of precedent. To avoid blurring the exact differences in the meaning of these terms, Witkin's definitions are quoted below:

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[29] *Id.*, at 772–773.

1. *Res judicata.* "The doctrine of *res judicata* gives certain conclusive effect to a *former judgment* in subsequent litigation involving the same controversy [and parties]. It seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.* It is well established in common law and civil law jurisdictions, and is frequently declared by statute." [Emphasis in original.][30]

2. *Stare decisis.* "The doctrine of stare decisis expresses a fundamental policy of common law jurisdictions, that a rule once declared in an appellate decision constitutes a precedent which would normally be followed by certain other courts in cases involving the same problem. It is based on the assumption *that certainty, predictability and stability in the law are the major objectives of the legal system;* i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. Another justification for the doctrine is convenience; lawyers and the courts are relieved of the necessity of continually reexamining matters settled by prior decisions." [Emphasis added.][31]

Even though an arbitrator is not bound by a prior decision based upon an interpretation of the identical contract provision between the same parties, he will generally follow the prior decision to assure stability and finality to the collective bargaining relationship. A fundamental objective of grievance arbitration is to provide a definite terminal point, a resolution of rights issues that is *final and binding* on both parties. *Finality* is vital to *stability* in the administration of the collective agreement. When an arbitrator, therefore, is asked to reverse a ruling established in a prior case between the same parties, he must carefully balance the importance of stability and finality against whatever doubts he may have as to the wisdom of the prior decision. In the panel's opinion, an arbitrator should rule contrary to a decision or a principle established in a prior arbitration between the same parties only upon a showing of substantially altered circumstances or an error so egregious as to outweigh in importance the consideration of stability and finality. Of course, when either party deems an arbitral decision repugnant to the contract or unsatisfactory for whatever reason, it can seek to modify (or nullify) that ruling during subsequent negotiations for a renewed agreement. In the absence of such modification, the parties may be held to have adopted the award as part of the contract.

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[30]Witkin, California Procedure, Vol. 4, §147, 3292, 2d ed. (San Francisco: Bancroft-Whitney Co., 1971).

[31]*Id.*, Vol. 6, Part I, §653, at 4570–4571.

The precedential value of arbitral decisions under other contracts depends upon a number of factors, such as the similarity of contract terms, pertinent facts, and, in particular, the arbitrator's competence. The reasoning of an experienced and respected arbitrator that is directly in point can be highly persuasive. In the final analysis, the weight given to a decision involving different parties, if any, is a matter of degree. Some arbitrators state flatly that they give no weight to decisions rendered under other parties' contracts, except for unusual situations.

Finally, a word or two is in order concerning the effect of grievance settlements as precedents for the future. The settlement of a grievance by the parties deserves considerable, often decisive, weight as to the meaning of ambiguous language. Frequently, such settlements may offer the most reliable basis for ascertaining the parties' intent. Therefore, should the same issue arise again, the prior settlement often will be considered a binding precedent. An important qualification should be noted: a large majority of grievances are settled annually at the level of the workplace with no reference to the contract, based upon individual perceptions of equities. Such settlements may involve either relatively minor matters that do not warrant arbitration, or even major matters when the parties choose to avoid a confrontation on the merits in the hope that the issue will not arise again. When the parties intend a settlement to apply solely to the grievance being processed, the final disposition should include a statement to the effect that the settlement is "nonprecedential." That should bar its consideration in any future proceeding. In the absence of such statement, the settlement will very likely be considered a binding precedent.

Time Limits

The right to a hearing and impartial determination of a controverted matter is so taken for granted in our concepts of justice that we sometimes forget this right is virtually nonexistent for a majority of the world populace. As the Second Circuit observed: "Under our Constitution there is no procedural right more fundamental than the right of a citizen . . . to tell his side of the story to an impartial tribunal."[32] In recognition of this

[32] *Winders* v. *Miller*, 446 F.2d 65, 71 (1971).

basic right, decision-makers normally can be expected to give a broad construction not only to statutory time limits, but also to those in a grievance procedure. In arbitration, the reasons for a broad construction of the time limits for processing a grievance are especially compelling because of the parties' continuing relationship. A grievance technically barred from being determined on the merits often leaves a festering sore to erupt again, in one form or another, at some future date. Therefore, for reasons of self-interest, it is quite common for both parties to extend time limits by mutual agreement. In a courtroom proceeding, by contrast, the parties usually meet and part as strangers; they are not compelled to "live together" and thus endure the practical consequences of an adverse ruling.

Time limits for each prescribed step in a grievance procedure must be observed in order to preserve the right to a hearing on the merits. When the language of such provisions are ambiguous in respect to a given situation, arbitrators will usually lean heavily toward a finding of arbitrability because of their belief that the long-term interests of the parties are better served by resolving such disputes on the merits, rather than upon technical grounds. An arbitrator, however, does not possess an unfettered discretion in such matters. His primary duty of interpreting the bargaining agreement requires him to reject an untimely grievance unless some valid basis for waiving the prescribed time limits is present.

The panel's consensus was that, in the interpretation of contractual time limits, doubts should be resolved against forfeiture of the right to process a grievance. The principle of avoiding forfeitures will usually be invoked, even when time-limit provisions are clearly spelled out, *if* the parties have been lax in their enforcement. On the other hand, if either party has not complied with an unambiguous time-limit requirement, further processing of the grievance might very well be barred when such time limits have been consistently observed.

The Trier's Role—Active or Passive

There are two polar positions of the trier's role in the hearing, regardless of whether he sits as judge or arbitrator. One is activist, involved, concerned about shaping the course of the proceedings to obtain all relevant evidence. The other is passive, detached, deferring to the representatives of the parties the

burden of presentation. The first speaks; the other listens.

The distinction is significant. The arbitration process provides a ready source of illustration. The activist arbitrator will take a hand in fashioning a submission agreement when the parties are unable to agree among themselves. He will push for stipulations of fact when there is little or no likelihood of a conflict of testimony. He will question witnesses vigorously. When neither side has called an important witness, the activist will do so on his own motion. If one side, either through inexperience or incompetence, puts on a dismal case, such an arbitrator will intervene to obtain information deemed essential. The purpose, of course, is not to make a bad representative look better. Rather, it is to elicit facts necessary to the rendering of a fair decision.

The passive trier will refrain from such activism, particularly when attorneys are present. The burden rests with them. If they fail to shoulder it, so be it. Such is the adversary system in all its implications. The decision-maker's role fundamentally is to make decisions. His task at the trial or hearing is to preserve order and to permit both sides to present what counsel and not the trier wants presented.

Conceived in such polar terms, the partisan of either view not only disagrees with the opposite position, but also tends to condemn it morally. Debate becomes obscured by self-righteous pronouncements. The activist holds that the decision-maker has a moral obligation to mete out justice. How can this be done if the conspicuous gaps in the record are left unexplained? The passive trier insists that his role is to make a decision on the record the parties choose to make. It is not his responsibility to shore up either party's presentation.

In the real world, of course, such extreme situations seldom, if ever, occur. The pressures of an actual case create their own modes of conduct, and no trier, regardless of how dedicated he is to one of the polar positions, can be impervious to them. Thus, we are all compromisers—some more, some less. In the context of most fact situations covered during our discussions, both arbitrators and judges conceded they would elicit information essential to the decision from a witness once it became apparent that counsel for the parties overlooked the point.

It is difficult to conceive of any arbitrator, an articulate breed, enduring a long, boring, and irrelevant proceeding without opening his mouth beyond announcing the arrival of the lunch

hour. Similarly, even maverick arbitrators in certain cases manage to suppress strong activist propensities. They view their role basically as judicial. When they intervene actively, they do so with the calculation of a high-wire tight-rope walker, well aware of the prospects of success and the perils of failure.

The active-passive dichotomy is even more accentuated in the propensity of decision-makers to encourage settlement of a case. Of course, judges often perform this role in pretrial proceedings, and the activist judge or arbitrator may choose to do so during the trial or hearing. Ordinarily, even an activist arbitrator will not attempt to mediate a dispute unless he perceives (usually based upon prior experience with the same parties) that the parties will be receptive to his efforts.

In the *typical* case, it may be difficult to tell an active from a passive trier by his conduct. Even in some unusual cases, one cannot tell them apart. But there are occasional instances in which the philosophical differences actually determine the manner in which the trier conducts the case.

V. Interaction of NLRB, Judicial, and Arbitration Proceedings

Trial judges rarely consider NLRA issues and almost never have occasion to resolve on the merits NLRA issues of fact or law. Thus, both federal district judges and state trial court judges are reasonably well insulated from consideration of the kinds of NLRB-related issues concerning which arbitrators and NLRB personnel find a *Collyer-* and *Spielberg*-created common ground.

NLRB decisions are reviewed by federal courts of appeals, and only in respect to extraordinary matters like injunction requests and procedural questions on the enforcement of subpoenas and similar types of matters do trial judges become involved in NLRA proceedings.

Federal district judges and state trial court judges could become involved in *Collyer-Spielberg* and other arbitrator-NLRB-related issues in their capacity as decision-makers in actions to compel arbitration or to enforce arbitration awards. But ordinarily those proceedings are not trials de novo in the sense that witnesses are heard and credibility and other issues of fact are resolved. An arbitration-enforcement proceeding is more akin to the judicial appellate process.

Even so, federal courts of appeals are required by the NLRB to examine the "record considered as a whole" for "substantial evidence" to support "findings of the Board." The flow of decisions continuously discloses that the judges of the various federal circuits do actively engage in fact-finding (in contrast to rule-making), sorting through the evidence, disbelieving this witness credited by the Board, accepting the account of that witness that has been rejected by the Board. Thus, to the extent that identical fact situations are encountered by arbitrators and the NLRB, so also do court of appeal judges perform fact-finding functions relative to them.

Thus, our panel of arbitrators, judges, and lawyers actually considered questions of law commonly considered by federal appellate courts reviewing NLRB decisions and the kinds of questions of law ordinarily considered by trial judges considering arbitration-enforcement issues.

On the questions considered, there was little disagreement among the panel members, particularly on matters concerning structural differences between the arbitration, judicial, and NLRB administrative processes. For example, no one disputed that with rising federal court caseloads (with Title VII cases highlighting the rate of increase), judicial proceedings are generally slower than arbitral proceedings. The NLRB's caseload also continues to rise each year, and the combination of administrative and judicial proceedings required to complete an NLRB case that is fully litigated through the judicial appellate process makes that process slower than the arbitration process. But general comparisons must be made with some caution. Most NLRB unfair-practice filings are disposed of quickly by voluntary withdrawals or other settlements, following the investigation the NLRB personnel conduct to determine whether an unfair-practice complaint should issue. Thus, the exceptional long and drawn-out NLRB judicial proceeding may not always be fairly compared with "expeditious" arbitration proceedings.

Nor was it disputed by the panel members that fundamental differences exist between and among NLRB, judicial, and arbitral structures. Yet, arbitrators, despite their pay-per-case status, view their responsibilities as decision-makers much as do judges. For example, the panel considered the question of whether a union unable to pay arbitration fees following a *Collyer* deferral to arbitration could prevail upon the arbitrator to decline jurisdiction on the ground that the NLRB "can now reas-

sert its jurisdiction and hear the case." Most panelists agreed that the arbitrator in that circumstance should not refuse to hear the case; another panelist suggested that the union, situated as the hypothetical union, would not reveal its financial condition until the arbitrator's bill arrived. But that would defeat the purpose of the union's plea of poverty at the outset of the case: to get back to the NLRB as quickly as possible, in hopes of becoming the beneficiary of a fairly quick and inexpensive (to the union) NLRB disposition that favors the union.

As arbitrators, all panelists would have proceeded with the arbitration if the union had walked out of the proceedings following the arbitrator's decision to hear the case, despite the union's plea of inability to pay arbitration costs.

The question of whether the "special competence" of arbitrators should be considered by the NLRB in *Spielberg*-type cases, as it is considered by federal district judges in Title VII cases (per note 21 in *Gardner-Denver*), did not quite get off the ground. All panelists agreed with the view of one panel member that *Gardner-Denver* incorrectly presupposed that federal district judges, in determining what weight to give an arbitrator's award, had the capacity to determine the "special competence of particular arbitrators" to hear Title VII cases. Since, in that respect, NLRB members have no greater powers of discernment than federal judges possess, NLRB members and other NLRB personnel are similarly incapable of measuring the "special competence of particular arbitrators" in determining what weight an arbitrator's award should be given in a *Spielberg* setting.

The panel considered the reasoning of arbitrators and the NLRB in "concerted activities" cases. As arbitrators, all panelists would have upheld the stern discipline of an employee who endangered fellow employees in his attempts to bring unsafe working conditions to the attention of a safety inspector. The fact that the NLRB had held to the contrary in a "concerted activities" unfair-practice case would not have led any panelists to sustain the grievance. It was an almost unanimous view of the panel that the interpretation of "just cause" provisions in collective bargaining agreements need not—and possibly should not—be influenced by NLRB interpretations of the "concerted activities" provision in NLRA Section 7. Disagreement with the NLRB centered on what appeared to be a subjective rather than objective standard employed by the NLRB in concerted-activities discipline cases. Similarly, all panelists felt that an arbitrator should

order the reinstatement of an employee who was discharged after protesting to the company president (with a loud voice and a finger shake) the union's failure to grieve his wage dispute with the company. All panelists felt that an objective rather than subjective standard should govern cases in which employees refuse to perform work for reasons of safety. Thus, as arbitrators, all panelists would prefer to apply the rule that for "just cause" purposes a concerted work stoppage would constitute grounds for disciplinary action on determining that employees could not have reasonably believed that a job danger existed.

VI. Fair Representation[33]

The duty of fair representation is of legislative and judicial origin. In *Steele* v. *Louisville & Nashville Railroad,* in 1944, the Supreme Court read into the Railway Labor Act the rule that a union that had been certified by the National Mediation Board as the exclusive representative of all members of a craft was forbidden to discriminate against some of them because of their race. In 1964 the National Labor Relations Board adopted the same principle in the *Hughes Tool* case under the National Labor Relations Act.

These landmark decisions, and many others as well, were concerned with racial discrimination. Nowadays everybody, excepting members of the Ku Klux Klan, would agree with the principle that a union acting either alone or jointly with an employer cannot discharge its duty to represent employees in the bargaining unit fairly if it discriminates against those who are black. To the best of my knowledge, neither appointment to the bench nor selection as an arbitrator is conditioned upon membership in the Klan. It is fair to say that judges and arbitrators, if faced with this issue, would respond to it in exactly the same way. This is clear and simple. Everything else about the duty of fair representation is muddled, controversial, and troublesome.

In recent years there has been a small flood of cases involving the duty that have gone to the Labor Board, to the courts, including the Supreme Court of the United States, and to arbitrators. They bespeak trouble. The uncertain state of the law is admirably summarized in the recently published collection of

[33]This section was submitted by panel member Irving Bernstein.

essays edited by Jean McKelvey under the title *The Duty of Fair Representation.* Another complication is that, given the litigiousness of Americans as a breed and the unfortunate propensity of many people to try to get something for nothing, the rule encourages frivolous claims. Still another is that unions, fearful of being held to have defied the duty, are prone to process grievances that they know have no merit. Finally, for the present purpose, which is, presumably, to contrast the conduct of judges and arbitrators, there is no basis for the comparison because they play different roles. Since this is a meeting of arbitrators, I shall confine myself to the problems that arbitrators confront and simply wish the judges Godspeed.

The typical arbitration involving the duty of fair representation in my experience is at best troublesome and at worst a prelude to litigation. This is because an adversary system designed for two contestants is not comfortable in accommodating three. The eternal triangle is designed for the TV soap opera; it does not fit into the arbitration hearing room.

Among the difficult problems are the following: Is the grievant a "party" to the proceeding? If the parties are represented by counsel, which is usual, do the attorneys for both the union and the grievant speak? Is the grievant's adversary the employer or the union? Or both? Suppose the employer refuses to go forward until the question of the grievant's status is resolved. Can the arbitrator compel him to do so? Does it make sense to proceed ex parte? Who files the brief? If the grievant loses, is the award final and binding upon him? Who pays labor's share of the costs—for witnesses, for the hearing room, for the transcript, for the arbitrator's fee?

I am not sure that there are any satisfactory answers to these questions. But I have devised a procedure in some half-dozen cases with which I have wrestled that seems to work out reasonably well. It can be called the "one voice rule."

The basic theory rests on the national labor policy and the collective bargaining agreement. That is, the union is the certified and exclusive representative of all the employees in the unit, including the disaffected grievant. Unless there is conclusive evidence to the contrary, the union is presumed to be acting in good faith as the grievant's representative. The arbitrator is the creature of the collective bargaining agreement. It is the sole source of his authority. Thus, he has no power to make the grievant a third party to the proceeding. Nor does he have

authority to compel the employer to proceed before the party question is resolved. If there is insistence on such a position, the arbitrator should withdraw, putting pressure on the moving party to resolve the matter in the courts.

If the arbitration, in fact, goes forward, the union and the grievant shall speak with only one voice, which is the union's. Actually, counsel for either the grievant or the union may speak for the union, but only he is allowed to speak, both orally and in writing. The attorneys shall have time to caucus. The award, of course, is binding upon the union.

This arrangement will win no awards for neatness or the elimination of loose ends. All I can say for it is that thus far, at least, it has worked for me.

VII. Conclusion

As Justice Powell stated for a unanimous Court in *Alexander* v. *Gardner-Denver*,[34] judges interpret the law of the land and arbitrators interpret the law of the shop. Despite these important differences, the decision-making process of judges and arbitrators is much the same.

The principal function of trial judges and arbitrators is "fact-finding," a term that does not convey an entirely accurate impression of the process that occurs at the conclusion of a trial or hearing. Facts are not simply "found"; they usually must be "extracted" from the conflicting testimony of witnesses who, like most of us, have different perceptions of external events—differences compounded by the passage of time and fallibility of human memory. While triers of fact apply well-established credibility guidelines in the resolution of contradicting testimony, "fact-finding" remains a highly subjective process both as to witnesses who relate the facts and decision-makers who construe them. In addition, the interpretation of ambiguous language may add another element of uncertainty to the outcome of a contested case.

Once the case record is completed, the decision-maker mulls it over, then subjects it to an intensive scrutiny and examination. Eventually, as we have noted, a guiding idea, a tentative conclusion, will be crystalized.

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[34]415 U.S. 361, 7 FEP Cases 81 (1974).

Those of us who find it repugnant that a conclusion, even a tentative conclusion, should precede a stringent analysis of the record rather than emerge as the end result of the decisional process, may take comfort from the assurances of Justice Cardozo. "We think," he wrote, "we shall be satisfied to match the situation to the rule, and, finding correspondence, to declare it without flinching. . . . There is nothing that can relieve us 'of the pain of choosing at every step.' "[35]

Cardozo chided the skeptics:

> "We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. *Principles and precedents . . . are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities.*" [Emphasis added.][36]

As a postscript to the above extracts, we need only be reminded that probability, rather than mechanical certainty, is the underpinning of all social disciplines. The field of economics provides as good an illustration of this point as any. Most of us are familiar with the role of guiding ideas in that discipline, from the sublim · of Adam Smith's invisible hand of the market place to the currently disputed Laffer curve. The question may be legitimately posed: If an economic theory which can determine the fate of millions be of necessity offered as a hypothesis, as a guiding operational idea the truth of which is based upon probability rather than certainty, why should we expect that the field of jurisprudence be an exception? Why should we insist that our decisional thinking be limited to the mechanical certainties of the syllogism while we eschew probability as a means of solving legal problems. Legal problems are, after all, human problems, and even jurimetric scholars base their computerized legal findings on the mathematics of probability.

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[35]Cardozo, Growth of the Law, ed. Margaret E. Hall (Albany, N.Y.: Matthew Bender & Co., 1947), at 215–216.

[36]*Id.*, at 216–217.

WEST COAST PANEL DISCUSSION

Chairman Block: Discovery in law is an aggregation of procedures that have evolved and been liberally administered by courts to compel early and full disclosure at a pretrial stage of prospective litigation, and also during trials, of all the information that may enable the litigants to understand and thus settle the dispute; it also enables courts more effectively to narrow and then resolve the issues in dispute. Can, or should, legal discovery procedures be transplanted to arbitration proceedings?

Judge Pfaelzer: Certainly the discovery procedures that are used in the federal courts could be transplanted to the arbitration process. But under no circumstances do I believe that that would be desirable. There cannot have been anything more disastrous and damaging in terms of the cost of litigation than the expansion of the discovery procedures in the federal district court. I cannot begin to describe to you what lawyers have been able to do in this field with the sets of interrogatories, one, two, and three, and depositions that take place in between those interrogatories, and the production of thousands and thousands of documents which are then computerized. If people want to know what makes it cost so much to litigate in the federal courts, all they have to do is to look to the expansion of the discovery procedures. If transplanted into arbitration, the length of time that it will take you to dispose of the matter and the cost of it will escalate dramatically. That discovery is not even used at the trial. That is what the problem is. At least three-quarters of this very expensive lawyer time and paralegal time is not utilized at the trial. So you could have asked 30 interrogatories, or 3,000 interrogatories, and probably two of them will be used at the trial. I would urge that you should be very careful about expanding discovery. It has a wonderful appearance, but it is purely an appearance. The reality of discovery has proved, I think, that it can have a very negative effect.

Judge Lucas: I agree with Judge Pfaelzer. The judicial air is filled with concern about the abuse of discovery in lawsuits. Often we see the discovery process used for strategic purposes by the larger of the entities involved in the litigation in expending more money and adopting very onerous discovery procedures not necessarily to discover something, but to impress on the other side that the task they are taking on is going to be very

burdensome and expensive. And to infuse that in arbitration I think would be a substantial mistake.

Panel Member Bernstein: Not being a lawyer and not being terribly enamored of judicial-type procedures in the arbitration process, I am very reluctant to issue subpoenas. My first step would be, if I felt the information was necessary to the disposition of the matter before me and if I needed the information, to call the other side and say, "I think that you ought to produce it. I have the authority to issue a subpoena. I don't really want to issue a subpoena, but I want you to produce it"—and see whether it works. If it doesn't, then issue a subpoena.

Mr. James H. Webster: The federal law imposes an obligation to share information. If in a typical discharge case the employer refuses to explain to the union, upon clear request, why the person was fired, I think default is an appropriate order, for that evidence which was not produced forthrightly upon clear request in prearbitration stages should not be admitted in formal arbitration because the union has not known the grounds for discharge and is taken by surprise.

Mr. Philip Scheiding: In the 1980 steel contract, the parties put in the contract a provision whereby neither party would call upon witnesses of the other side in an arbitration proceeding. This, I think, would negate any attempt to introduce discovery in our proceedings. We did that for a good reason. In our union constitution, it is a disciplinary matter for a member to give testimony against a fellow member—and we have had a few embarrassing situations in the past in arbitration in that area.

Chairman Block: In evaluating evidence, a significant difference in the trial judge approach as contrasted to that of the arbitrator is observable in the application of "burden of proof" concepts. Judge Lucas, how important a criterion is burden of proof in contested proceedings?

Judge Lucas: It is with some trepidation that I discuss burden of proof after what Ted said this morning. Our use of it, he said, was "disingenuous," or something of that nature. Well, it is a very nice security blanket to have as a judge, and certainly in criminal cases, for example, it is an important criterion. The lawyers spend hours on hours cumulatively talking about "reasonable doubt." They build brick by brick this impossible wall of reasonable doubt for the prosecution to get over, and then the prosecutor hastens, before the mortar hardens, to take some of the bricks down and to tell them that "It is not beyond *all*

possible doubt, but *reasonable* doubt." Then they talk about what is "reasonable doubt." And don't forget "moral certainty." Everybody knows what "moral certainty" means! As I am indicating, it *is* an imprecise standard. I was amazed and interested in our panel discussions when Irv said, "Well, we generally don't go into burden of proof. Sometimes if we have a discharge involving moral turpitude, for example, then we require proof beyond a reasonable doubt. But other than that, we search around together and we find what we feel is the appropriate result and let it go at that." I don't mean to denigrate that. But we are looking at that marvelous "preponderance," and if that scale doesn't tip slightly, well, that is too bad. The burden is on the one who is preponderating that issue, and if he hasn't done it, thank God I don't have to think through that whole thing, because that is the end of it. And in terms of civil litigation in the federal courts at least, it is a much more significant criterion than in arbitration. For better or worse I don't want to say, but it is a much more significant criterion.

Judge Pfaelzer: I would like to mention an area in which this matter of burden of proof has become extremely interesting. That is the area of Title VII cases. The United States Supreme Court in *McDonnell Douglas* v. *Green* has articulated a standard way of approaching these cases. In that case they said that the plaintiff must come forth and prove that he belongs to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that despite his qualifications he was rejected, and that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. When that has been proved, the burden then shifts, and when it shifts, it shifts to the employer. The employer must then show that he had a legitimate, nondiscriminatory reason for the decision. And then it shifts back to the plaintiff to show that that reason was in fact prejudicial—that it was a mere pretext. The concept of burden of proof applied in that kind of case, I think, has a beneficial result. I am looking now at *Fernco* where the Supreme Court said, "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if they are otherwise unexplained, are more likely than not to be based on the consideration of impermissible factors." And what they are saying is that "we don't want to be that rigid and mechanical and ritualistic about this, but we are just trying to

furnish litigants and judges with a pattern, a way of approaching these cases, which is logical." And so if you take burden of proof, and you don't become so terribly technical about it and you apply it in this way, I think it is beneficial.

Chairman Block: Are you saying then, too, that burden of proof is sufficiently flexible to provide an equitable remedy when that seems indicated?

Judge Pfaelzer: Yes. Sometimes burden of proof is an excuse, because burden of proof is very often just a conclusion in a case. If the fellow is going to lose, he didn't bear his burden of proof; if he is going to win, he did. I agree with what Ted said this morning: in lots of cases it is just a conclusion.

Panel Member Bernstein: To set it in a little broader framework, it seems to me that labor arbitration is kind of a schizoid process. In part, it is an aspect of collective bargaining as a terminal point in the grievance procedure in which it is utilized in order to resolve problems presumably of mutual interest and benefit to the parties who are involved in it. And then, secondly, it is in the great stream of Anglo-American jurisprudence arising out of the common law as a kind of trial procedure for making determinations in a quasi-judicial manner. And, of course, the two are mixed up, with varying degrees of emphasis in particular relationships. And here you are dealing with one of the traditional standards of the second variety.

My own preference is to treat labor arbitration primarily (but not exclusively) as an aspect of collective bargaining, so my mind just doesn't run in this kind of channel. For example, the question arises (and I think Judge Pfaelzer referred to it in a different context) very frequently in discipline cases in arbitration as to who goes first—which is, it has always seemed to me, a very silly argument; I really don't care. It seems to me that my job in a disciplinary matter is to determine the facts, and who presents Fact A first and who presents Fact B first is not a matter of very great concern to me. And the question of whether or not the employer, if in fact he goes first, discharged his burden of proof is just a question that I don't find very interesting or helpful. However, as Judge Lucas has indicated, when you get to the actual decision-making process and you are dealing with questions of credibility and there are particular problems involved—for example, in a discharge case where the allegation against the individual is that he or she had a very bad attendance record—it seems to me that the standard of proof in that type

of situation, while it ought to be sufficiently high, need not be terribly high. And I would suspect that the common law standards, which I assume were worked out over centuries, are fundamentally reasonable and that "preponderance of evidence," or whatever the phrase might be, in comparison with some other represents a distinction. So, in my illustration I would want to have a higher, perhaps the highest, standard of proof where a question of moral turpitude was involved, and I really would be falling back on the old standard. But I would do that on a very selective basis.

Panel Member Alleyne: If you do not apply any kind of burden-of-proof standard, what do you do when the evidence is of equal weight on both sides?

Panel Member Davis: That is the "irresolution" part.

Panel Member Bernstein: You have to make a decision. That is what Ted Jones said. That is hard to do, but they submitted the question to you and you have to say "yes" or "no." I have almost never had that experience, Reg. In puzzling over the thing and, in most cases, in simply writing a case up, in 19 out of 20 answers automatically come from the findings of fact for me. But you know there *are* close cases. I think I have one presently which involves a version of a theft in which I will have to apply the standard, and I don't really know the answer. My guess is that the guy did it, but I am not sure that I can reach that conclusion.

Chairman Block: I have tried to follow Bertrand Russell's formula. When the scales are evenly balanced or when confronted with a problem that seems insoluble, he says that he puts the problem into "subconscious incubation" and lets the work go on underground—and within a day or two it will surface with, as he puts is, "blinding clarity." That has been helpful to me in cases.

Mr. Ralph Seward: In my experience there can be few more dangerous or damaging concepts, in labor arbitration at least, than this business about the burden of proof. The most important thing in labor arbitration, in my opinion, is always what happens after the decision in the plant rather than what happens before the decision. The effect of the decision, in helping labor relations get along or in making them worse, is so important. The job of an arbitrator is always to convince the losing side that it has had a fair shake, whether that is the company or the union —that the procedure has been a fair and good procedure. When you turn down a case on the ground that "Yes, maybe they had

a lot to say, maybe they were right, but they didn't prove it for this or that technical reason," that is not very convincing. It just means to the union that they had a lousy representative or to the company that maybe it ought to switch lawyers. But it is not good for the proceeding. I hope at least that some of these legal procedures are not used because of their effect later on in convincing people that they just didn't get a really fair or full consideration of their real position.

Panel Member Bernstein: Going back to this "schizoid" comment I made earlier and leaving the judicial language of burden of proof, it seems to me that one of the basic purposes of collective bargaining is to impose a standard of rationality in conduct —the conduct of the employer, the conduct of the union, and the joint conduct of the union and the employer. So you have to justify actions and be able to defend actions. You have to have a wage structure which is not what the wage structure in the steel industry was prior to collective bargaining, but what it became after collective bargaining when you had some approximately rational classification of jobs and the establishment of differentials between various levels of skill, and so forth.

I am not a union representative, but if I were one, I would be very concerned about what evidently is the fact that unions lose more cases than they win in arbitration because, by bringing cases, they are enforcing a standard of rationality on the employer. By challenging his decision again and again, they are requiring him to be able to defend the action he took, particularly in disciplinary matters. And I think that this is a very essential ingredient of the whole bargaining process of which arbitrators become a part and a very important one. And you can use legal or judicial terminology to describe it, but you can also frame it in reference to collective bargaining in the way that I just tried to do in a rather cumbersome fashion.

Panel Member Byrne: I have to disagree with the assertion that collective bargaining is necessarily a *rational* process. Quite often it is just brute strength on one side or the other that will force language, or there can be a heck of a lot of confusion among people in what they are doing. So I think that to look upon arbitration as part of the collective bargaining process is a bad mistake. I think that what the arbitrator has to do is to look at that contract and all of the facts involved and make a judgment—and then let the parties worry about his decision in their next negotiation.

Chairman Block: There are rather divergent views on how a

trial judge or arbitrator should conduct a hearing. Some say that the judge or arbitrator should simply make the appropriate rulings on motions and announce the arrival of a lunch break and not much more. Others take the position that the judge's or arbitrator's function is to get all the relevant evidence necessary to reach a proper result, and if the parties don't do it, then the judge or arbitrator should do it. What is the arbitrator's proper role in conducting a hearing, active or passive?

Panel Member Bernstein: This is a very old argument. It was an argument between George Taylor and Wayne Morse as to how arbitrations ought to be conducted. In the overwhelming majority of cases within my experience, you can't really tell the difference between being a passive and an active arbitrator because it doesn't matter in that particular instance. But from time to time it becomes important, particularly in disciplinary matters, that I am a dispenser of justice and that in order to answer the question which is submitted to me, I have to know everything that is relevant in order to make a correct award. I find it very difficult to deal with union people being unwilling to testify when called by an employer, and employers being unwilling to call union people in the bargaining unit, so that sometimes crucial testimony is simply unavailable. Then how do you discharge your role in that situation? Fortunately, it does not happen often, but it happens from time to time. How do you discharge your role of making a proper and just award when you don't know the facts and the facts are crucial? It seems to me that this is a kind of litmus-paper test of the difference between the passive and the active arbitrator. In that situation, I would fall in the active group. I would call the guy on my own motion: "I want to know. You saw what happened. Nobody else here testified to what happened. You were there. What did you see? I have got to know." I have done this on rare occasions and I am sure that I made people mad by doing it. Jerry has already indicated that he doesn't care for this kind of conduct. But I don't see how you can answer the question submitted to you unless you do that sort of thing—and I feel that it is my duty to do it.

Chairman Block: How should the trier of facts respond at the hearing when relevant testimony has not been elicited from a witness on the stand?

Panel Member Davis: In the situation in which a question that you consider to be relevant was not asked, if I were the arbitrator I would ask the question.

Chairman Block: When a witness who can offer testimony relevant to the issue has not been called by either party, would you on your own motion call that witness? Judge Pfaelzer, are there courtroom situations where you might feel impelled to call a witness on your own motion?

Judge Pfaelzer: I think if I felt that way, I would go in my chambers and put a cold cloth on my head. I strongly disapprove of that. I think that that is weighting one side against the other, and I wouldn't do it.

Chairman Block: Judge Lucas, do you belong to the "cold cloth" school?

Judge Lucas: I belong to the Chancellor Hutchins school. I would lie down until the impulse goes away! As we discussed earlier, in federal court, at least, there has been massive discovery, and presumptively there are able counsel. They know fully what the facts of the case are. The fact that they don't happen to call a witness whom I maybe perceive to be somebody who might be able to testify, I often look upon as a godsend. We have so many cases anyway. They are not calling another witness, which demonstrates their facility and ability. And it certainly would not occur to me to run out and gather more witnesses if they, from their respective sides, have shown me what is sufficient.

Panel Member Alleyne: What I find fitting about the responses of Judge Pfaelzer and Judge Lucas is that we often hear from parties and from arbitrators that in arbitration proceedings we should not follow courtroom procedures. Arbitration is different; these are parties who must live with each other. And yet on the subject that we are discussing, I think that there are stronger reasons in the industrial relations setting in arbitration for the arbitrator's minding his or her own business and not calling as a witness an individual whom one party could have called and refused to call. There simply may be reasons that transcend the result in the immediate case that go to peaceful relations in that plant and which call for that witness to remain isolated and in anonymity.

Mr. H. Dawson Penniman: Would it not be proper in these circumstances for the arbitrator simply to draw the necessary inference that he does not get himself into this matter, but draws inferences from the failure of one party or the other to call a witness who appeared to be a material witness?

Panel Member Bernstein: That might be difficult. Suppose

you had a case involving an allegation of theft and the employer produced one individual who said that he saw this person steal something. The person said, "I didn't do it." There was another individual who was present who was a member of the bargaining unit, a Steelworkers unit, where he was forbidden under their constitution to testify. And the employer had a policy, which I believe Bethlehem used to have, in which they do not call anybody from the bargaining unit. How in the world do you decide that issue without the testimony of that individual? The question before the arbitrator is, "Did you have just cause in firing this guy?" Well, I take that seriously. In that kind of rare case, I think it is terribly important to get that person in who saw what happened—and the rules of the Steelworkers and your rules frustrate me.

Chairman Block: In Title VII cases there has been an increasing backlog in the district courts, and most of these cases cannot wait for three or four years to be heard. Judge Pfaelzer, is arbitration a feasible alternative for some of these Title VII cases?

Judge Pfaelzer: I have been a very strong advocate of using arbitration in Title VII cases. I think that it far outweighs the beneficial effect of a court proceeding. So in response to some of our panel conversations, the arbitration committee of our court explored the question of whether we could indeed institute a mandatory policy of sending Title VII cases to arbitration. Arbitration experiments have been conducted in two districts in the United States where they have actually compiled the results, analyzed them, and sent questionnaires to the lawyers who were involved in them, and so on. And the result of all of this is that in those two districts the arbitration experiment has not worked terribly well because everybody regards arbitration as being a tryout outside of trial. You may, as a matter of right, have a trial if you are not satisfied with the result of the arbitration—and in 53 percent of the cases they then asked for a trial. Now, I would think that those were not Title VII cases in which that experiment was conducted. They were business-transaction, commercial-type cases. I think, because of the level of feeling involved in a Title VII case, that if we had to permit them to have another trial or a trial as a matter of right, 75 to 80 percent of them would take it—and they would also use that arbitration proceeding just as an attempt to take discovery of what is going to happen at the actual trial. And so, on the present state of the record of experiments, I would say that it won't work, although I deplore the fact

that Title VII cases are tried in federal district courts and the individuals are made to wait for seven years, especially if they are still working for the same company, as happens all the time.

Panel Member Byrne: I do not think that in the normal collective bargaining context where lawyers are appointed by unions and employers that there is a viable method of handling Title VII or discrimination matters. If there is a discrimination problem, quite often the union that is involved can be as much a part of it as the employer may be. I don't think that that is a resource upon which we can depend. It occurs to me, however, that the backlog of Title VII cases is really a terrible indictment not of the federal courts, which are overburdened, but of our procedures which permit, as Judge Pfaelzer's earlier comments pointed out, this enormous discovery proceeding even in a case that is not certified as a class action, which is quite a different situation. Take the individual case that is not certified as a class. It occurs to me that it would be highly desirable to establish a panel of magistrates who would be able to make final and binding decisions in cases of that type, once the case is certified to such a magistrate by a federal judge. But as a quid pro quo in that area, I certainly would prohibit the type of discovery proceedings that are currently engaged in in that individual-action Title VII case. I think that that would go a long way toward relieving a burden on the courts and would be important because these things would be resolved at a time when the witnesses are available and the records are available, and it can do some good one way or another instead of being delayed for three or four years. That, of course, would require legislation, but it does open up a different area, it seems to me, for magistrates or arbitrators—whatever you wish to call them. And you could develop a group of people who would have expertise in this area. It might be a group similar to that which is represented in the National Academy of Arbitrators.

Panel Member Alleyne: It would be desirable to substitute for a portion of the large number of cases that are now being filed in the federal district court under Title VII a procedure calling for arbitration. But when I ask myself, "How does one create the procedural structure and format for bringing that about?" I have very grave difficulties. Judge Pfaelzer has raised an interesting point in noting that if the parties can simply use arbitration as a means for bringing about some kind of discovery before they really get into the big arena of the federal district court, that

is certainly not desirable. You can get around that by getting the parties to waive the right to file in a federal district court and to commit to accept the arbitrator's decision as final and binding. But I am not sure how many parties would mutually enter into an agreement to waive the right (and I think waiver would be required, certainly with *Gardner-Denver* on the books) to proceed in the federal district court following termination of proceedings in the arbitration forum.

Mr. Frederick H. Bullen: I entered into that kind of an agreement when I was an advocate in New York. We had a series of cases in which the individuals involved in the litigation agreed to waive their right to proceed in any other forum. They then had an expeditious disposition of cases that were before several different agencies and otherwise would have taken years to resolve. I think that the basic point is that the EEOC has acted irresponsibly with the tremendous backlog that they have in not pushing parties—at least in not encouraging the parties—to use a process which is well established and which can lead in the end, I think, to as much justice as going through all of the litigation, trying cases de novo in a federal district court.

Judge Pfaelzer: I agree. I think that would be highly desirable, if they would agree to it. It is a much more expeditious process.

(Second Day)

Chairman Block: Our first subject today is the decisional thinking of judges and arbitrators as triers of fact, some of the more troubling aspects. At what stage, if ever, do you form a tentative or a final conclusion?

Judge Pfaelzer: It is certainly true that a tentative conclusion is in your mind at the end of hearing the facts and studying the law. In the Ninth Circuit, generally speaking, it is frowned upon to permit the parties to prepare the findings of fact and conclusions of law and submit them to the judge. The reason is that the appellate court wants to know why you decided the case and not that you just looked into the blue eyes of one of the counsel and said, "I am holding for you. You submit the findings of fact and conclusions of law—and I will find them." That is frowned on. And I think that that is entirely proper because the appellate court and the parties are entitled to know what caused you to come to the decision. There are always those opinions that you begin to write and you get to the point where the tentative

conclusion will not work; the opinion will not write. So you must go back and rethink the tentative conclusion. That does not happen to you when the winning party hands you the findings of fact and the conclusions of law, and you make a few changes here and there. It only happens to you when you have gone through the entire process of thinking about what supports that initial, tentative conclusion. So even though it causes a great deal more work than we would like to engage in when we all have 400 civil cases to decide and deal with, I still think that that is a beneficial rule and created simply to face that point.

Chairman Block: Do the advocates think differently than does a trial judge or an arbitrator?

Panel Member Davis: After you have found or had the facts given to you by a union official in a discharge case, perhaps you make a tentative conclusion. But that has to be examined a little bit further before you make your final decision whether to tell the union, "I think that you have a good case because of equity grounds and based on the facts," or you tell him that "Your chances are not very good and *you* are going to have to decide whether you want to go anyway." In a second type of case, a contract-interpretation case, there are so many different types that there is no way that you can reach a tentative conclusion by simply listening to the grievant whom the union officer brings to you, or by reading the grievance that the grievant brings to you. You have to study the language of the contract, find out if there is any past practice that might affect it and what the relationships of the parties have been in the past on this issue, and finally go to arbitration texts and decisions and see if there are other decisions which bear on this point and may be helpful. It is after that process that we reach a tentative conclusion either not to go to arbitration or to proceed.

Panel Member Byrne: First of all, let's separate the advocate role from the role of the adviser in the situation. You first are the adviser as to what kind of a case you have. I think at that point you try to psych out a decision-maker as to what that decision-maker would be interested in—what from your knowledge, maybe without any research of the body of law or practice, would be important from the salient facts that have been presented to you. Not *all* the facts, because you haven't done that degree of preparation yet that is so important for presenting a case. And you really go into the decisional process of the trier of fact, whether that is to be the arbitrator or a judge, as to what

would appeal in the situation, one way or another, to reach a result. You tend to be, in that role, quite objective. At some point in time (and I don't know how quickly it occurs, for it depends on a lot of factors), all of a sudden when you get working on the case, you find that you have become the advocate. The objectivity that you had before, I find, moves into the background; you begin building and constructing the case, perhaps on the basis of some of that thinking work you have done before. But you go forward with it and lose a little bit of that objectivity you had when you were first trying to figure out the decision. I do not think that that process is much different in a court matter or an arbitration matter. The difference is that in a court matter you have a heck of a lot more time. You have the luxury of discovery, and you have the finality (if you are a defense counsel) of a pleading which you have to confront. But you know that in the course of that discovery process you can, a little more slowly, go about the advisory function first of all, subsequently turning it into the advocacy function.

Chairman Block: But in that decisional process there may be some cases where you advise a client: "Well, look. You have a loser here. Maybe you'd better settle it and forget it."

Panel Member Byrne: Of course.

Chairman Block: So there is a decisional process that might lead in that direction?

Panel Member Davis: That is the point. You come to a decision, but in the case of an advocate, I think you do it only after you have studied the case and the facts as opposed to an arbitrator's sometimes arriving at that tentative conclusion fairly early in the hearing. He hasn't necessarily heard all of the facts. I think an advocate has to do just the opposite. If he is going to advise his client properly, he has to get all of the facts and then make his judgment on those facts before he decides—and only then does he reach a tentative conclusion.

Chairman Block: A judge normally decides cases involving one-shot litigation, whereas arbitrators' decisions affect the continuing relationship between parties to a collective bargaining agreement. To what extent, if any, should these differences affect the decision-making process as between a courtroom decision and an arbitral decision?

Panel Member Davis: I have heard discussions to the effect that the arbitrator plays a different role, that he should be concerned with the relationships of the parties, and impliedly that

that enters into how he reaches a decision in particular cases. I don't think I agree with that approach. I believe that an arbitrator in this connection should act as a judge. He should find the facts as they appear to him; he should reach his conclusion—rationally, we hope—and then let the chips fall where they may. If the parties have made a mistake, and the arbitrator fears that his decision based on the approach that I advocate will have an adverse effect upon the relationship of the parties, let it be. I think the parties then should wrestle with that problem amongst themselves and perhaps at the next negotiation see if they can repair any damage that the arbitrator may have done. So I don't believe that an arbitrator should take any different position than he would otherwise take based on the record that is before him.

Panel Member Byrne: I certainly agree a hundred percent with my colleague. I think I would attack the kind of thinking that would say that the arbitrator is really part of the collective bargaining process. I really feel that he must be the judge. For that matter, I don't think that judges are so oblivious to the extended relationships of the parties. Judges are dealing with child support in matrimonial disputes; they are dealing in Title VII actions with situations where the people are continuing to work in an industry or in a plant; they are dealing with on-going business relationships. It may not be between X and Y, but it will be between X and A, B, and C. I don't think that there is that much difference. I think that we got off wrong with the *Trilogy*. It came down at a time when there was a jealousy in the courts to protect their preserve from these arbitrators. There was a desire for speed and finality, all of which one would agree with. But then we have this overblown language saying that "Labor arbitration is something quite different from anything else that was ever created." I don't think it is. It does require expertise and knowledge. But if Judge Pfaelzer today has a patent case and tomorrow a Title VII case, and the next day she has a plain old business-contract case and the next day an immigration problem, a criminal problem the next day, she has to become an expert in all these fields. She has to learn from what the lawyers can present to her, from what her clerks can dig up for her, and so forth. I just don't think that we can say that labor arbitration is something totally different.

Panel Member McCulloch: I agree. We are not looking for a mediator. We are looking for an arbitrator to make a decision. If we wanted a mediator, we would hire a mediator and sit down

and discuss the subject with the mediator. The parties have been through this thing for a long time. It started all the way back in the grievance procedure. It was discussed by many people. If the parties aren't able to reach an agreement by the time they get to arbitration, I would assume that the arbitrator's sole role is to make a decision. He ought to make it on the basis of the record. If he doesn't understand the issue, all he has to do is to question the parties. I haven't seen many of them bashful in that respect. But after that is done and you get to the influence on the two parties, I guess you would have one who is happy and one who is mad. But you are going to have that in every case, so that really shouldn't enter into it.

Judge Pfaelzer: Nobody comes to a decision in a case without considering what the consequences would be, particularly where the parties are in a continuing relationship with each other. I always take into consideration the impact of the decision on the continuing relationship of the parties. Perhaps what I am doing is just acknowledging what other people don't want to acknowledge, which is that that is a factor which influences your decision. To say that you were just asked to make a decision and that's all—let the chips fall where they may—is, I think, a little naive. I mean, with all due respect to my friends up here, you will, subconsciously I think, always take that into consideration. There will be more and more of the kind of cases that will test some of this—the kind that I had just yesterday on sexual harassment where the supervisor has been regularly harassing the women employees. Now, if you don't think about the continuing relationship of the parties there, you are wrong. If I said, "You just came to me for a decision and I'll give it to you," I think I would be naive.

Mr. Harry H. Klee: With respect to this issue of morale and the continuing constructive relationship of the parties, how do arbitrators know what effect their decision will have on those continuing relationships if they don't really know the factory, the plant? Before I became a labor attorney I was an industrial relations manager for about 15–16 years. It took me several years to sense in a plant or a division that I was working in what kind or quality of "morale" there existed, what would be a more constructive relationship between the parties. I have always preferred decisions where someone was happy and someone was miserable. I would rather you call it as you see it and don't worry about what the effect is going to be. We're

going to sit down in three years and we will resolve it at that time.

Panel Member Alleyne: I think the speaker who posed that last question is really in agreement with virtually all of the arbitrators whom I know. I think the answer is that generally we do not take into account what the morale in the shop might be because in 99 out of 100 cases we simply don't know what effect our decision will have on morale.

Mr. Chester C. Brisco: As I understand the panel's thinking, it is that the tentative decision is a crucial starting point in this decisional process. My question is: Where does the "tentative" decision come from? My feeling is that the decision-maker (and I am referring to my own experience) reaches the tentative decision by somehow appealing to his own hierarchy of values which he brings into the room with him as part of his equipment. I want to ask Judge Pfaelzer: In arriving at a decision, for example in a sexual-harassment case, do you recognize a choice of values that you have and do you try to identify those in the decision, or do you let them lie there and use judicial language without going back to your own values?

Judge Pfaelzer: I think the way you put that is very interesting and I will answer it directly. But I brought a quote here today which I wanted at some point to mention to you. Lillian Hellman once said that "Nobody outside of a baby carriage or a judge's chambers can believe in an unprejudiced point of view." I think that that is absolutely true.

Mr. Brisco: "Values" is a very dignified word.

Judge Pfaelzer: I understand that. I constantly tell juries that they have to be totally unbiased and leave all prejudices outside of the courtroom. I try to take that point of view myself. But I am not so blind that I think that each and every individual does not bring to the fact-finding situation a whole "value structure," as you put it, which influences the decision. I have seen that happen over and over again. No matter how you try, it happens. Perhaps that is why the choice of the arbitrator is so important, or why the choice of the judge (if you choose one) is so important. And I will tell you just how serious this has become. The lawyers around town have decided now that they want a mandatory peremptory challenge of the federal judges for that very reason. One of them said, for example: "Can't you put yourself in my position? I am a patent lawyer, and I know that there is a judge on that bench who has never in the 20 years he has been

on the bench ever held a patent valid." That is because of a predisposition to look at it that way. I think that we would be blind if we didn't all recognize the fact that we have this "value structure," as you put it.

Mr. Harvey F. Pings: We have heard a lot today about how you make decisions. I would like to raise the question of *when* you make decisions. I think those of us who have practiced advocacy have noticed in certain instances that the attention, shall we say, of the arbitrator wanders a little bit. Sometimes you think, "The case has been decided. Let's go to lunch." I realize that we are talking about tentative conclusions, reexamined and perhaps others tried out. Do arbitrators feel that they are successful in overcoming a first impression which, in fact, really was wrong?

Chairman Block: There is a great distinction between a "first impression" and a "tentative conclusion" as used in our report. The "tentative conclusion" comes at the conclusion of the case, when the record is complete. That does not mean that some impressions are not formed along the way, but the "tentative conclusion" that is used to test the evidence in the record is reached at the end of the case.

Mr. Pings: Does that not sometimes coincide with an impression halfway through the case?

Chairman Block: It may very well. After hearing hundreds of cases of a similar nature, some do fall into familiar patterns, and it is very likely (it happens frequently, I would say) that a first impression is reinforced by evidence that comes in later. But the "tentative conclusion" of which we speak is not arrived at until the conclusion of the case when all the evidence is in. And no arbitrators with whom I am familiar would reach that conclusion until the record was complete, even though one's mind may "wander" on occasion. Judge Pfaelzer, what has been your experience with briefs where credibility is at issue?

Judge Pfaelzer: It is not helpful in that kind of case. I would urge the arbitrators not to adopt the same techniques that are adopted by lawyers who go to court. Lawyers who go to court never ever want there to be a time when the last word has been spoken! They just can't stand it! And that's why you have final briefs—not because you need them.

Chairman Block: May we infer that in credibility cases, by the time that you have heard the testimony from both sides you have a pretty good idea which side you are going to believe?

Judge Pfaelzer: Yes, yes.

Mr. John Phillip Linn: I guess I am somewhat surprised by the reaction I have heard up to this point with respect to the ability to decide immediately an issue of credibility at the end of a hearing. I don't find it that easy at all. And I must admit that I seldom take my hand from my yellow pad during the course of a hearing, even when Ed Conklin is reporting the case. I think the issues of credibility generally cannot be decided on demeanor. I have taught evidence. I have tried to find out what it is that I am supposed to learn through demeanor, but I can't recognize it. I think most evidences of credibility are established on a factual basis in terms of what reasonably can be anticipated with these particular witnesses involved. So I simply wouldn't want to leave without saying that I think that there is another point, and that is that all arbitrators certainly can't decide issues of credibility at the end of the case. That does not mean that you need a brief to help you, but I just don't think that you can make the decision as rapidly as it appears.

Judge Pfaelzer: I think that this is the most important part of the conference: How do you go about judging this credibility matter? When you have a jury in front of you, you are telling a group of people who are totally unsophisticated (some of them are sophisticated in some fields, but not in fact-finding): "Now, *I* am not the fact-finder; *you* are, and at the end of the case when we are all through, I am going to tell you how you go about finding facts. I am going to give you a list of instructions about how you do that." One of the instructions that is given, and that is considered to be almost mandatory, is: "Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matter as to which he has testified and whether he impresses you as having an accurate recollection of these matters." It goes on to say: "Two or more persons witnessing an incident or transaction may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience." And then I go on to explain to them how they weigh that evidence: Their only time as finders of fact to judge whether those witnesses are credible or not is when those witnesses are there. The same thing, I think, it true of me. I have an opportunity to see them; I try to make myself evaluate the document and the other testimony while the hearing is going on because, if I am later on going to take a cold piece of paper, after three or four weeks I have no possible way of saying that I am

giving a proper judgment. And so while I am taking notes I write in the margin, "He is lying," or "He has been impeached," or "That document clearly contradicts that former witness." I really am a strong believer that in a credibility case you must do that as the testimony is coming on.

Mr. Eli Rock: I have been sitting through these two days of discussion, and I think it needs to be emphasized, on this basic issue of the *Trilogy,* that arbitration is a vastly diverse phenomenon, and really to make sense in this kind of discussion, I think you would have to have had about six separate categories and discussed each one of them differently. Much of arbitration is like domestic relations; of course you try to anticipate the future result. But the problems are different for different issues, and in different plants, and in different unions. There are still an awful lot of cases where no lawyers appear and where even the local people who present the case do not have the expertise. I don't know what percentage of the arbitrators are still economists, or political scientists, or law professors, or law graduates as I am. But I think it would be a mistake to accept some of the statements that we have made here about the whole field.

CHAPTER 6

DECISIONAL THINKING

NEW YORK PANEL REPORT*

THOMAS G. S. CHRISTENSEN, CHAIRMAN

Preface

The following report of the New York Panel on Arbitral/Judicial Decision Making is based on certain premises which, we believe, should be set forth at its outset in order that what follows may be properly understood. The panel, while recognizing that different *conclusions* might be reached by either judges or arbitrators in a given fact situation, has regarded this element to be irrelevant to the purposes of this study. In that regard we have deemed the question of a precise result in a particular case (frequently affected by the different metes and bounds of judicial and arbitral authority and source of law) to be beyond and apart from the method, if any, by which that result is reached by the adjudicator.

This is, of course, a distinction which has particular importance when the litigation before either the arbitrator or the judge involves both the "law of the contract" and "external law," that is, the Occupational Safety and Health Act, the National Labor Relations Act, Title VII of the Civil Rights Act, or the duty of fair representation as developed by the courts and by the National Labor Relations Board. In such situations, we believe, differences may well and presumably do exist as to arbitral and judicial rulings as, inter alia, scope of inquiry, ad-

*Members of the panel are Thomas G.S. Christensen, Chairman, Member, National Academy of Arbitrators, Professor of Law, New York University, New York, N.Y.; Wayne E. Howard, Member, National Academy of Arbitrators, Philadelphia, Pa.; Honorable Alvin B. Rubin, United States Court of Appeals, Fifth Circuit, New Orleans, La.; Honorable Morris E. Lasker, United States District Court, New York, N.Y.; Christopher Barreca, Counsel, General Electric Co., Fairfield, Conn.; and Howard Schulman, Schulman & Abaranel, New York, N.Y. Judge Lasker was unable to attend the Los Angeles meeting.

missibility of evidence, and authority to grant or deny relief. We do not believe these differences, founded on such matters, reflect an arbitral/judicial variance in decision-making; rather, they reflect the boundaries of the decision which can be made.

We have also found, in our discussions, that the panel members, whether adjudicators or counsel, can perceive no significant distinction between the decisional processes of law-trained and nonlaw-trained arbitrators. Our conclusions, accordingly, refer to arbitrators generally without such a division within their ranks.

The bulk of this report, further, is based on the premise that the mechanics and form of the forum are, inextricably, factors that may bear upon the making of the final decision by either a judge or an arbitrator. We have, accordingly, cast the report's findings in the framework of the three major divisions which mark the progress of a claim through litigation, that is, the prehearing, hearing, and posthearing stages. As stated by one panel member, "It is difficult to isolate the decisional process and focus only on what the arbitrator or judge thinks about from the time testimony is completed until the time he writes an opinion. Differences in procedure affect the role of the advocate in the two tribunals, the material available to the trier (whether arbitrator or judge), and the decisional process. Indeed, the method of articulating the result may itself reflect some of these differences."

Finally, while not unknowledgeable of such scholarly research and literature as exists in this field of study, we have not attempted to prove or disprove the various theses which have been advanced therein. We have felt it our mandate, instead, to offer only those reasoned conclusions which we could reach from our own collective and individual experience.

I. Prehearing Procedures and Processes

The Choice of the Forum and of the Adjudicator

Any choice between having one's claim or defense determined by an arbitrator rather than a judge and/or jury may well not be one realistically available to a party to a collective bargaining contract as of that point at which a dispute actively arises. Given the fact that an almost overwhelming percentage of collective bargaining contracts in this country designate

grievance arbitration, to one degree or another, as the forum in which disputes as to interpretation and application of the contract must be determined, one can assume that this choice and its consequences have been settled well before litigation arises.[1] That choice, as a consequence of the *Steelworkers Trilogy*, only rarely offers opportunity for later reflection and rejection.

It can reasonably be asked whether this choice (however voluntary at the moment) of the forum nevertheless subsumes a prior, deliberate choice as to different methods of decision-making. Justice Douglas's paean to arbitral virtues in the *Trilogy*, even shorn of its rhetoric, can be interpreted as support for such a proposition with its emphasis upon the arbitrator's presumed singular knowledge of the "law of the shop," the "therapeutic" value of arbitration, and the proposition that arbitration is not a substitute for litigation but for industrial strife. Indeed, Justice Douglas states that it must be the expectation of the parties that the arbitrator's "judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished."

Despite this description of the arbitral function as one ranging appreciably beyond the limits of judicial discretion, it was the consensus of the panel that arbitrators, generally, are not granted, nor rely upon, the power to determine intuitively what is best for the parties. Rather, the selection of arbitration as the dispute-settlement device is founded on an expectation of greater experience and expertise among arbitrators as to matters of industrial relations, experience and expertise to be used as a guide to determining what the parties have agreed to do in their contract rather than an independent determinant of what is "right." If so, it is an adjudicator experienced in the type of dispute at hand rather than a different type of ultimate adjudication which is being selected.

Much the same conclusion, in the opinion of the panel, must be reached as to the impact on decision-making resulting from selection of a particular arbitrator to serve either ad hoc or for the term of a contract. The selection is, of course, within the

[1]This "choice," of course, may well not have been made by an individual pursuing an individual claim under the contract.

control of the parties rather than one more often than not imposed upon them by the mechanics of the court system in the case of a judge. Again, however, it is the consensus of the panel that, while a more informed judgment may be sought, such party-controlled selection rarely has effect upon the *method* by which decision is reached.

Pretrial Preparation by Counsel and Discovery

It was the consensus of the panel that, with obvious exceptions for unique cases, preparation of counsel for a judicial proceeding tends to be far more extensive and thorough than that engaged in for arbitral proceedings. The question naturally arises as to whether this assumed greater degree of preparation has ultimate bearing on the manner in which final decision is reached.

The panel's discussion did not reveal any perceivable difference in arbitral/judicial decision-making resulting from the degree of pretrial preparation (or, for that matter, the relative skill of counsel) except when such pretrial preparation occurs in the form of discovery procedures, basically available only in the courts. As summarized by a panel member: "In essence, there are no pretrial procedures in arbitration. The parties seek to have the arbitrator arrive at the hearing with a mind that is tabula rasa. They want him to have no impression at all concerning either the facts or merits of the suit.

"On the other hand, in most state proceedings and in all federal proceedings, pretrial discovery, orders for pretrial conferences, discussions with counsel, rulings on discovery requests, familiarity with motions, and the almost universal requirement of pretrial briefs bring the trial judge to trial date with a familiarity with the facts and, in most cases, with a grounding in the applicable law. The trier who has such a background will inevitably have some impressions about the validity of the parties' positions before trial."

This presumably deliberate choice of parties and their counsel as to what the adjudicator will know about the dispute before a "hearing" takes place unquestionably allows the judge, as contrasted with the arbitrator, an opportunity to make earlier judgments. The question remains whether it allows better or different judgmental processes. It would seem safe to state that the extent to which this provides a judge with more solid

grounds on which to determine admissibility of evidence, or the degree of its relevance or materiality, must necessarily affect the judgmental process. Although even this difference between arbitration and the judicial process may be obscured in trials by a judge without a jury, the "I'll take it for whatever it is worth" response by many arbitrators (and corresponding lament by opposing counsel), with its resultant doubts as to the corpus of evidence which will result in reasoned judgment, is avoided.

On the appellate level, the judge is further assisted, prior to any actual argument, with far more—that is, the trial judge's opinion, the briefs of the parties on appeal, and, possibly, a transcript of the proceedings below. It would seem inescapable that these aids must narrow both fact and law questions to the degree that a far more finely honed decision is possible.

As was made clear in the panel's discussions, the impact of the foregoing must, however, be considered in the context of the comparative range of expertise brought to an individual case by the adjudicator in the two forums. While the precise subject-matter of an individual case presented to an arbitrator may range from nuclear power plants to baseball salaries, from complex incentive plans to sparsely stated provisions for premiums for "dirty" work, not to mention the enormous diversity of situations allegedly constituting "just cause" for discipline, the individual cases arise in a single field of jurisprudence, the common law of the collective bargaining contract. By contrast, a judge either on the trial or appellate level will encounter a diversity of laws from admiralty to wills with no common denominator. The proposition can be argued, with considerable force, that prehearing procedures available to the court are far more required by the need to become an instant expert in a multitude of fields rather than factors in how an individual decision is actually made.

Settlement Before Hearing

It appears to the panel that there is substantial reason to conclude that far more cases are settled on the "courthouse steps" as contrasted to those resolved in the corridor outside the arbitration hearing room. If such is true, as we believe it to be, that fact might reveal some difference in the decision-making process as perceived by counsel for the parties. At a minimum, it may disclose some indication as to how judges and arbitrators

view their functions, that is, as decision-makers or problem-resolvers.

As was stated during the panel discussions: "In federal court, and in many state courts, settlement discussions are held at the pretrial conference. We must focus on the nonjury case because, typically, federal judges are less active in attempts to settle nonjury cases. However, even in such cases, it is common practice for the judge to inquire about settlement possibilities.

"On the other hand, some arbitrators diligently avoid any settlement discussions. It is my perception (perhaps erroneous) that the few arbitrators who do encourage settlement discussions are usually those who have a long-standing acquaintance with the parties and that the typical ad hoc arbitrator, who has only an occasional case with them, would avoid initiating any such discussion." The number of arbitrators who are alert to (and seize upon) opportunities for mediation rather than final adjudication is not easily quantifiable. Some, unquestionably, exist and are presumably known to the parties who select them as such.

It can be argued—and hotly disputed—that an arbitrator who attempts, successfully or not, to mediate a satisfactory settlement as compared with rendering a judgment thereby indicates a disposition for a different bench mark—that is, an acceptable result—for decision-making. If so, this would, on the face of it, be a trait shared by much of the federal bench in view of the settlement procedures noted above. No such conclusion has been drawn by this panel. The question remains, nonetheless, whether mediation may, for either arbitrator or judge, have carry-over effect if decision ultimately must be made.

II. Hearing Procedures and Processes

It was the firm consensus of the panel that the very atmosphere and setting of a trial as contrasted with an arbitration hearing may have some, if not appreciable, impact upon the decision-making process. As summarized by a member of the panel: "The difference in atmosphere plays a role both in the testimony and the role of the trier. In the typical arbitration, the arbitrator seeks to have the parties accept him as merely primus inter pares. He sits at the same table, and at the same level with the parties. There is no pomp and no circumstance. On the other hand, in the courtroom the judge sits in a paneled room,

clad in black robes with an American flag behind him. Inevitably, the proceedings are much more formal—apart from whether or not rules of evidence and procedural rules are followed.

"This difference in atmosphere may also affect the role of the trier. Typically, the parties are suspicious of the arbitrator. The arbitrator must, except when he is well known to the parties over a period of years, observe a super-sanitary atmosphere. On the other hand, the layman is less inclined to view the judge as potentially subject to influence. This attitude, originating at the outset of the proceedings, is nurtured by the difference in trial." To this, however, a caveat must be added: "Obviously, these observations apply to the judge-tried case as compared to the arbitrator-tried case. No comparison can effectively be made between arbitration and the jury-tried case. To the extent that comparisons can be drawn, however, the role of the advocate in trying a case before a jury is much like the role of the advocate in trying a case before an arbitrator. Here the jury is 'sanitized.' The jury is completely uninformed about the case and must be educated by the advocate, and the result is not at all likely to turn on precedent. Indeed, the appeal to equity and conscience may be even greater than in a case tried to an arbitrator." Other, more particular aspects of the courtroom/hearing room comparison are as follows:

The "Parties" to the Action

The formal "parties" to a judicial action are, of course, identified as such through the various pleadings and are subject to known judicial rules as to opportunity to be heard. While in the early years of labor arbitration the same certainty might have been true (without formal rules as such), the development of the doctrine of fair representation since the 1940s has made the matter a far more complex one. Many of the issues will be the subject of a separate paper for this Annual Meeting where considerations of substantive law will be more the focus of attention than herein. The panel believes, however, that specific attention —in the context of comparative decision-making—should be paid to the question of the third "party" involved in arbitration hearings.[2]

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[2]While such "third party" questions could arise in other contexts than the duty of fair representation, such as jurisdictional disputes, the panel restricted its discussions to the areas indicated.

Union and management counsel can and do legitimately disagree as to the degree, if any, to which an individual employee involved in a particular dispute should be allowed to participate in an arbitration hearing. It can be fairly argued that a proceeding which, by contract, is established for union-employer litigation should not (and, indeed, cannot) be made into a tripartite contest. Conversely, the strains of compliance with the obligations of the duty of fair representation can easily justify union wishes that the individual employee not later be heard to state that he or she was not given a proper and full hearing.

It is not the mandate of this panel to resolve that question. It is possible to conclude—whether or not with complete certainty —that the somewhat ambiguous status of "parties" other than the contracting union and employer may well make the decision-making of arbitrators more difficult than that of judges in such situations. Such difficulty, if it exists, may have more impact on the time and care which might be devoted to decision than on the method of reaching such decision.

Apart from the time and care involved in reaching a decision, there is the underlying question of whether such three-party situations may impose a greater burden of independent inquiry on the part of the arbitrator, that is, deliberate probing as to matters not covered by either union or company counsel. Or, from the opposite point of view, is not the arbitrator, unlike the judge, restricted to the determination of those matters which the contracting parties have indicated they wished to resolve? The panel has no consensus (or firm lines of disagreement) to offer in this respect. It would appear that these problems, perhaps only dimly understood at this juncture, remain to be resolved on an individual basis by arbitrators acting according to their own individual predicates. The same may well be true of trial court judges, although the place of the individual employee as an acknowledged litigant may make the task of such a judge more traditional in concept.

Rules of Evidence

It is a commonplace that arbitrators, unlike judges, are not bound by the rules of evidence observed in courts. Such evidentiary restrictions were developed over centuries of Anglo-American judicial experience as a consensus (however varying over the years) of what constitutes a reliable basis for decision.

In the area of criminal prosecutions, some added stringency as to what may be included in a record may well have resulted from the concept that it is not what is probable, but what is certain which can be relied upon to determine a contest between the state and an individual where life or liberty may be at stake.

It can be argued that, at least compared with criminal cases, the basic function of arbitration is to explore all that can be asserted on either side. The fear of the arbitrator was, in the words of Dean Shulman, not that he would hear too much but, rather, too little. Objections of "immaterial," "irrelevant," "not best evidence," "hearsay," however, are not uncommonly heard in fervent utterance by counsel in the average arbitration case even when "counsel" has not been admitted to the bar. It can reasonably be assumed, accordingly, that parties to an arbitration are not necessarily requisitioning an unlimited search for "truth" when they commission an arbitrator to determine a dispute.

No expressed consensus was formally noted (or sought) as to the panel's conclusions on the possible effect of the lack of binding rules of evidence in arbitration upon the decision-making of the arbitrator. It would appear, however, that any arguable "warping" of decisions resulting from broader, more relaxed standards of what is to be considered as part of a record is not perceived as a major problem or affecting, of itself, the arbitral-judicial method of reaching final conclusion.

III. Posthearing Procedures and Processes

A considerable amount of scholarly inquiry has been published by academicians, judges, and arbitrators as to the nature of the decision-making process. That process has been described as sometimes "analytic," sometimes "intuitive," and, even, sometimes "apocalyptic." It is the consensus of the panel that a single arbitrator or judge may well use only one or, at times, all of such methods in making a determination. None of such methods, however, appeared to the panel to be a matter of judicial as contrasted with arbitral thought-process; as was remarked in our discussions, "It is the individual personality, not the title, which determines."

This section of the panel's report is directed, instead, to what happens after the hearing during the period when the trier of the case is attempting to reach and formulate a decision.

Timing of the Determination: Bench Decisions

One difference in arbitral/judicial procedures should be noted at the outset: today in many judge-tried cases in federal court, given adequate pretrial preparation, the judge is prepared to and does hand down an oral decision at the termination of the hearing. For various reasons, this is almost never done by arbitrators. In some instances, the judge's oral decision may, in the event of an appeal, be supplemented by formal findings. If there is no appeal, these oral reasons are likely merely to be transcribed and made part of the record.

Obviously, the thought-processes of the decision-maker are affected by his preconceptions concerning whether or not he is likely to be able to, and wants to, render a decision at the hearing or whether he is likely to take the matter under advisement and study it. In many instances, in court-tried cases, posttrial briefs are not being utilized. Of course, where the matter is taken under submission by a judge, and posttrial briefs are filed, then the differences in the decision-making process are less pronounced.

Findings of "Fact" and "Law"

In connection with the trier's effort to reach a decision, a distinction must be drawn between "facts," that is, the reconstruction of events, and "law," the rules applicable. To some extent this distinction is artificial, but the difference can be critical as to arbitral/judicial judgment. In deciding what were the "facts," that is, the historical reconstruction of what the trier thinks actually happened, it would seem that both the arbitrator and the judge follow the same criteria. In the event of a conflict in testimony, they each must evaluate credibility. This is not done by "rules," but based on experience, a priori assumptions, "intuition," and human and subjective factors. Documents either confirming or disproving the testimony of a witness receive much the same kind of evaluation. Here differences from one case to another depend more on the personality of the trier than on the process. There are arbitrators who are technical and legalistic in their judgments, just as there are judges who follow these processes. On the other hand, there are judges who lean much more to subjective and elastic equitable principles in trying to ascertain "the facts," just as there are arbitrators who do this.

When we turn, however, to the rules that are applied, we find important differences. Judges tend to rely on precedent, a "paper trail" to proper result. Even in an area where there is no precedent, they seek to draw analogies. They look at law books. In a typical arbitration case, there will be little precedent. To the extent that there is some precedent (other than a prior interpretation of the same collective bargaining agreement between the same parties), this precedent is not binding on the arbitrator; it is merely information concerning what other arbitrators have decided. Therefore, by its nature the arbitration process, subject only to the terms of the collective bargaining agreement, leaves much more latitude for equitable considerations.

In noting the lack of *binding* precedent, this is not to say that "precedent" in the form of evolving concepts of basic guidelines have not been developed by arbitral consensus. It is a consensus rather than precedent as such which has led to the development of such basics of industrial relations as progressive discipline, the place of "practice" in interpretation of the contract, and the separation of misconduct connected with or unconnected with the work situs, among others. Yet these are guidelines which, in many respects, serve the same purpose as legal precedent.

Judgment and Opinion Versus Opinion and Award

The functions of the written (or oral) opinion of the trier appear to us to be different.

The arbitrator seeks primarily to use his opinion as a device to educate the parties. Ancillary to and, to some extent, a part of this is his effort to convince the losing party that the arbitrator understood his position and had a rational basis not to accept it. To some extent the arbitrator must, at least subconsciously, be influenced by the compatibility of his decision with accepted principles of labor-management relationships and its impact on the continuing relationship of the parties.

On the other hand, in the "typical" judge-tried case (as contrasted to the atypical case involving an institutional decision with a continuing relationship), the judge pays little or no attention to the impact of the decision on the parties, although he may be to some extent concerned with its precedential value. A primary focus of the judge's opinion is to expose the reasoning that he has followed for judicial review. While it may be desirable for the opinion to be completely comprehensible to the

parties, its evaluation will usually take place not by the parties, but through other judges.

The judge will seek in his opinion to demonstrate that there is a rational basis for the result, but in doing so he is less concerned with convincing the loser that he has understood the loser's position than with demonstrating that a lawyer-turned-judge would render the decision this way. To a much larger extent, therefore, he will rely on precedent, accepted style, and professional notions of craftsmanship.

An arbitrator does not, in the typical opinion, seek to impress his peer group. His primary audience consists of the parties. On the other hand, when rendering opinions, particularly in significant cases where the opinion is likely to be published, judges have a tendency to seek to be craftsmanlike in their opinion-writing. This means not only that precedent will be relied on, but authority will be cited. The structure and thrust of the opinion will differ.

None of the differences discussed above would enable a bystander to predict a difference in result in a given case. If, for example, credibility of witnesses is the only serious factor in the case, despite all of these differences, the result is likely to be the same given equally experienced arbitrators and judges. Where, however, the issues turn not about who is to be believed and who is not to be believed, but upon application of rules to a relationship, then differences in result may be anticipated.

NEW YORK PANEL DISCUSSION

Chairman Christensen: We have been engaged in what I suppose would be called a search for truth, or a search for how you search for truth. I think we can get an immediate argument as to whether or not arbitrators or judges actually search for "truth."

In making our report and doing our studies, we proceeded on the basis of several premises which I think should be made very clear at the outset. It did not take much more than an initial meeting for us to realize what is perhaps a truism: that arbitrators and judges, either contrasted with each other or in each group alone, very possibly will reach different conclusions in any given fact situation. We did not construe our charter as a mission of finding out to what degree the group of arbitrators and judges involved would reach different conclusions in an individual case.

We felt that the answer in any particular case is going to be profoundly affected by the metes and bounds of the authority of the arbiter or the judicial determiner, and that these different metes and bounds of our authority, and the sources of law on which we operate, were really beyond and apart from the study we thought we should do, which is to examine how we make decisions and to what degree, if any, an arbitrator and a judge —circuit court or trial court—as determiners of fact, might operate differently in the decisional process.

As a slight digression in our researches and discussions, we looked at the question of whether or not, looking at arbitrators, there was any difference that we could see within the decision-making process of those who were legally trained (or, as the phrase has been used, "illegally" trained)—that is, whether there was any difference in the methods of decision-making employed by law-trained and nonlaw-trained arbitrators.

Our conclusion was that we did not find any difference of note whether the arbitrament resulted from the arbitrator being law-trained or not law-trained. So, generally, the conclusions we have reached in our discussion refer to arbitrators without deference to any such distinction. We believe that the manner in which litigation is conducted—the forum, the situs, the arena itself—can have impact at various stages on how a decision is made, and certainly molds the process of decision-making. What

we have done, accordingly, is to divide our research and our report into three basic areas: first, prehearing matters of procedure and of the forum; second, the hearing itself, whether it be in an arbitration room or in a courtroom; and third, the posthearing process.

As stated by one of our panel, it is difficult to isolate the decisional process and focus only on what the arbitrator or judge thinks about from the time testimony is completed until the time he or she writes an opinion. Differences in procedure affect the role of the advocate in the two tribunals. The material available to the trier, whether arbitrator or judge, and the decisional process—indeed, the method of articulating results—may itself reflect some of these differences.

Panel Member Howard: I find only one dilemma in attempting to formulate any conclusions on the similarities and differences between arbitral and judicial decision-making. We found very little discernible difference between arbitrators and judges in their decision-making functions, notwithstanding certain differences in procedures and processes. Yet these two decision-making systems with little discernible differences in their decision-making role have in recent years, I think, given some evidence of highly divergent results. Take the case of *Hussman Refrigerators.* How can we explain that judicial decision-making reached the results which I think no arbitrator—certainly no experienced arbitrator—could possibly have reached? Remember that it was a seniority and ability case, and its essence was that the court was convinced that the employer could not fairly and adequately represent the interests of the successful, but junior, job candidate. Arbitrators since time immemorial have relied on the employer to represent the interest of the successful, but junior, job candidate. It may be an oversimplification just to say that this is a bad decision, though I have heard it condemned quite roundly by arbitrators and advocates alike. I think it may be an oversimplification to call the decision nothing but a sport.

What I'm interested in is whether or not there are differences that really exist in the context of decision-making between arbitrators and judges which, notwithstanding a very challenging effort, we have not been able to discover. Notwithstanding the unanimity of our findings, the bottom line seems to be that in recent years there have been increasingly divergent results.

Judge Rubin: Sometimes divergent results come from divergent presentations. I'm reminded of the story about the father

who was going away from home on a business trip, perhaps the National Academy, and he called his two sons, 12 and 10, together and said, "I want you to be men and show your mother you are men while I'm away." He left them to their devices. So the next morning when they came down to breakfast, Mother said to the older boy, Johnny, "What would you like to have for breakfast?" and Johnny responded, "Damn it to hell, bacon and eggs." Down with the trousers, a paddling, and he went back to his room. Then she turned to the younger brother and asked, "What would you like for breakfast?" And he pounded the table and said, "Damn it to hell, you better be sure it ain't going to be bacon and eggs!"

I'm not troubled by the divergence in results. It seems to be inevitable that when you have two processes that are designed to serve different functions, that are operated by personnel selected differently, you must accept the notion that the results will be divergent, because the functions are divergent and the people are divergent.

Indeed, to put it another way—and I happen to have served in three capacities—you might well expect that precisely the same decision-maker who is cast as an arbitrator with one question that has some overlap with another question might reach an apparently conflicting decision in an arbitration process from the one he would reach, cast as a judge, in deciding perhaps a slightly different question with a slightly different thrust. Perhaps we have been overly concerned about identity of outcomes. I think if we get overly concerned about that, we will lose something of great value, which is a great dissimilarity of process, and to the degree we try to make the arbitration process like the judicial process so that the judicial process will accept the result of the arbitration process, inevitably in every single instance we will lose a great deal of value.

It seems to be inescapable, therefore, that we will emphasize those inherent and unique attributes of arbitration that make it of great value as a private forum as distinguished from a public one, an expeditious as distinguished from a deliberative forum, and a process that seeks insularity and quick resolution as distinguished from a process that seeks the ultimate right result at whatever expense and whatever length. We will emphasize those inherent attributes even though it may result in some instances in a discordant result.

So I feel, in this respect, it is important that both those who

utilize the arbitration process, and the arbitrators, resist this temptation to make the two processes alike so that one procedure will always approve the results reached by the other.

I have been thinking about two aspects of the decision-making process that I think we neglected to cover. One is the effect of advocacy. If the advocate, whether lawyer or layman, made no difference in the outcome, why do we have advocates? If the same decision-maker always reaches the same result with or without skilled advocates, why bother? On the other hand, if the side with the best advocate always won, why have a hearing at all? Now, we know that somewhere between these two extremes lies some impact on the decision-maker by the quality of advocacy. This is a rather elusive part of the thing. We didn't talk very much about it. As I was listening to Ted Jones this morning, I began to reflect: to what degree is my reconciliation of the inevitable resolution I am presented with as a decision-maker affected by the quality of the advocacy? It seems too inevitable that all of us who have had some role in decision-making will conclude that that has some effect, and although we try to discount it—we do try to say, "Now, I am not going to decide in favor of the best advocate or the best lawyer or the best nonlawyer in this situation"—there is some intrusive, though perhaps not always conscious, role of advocacy. I wonder what effect that has on the decision-making process, both of arbitrators and of judges.

A second question that I think is important to consider, and one Ted did not touch on nor did we, is: what is the impact of the review of decisions on the decision-making process itself? Let me rephrase that question a little differently. To what degree do I change my decision or slant my decision in a certain way because I know I will or will not have my decision reviewed by someone else? It seems to me that it is important, particularly for arbitrators, to resist the temptation to put something in the decision that will make it more palatable to a reviewer, and thus to alter the decision for the sake of review palatability.

I would distinguish that from making an articulate statement of the true reasons for the decision. I take it that any person who is obliged to reduce his rationale for decision to writing ought to try to give a rational and coherent statement of the reason. If we anticipate that someone else will review it, we may want to emphasize to a greater degree the facts that entered into our decision-making—to articulate them more clearly. But I would

distinguish between clarity, lucidity, and development, which I consider desirable attributes, and the inclusion of factors otherwise extraneous, or the slanting of decisions, to satisfy the demands of review. And so what I guess I'm saying in the context of arbitration is that I would urge arbitrators not, for example, to concern themselves with what a court may feel is the union's duty of fair representation in deciding the issue before them. I think essentially it is sufficient for the arbitrator to decide the issue presented without worrying about whether on another day the union will be able to justify the manner in which it had conducted its duty.

Panel Member Barreca: I think you know by now from what's already been said that basically this group concluded that there were very few significant differences in the decision-making process between arbitrators and judges. I suppose a natural consequence of that is what we have seen over the years, and that is an increasing formalization of the arbitration process. Many of you in this room, I'm sure, will recall that the late Dean Shulman in 1955, in his Harvard lectures, said that the objective of the parties was to keep the law out of the arbitration process but, mind you, not the lawyers. And at about the same time Professor Cox, speaking at the University of Michigan, said that the real intention of the parties was to keep the lawyers out as well as the law. I think Howard and I both can testify that our clients have been unsuccessful on both counts. And those of us who are members of the legal fraternity are, I suppose, thankful for that fact.

But, on the other hand, as we look at the arbitration process, in my view the greatest danger that exists to arbitration may well be the increasing formalization of it. There are increasing indications of greater and greater interest in discovery before arbitration takes place. There is increasing concern over the rules of evidence in the arbitration process. Much of this is driven by court decisions—by the decisions in *Alexander* and *Anchor Motor Freight.* All of these things tend to drive the arbitration process toward greater and greater formality.

As I understand the value of labor arbitration to the parties and to the individual employees, it is speed, expense, and informality, the things that are the time-honored attributes of the arbitration process, which are in danger to the extent that the arbitration process attempts to mimic the court system. That doesn't mean that we don't need to be concerned about the

fundamental issues of due process and about the fundamental considerations of rough justice, as we used to speak of them in the arbitration process. But while there are similarities in the processes by which the individual decision-maker may arrive at a decision, there are great differences which should remain in the processes themselves.

Panel Member Schulman: I was listening very carefully to Ted Jones this morning and sort of scratching my head and saying to myself, "Can I imagine myself going back to the people I represent, the union officials, and trying to translate to them what Jones was saying this morning?" I must tell you that I would have a lot of difficulty. I don't think I would last as much as two minutes with them. They are more direct people; of necessity, they have to be. I certainly appreciated Ted's comments this morning, but I'm a pragmatist in these matters. You have to be when you are an advocate for labor organizations. I have spent my entire professional career at it—40 years—and come out of a trade union movement as well. I went to college and law school as a result of the trade union movement in the thirties in which I was active.

We don't think there is, fundamentally, any difference in the decision-making process. We agree that the result may be different. There is a justification for that. But the approach to the subject and the approach to arbitrators, from my point of view as an advocate, is different. You size up who is going to be the hearer of the facts; you try to get an insight on the individual; you try to "get a book on him"; and you try to cast your case with that in mind.

Your witnesses are then prepared accordingly. You anticipate what your opposition is going to say. You try to rebut. You may try to emphasize certain facts. You may deprecate the position of the other side and show the fallibility of it. These are advocates' points of view as distinguished from the decision-making process.

But the arbitration process is a totally different process. It is not as new as so many people like to think. It goes back religiously, historically, in my faith. We have had the senior rabbi for generations deciding issues at dispute between parties. Maybe the standards he used were a little different, but the process of arbitrating is not unusual.

Within the field of labor relations, you have something else; you bring to it a different cast. You know that labor organiza-

tions for many years, particularly craft unions, tried their own grievances without joint participation; they disciplined their own members without employer participation and, upon analysis, suspended, fined, and expelled—the same function an arbitrator performs. Those labor organizations of a craft nature have a long history of doing that.

My last comment concerns the question of the arbitrator's accountability. I think every institution has to look at accountability, the quality of what is coming out, the degree of policing, the degree of obligation to render a quick decision, which was the whole purpose of arbitration. There are cases that take six, seven, eight months, not because they are complex but because the arbitrator is busy, or the people can't get together, or some other things like that.

Chairman Christensen: Some of the comments that have been made remind me of two things. It was hardly a radical member of the Supreme Court, Mr. Justice McReynolds, who made the comment, "The law is not made by judges nearly as much as it is made by lawyers who argue before judges."

One of the reasons we have two advocates on the program is that it has been suggested that as advocates, whether lawyers or not, you really play a vicarious role as an arbitrator or as a judge because, in deciding whether to go to arbitration or not, or to go to court or not, you probably make an informed judgment as to what are your chances of success. In fact, you go through a decision-making process for it.

Judge Rubin mentioned that people who go to either arbitration or the courts accept a difference in results. This is really where we started in our search. We went right back to the choice of the forum and the adjudicator. Does the fact that someone goes to arbitration rather than to a court mean that the person expects a different type of decision-making? Now, you can fairly say that the decision to go to arbitration really was placed upon both management and labor by the United States Supreme Court from the *Trilogy* on. The panel felt that there was still an element of choice here, and we probed into what that choice assumed.

Every arbitrator with any sense of misgiving as to wisdom before going to sleep at night, of course, repeats Justice Douglas's statement that he or she is wiser and better able to judge, and also is comforted by the fact that Justice Douglas said that an arbitrator's judgment will reflect not only the contract, but

such factors as the effect upon productivity of a particular result, and the consequences to the morale of the shop and the judgment as to whether or not tension will be heightened or diminished. The panel did not think that advocates, judges, or arbitrators would agree that what an arbitrator really does, in the sense of going beyond the intuitive, is to enter into a judgment of what the effect on morale will be.

We concluded that selection of arbitration, either broadly or specifically (and you have to exclude the individual who may be there by choice of the union and employer) is probably more founded on an expectation of expertise in this particular field than on any real thought that a different decision-making process will produce a different decision.

There is a second part of this particular problem. It is possible that the selection of arbitration vis-à-vis the judicial method of dispute resolution is the selection of an individual arbitrator, and here perhaps there is more of a problem. Do the parties make book on a particular arbitrator and, if so, can they collect on the book?

Judge Rubin: Let me just qualify one thing you said, Tom. I hope that what I said was that parties must accept the possibility of a different result, not that they do accept a different result. I think that emotionally, obviously, most people would expect the same result by whatever process, but a different forum does necessarily by its very nature imply the possibility of a different result.

Chairman Christensen: The selection of an individual arbitrator implies the selection of a particular result.

Judge Rubin: Yes. As you recall in our report we said that in some instances the personality of the decision-maker, whether that decision-maker was clad as judge or arbitrator, had more impact on the decision than the difference in the process.

Panel Member Barreca: I think we also have to be careful with respect to the process itself. Certainly as advocates on either side, when we are selecting an arbitrator, we obviously will try to select the forum most favorable to our point of view. I think that is a perfectly natural kind of thing for individuals to do. Which means that the arbitrators who are probably going to be most successful in the long run are ones who call them straight, because they are most likely in the long run to have the respect of the parties who are doing the selecting.

But there is another dimension to this. We keep talking about

comparing arbitrators and judges, sort of on the basis that the parties have that kind of option. I think that Dave Feller has expressed the view, in most of the things he says, that "Arbitration is really an alternative to industrial strife," which is a different dimension of the issue and which suggests, perhaps, that that factor has to be taken into account when we are talking about the procedures and the process itself.

Chairman Christensen: I don't know that I'm going to let you go with just that. I would assume, putting it perhaps too simplistically, that both of you get a list of arbitrators from the AAA or FMCS, and you go down it and pretty readily pick out from among those you know those you think would be more sympathetic to your position. Let's say it's a discharge case. You know X is a former prosecutor who won't look kindly on anything that resembles a crime. You know Y is a retired minister, and he holds the charity of his church. So you make your selections, but I would warrant—maybe you will disagree with me—that you cancel each other out. What you end up with is the lowest common denominator, and frequently somebody you don't know anything about.

Panel Member Schulman: I would be in accord with that. That has been my experience. You fence with each other, you look for advantage, and you do wind up with really an unknown. In some instances it's been very fortunate, other times unfortunate.

Chairman Christensen: Why are you any better off in an arbitration room than before a politically appointed judge?

Panel Member Barreca: I think I have to take issue a little bit with Howard. I think it is true that it is possible, particularly in the ad hoc selection process, that you frequently wind up with someone whom you don't know at all.

But I think the statistics of the FMCS, and the AAA as well, tend to indicate that a small group of individuals, relatively small compared to the total number of people who are in the process, hear a very substantial number of the cases. That says to me, at least, that the parties do tend to select people whom they believe they can trust to make an honest decision. I know there are a lot of new arbitrators; I have been involved in the arbitrator development process.

One of the first questions you get from someone new in the situation—and I'm going to paraphrase it—is, "How do you keep your scorecard equal?" Well, that, in my judgment, is a mistake that new people in the process frequently make in think-

ing that there is some kind of scorecard that determines whether or not they are selected. It is really the quality of their decisions, because if it now is a scorecard situation, and you have a critical case and you are faced with whom you are going to pick for an arbitrator, but you don't know whether it is "your turn" or not, that can be fatal!

Mr. Joseph Krislov: If the parties feel that they end up with the lowest common denominator because of arbitrator panels, why don't they go toward the permanent arbitrator?

Panel Member Schulman: From some of the comments I have had from labor representatives, there is first of all a distinction, of necessity, between the types of cases which go to arbitration. In some cases, someone's got to take somebody off the hot seat. That is one class of the two. The other cases are of a serious nature. From the labor point of view, to have a permanent arbitrator for those which are very important, very crucial to what we felt we bargained for, to the administration of the contract, we may very well, if we had our druthers, have gone out and gotten what we collectively thought was an erudite, able, and experienced person who has been around and who understands the trappings and the workings. But for the run-of-the-mill, for this fellow getting off the hot seat, labor organizations are not apt to put everything before one person. They will take their chances, given the two different propositions I gave you, with an ad hoc situation.

Sure, the ad hoc situation poses problems. In serious cases, my experience has been quite varied. I have had no problem with ad hoc selection. Maybe I'm a great believer in advocacy. Maybe I'm a great believer in the fact that you get your chance to present your issue, lay it out, show them the righteousness of your position, the injustice of what is happening here, the consequences, the significance of it. To that extent I have found that I can go with the present ad hoc situation. I hope that has been some answer, some aid to you.

Mr. Jim Farrell: I'm not clear on the element of choice involved here. If you have a collective bargaining agreement that requires that any question of interpretation or application will be arbitrated, what is the element of choice?

Chairman Christensen: The choice was in writing that contract. There is specifically a choice for management or labor.

Panel Member Barreca: There is also, of course, the choice of whether you're going to go ad hoc or permanent umpire or

permanent panel. I think those of us who represent large corporations which may have a series of collective bargaining agreements probably have a whole panoply of different types of approaches for arbitration—a separate panel, the AAA or FMCS, or some other way of selecting an arbitrator. There is a whole series of choices here. But I certainly would agree that since the *Trilogy,* at least to the extent to which the parties have agreed to arbitrate, the choice of whether it is going to be arbitration or some other forum is certainly not there, or not quite the same.

Mr. Alan Walt: The effect of the rules of evidence, or the failure to apply them, on the decisional process: I wonder if you think it has a substantive effect. I know that judges sitting without juries do not apply the rules of evidence as strictly as they would with a jury; nonetheless, they certainly do honor them, and I think it gives them perhaps a more limited record.

On the other hand, most arbitrators, regardless of their training, lawyers or nonlawyers, favor a loose presentation where the parties can present what they think is relevant, important, and material to the issue, and in the decisional process we weed out what we think shouldn't be considered. Is there a difference in the decision we are going to get as a result of that?

Chairman Christensen: One of the obvious areas in which arbitration and courts mainly differ is, of course, the pretrial stage—preparation and discovery. There seemed to be somewhat of a consensus of this panel that you are more likely to have more in-depth preparation for any judicial trial than for an arbitration. That may or may not be true in a particular situation. But there is no question that the availability of discovery techniques in courts, and their nonavailability in practically all arbitration situations, could conceivably have an impact on the decision-making. Judge Rubin knows that there are virtually no pretrial procedures in arbitration. He says that the selection of arbitration, by deliberate decision of the parties, is to have an adjudicator with a mind that is pretty blank at the outset.

Panel Member Barreca: Sometimes at the end, too.

Chairman Christensen: Present company excluded.

Judge Rubin: There is no assurance that on the bench you would get a different kind of mind.

I would like to respond briefly, however, to that last question because my impression would be that statistically you would get less than one different result in a thousand cases. I think this business of the rules of evidence has been exaggerated really out

of proportion. Let's not talk about rules of evidence as they exist in common law a generation ago. We take the best distillation of current thinking on the rules of evidence, the Federal Rules of Evidence, which have been in force for about six years. We see, by and large, that they are designed to keep out of decision-making those factors which really are not germane; they do not logically have probative force.

It doesn't make much difference if you let them in. If you let them in in a short hearing like an arbitration hearing of the kind normally conducted, you may protract the hearing a half hour or so. You won't really influence the decision-maker because he knows that that is not really of probative value. I don't believe adherence to, or lack of adherence to, rules of evidence has much of an impact. I think it is more of a solace to the inexpert person who has not been trained in a law school to let it all come in and say, "Well, I will weigh it at the end."

Chairman Christensen: Where do you stand as to that factor?

Panel Member Howard: I don't think it has that much effect in arbitration. I don't see a problem.

Panel Member Schulman: I would like to get back to the question about someone looking over the arbitrator's shoulder and the arbitrator making a decision with that in mind—the review. The whole purpose of the arbitration institution, as I see it, was to get the answer from the arbitrator and having the arbitrator calling it as he sees it. The question of review of fair-representation cases should not move us away from the very footing of the arbitration process. The courts, a minority to date, have forced a sort of hysteria. A particular circuit comes down with a decision, as in the *Hussman* case, and everyone starts wailing about it. But that is just one circuit, one of many, and it should not deter the arbitrator from "calling it as he sees it." That is what I think the labor organizations have bargained for, and that is what I think the arbitrator should do.

Chairman Christensen: Companies and unions almost invariably resist having anything before the arbitrator before the hearing starts, a complete reversal of the courts, and it puzzles me. I think that that conceivably could have impact on the decision-making. It is almost impossible to rule on relevancy when you don't know what is relevant.

Mr. Jack Leahy: In a case I had recently, at the hearing all the witnesses stood up and were sworn in at one time. The hearing proceeded. The union presented its case. Time for lunch. At

lunch someone approached me and told me that two witnesses who had been sworn were not represented by either party. They were employees who took a day off from work at their own expense, and they were there and they wanted to testify. This was after testimony had already been completed. I got together with the other two attorneys and directed that they be permitted to testify. Then we allowed the two witnesses, without representation whatsoever, to present their testimony and be cross-examined. Up until the time those two witnesses went on, it looked like a 49 to 51 percent case. After they presented their evidence, it went completely in another direction. As a result, the union did not win the case.

The arbitrator is faced with this: Does he or does he not admit these strangers? The parties who were represented in the case have an interest in not having them there, they are paying the arbitrator, it is their case—but in walk the strangers. We could very well have a civil rights case, or that sort of thing. What are your reactions as far as the arbitrator's authority, and your pleasure at having such people admitted to testify?

Panel Member Schulman: Envision a situation where two attorneys are trying a case before a judge in a federal court. They are presenting their evidence. In walks a stranger who says, "Judge, I want to testify." The attorneys get up and say, "We don't want him. This is our case. We are trying our case. We decide who our witnesses are." The court would say to that individual, "Thank you very much, but go home."

Now with respect to arbitration, you are there by virtue of a contract between the union and the company who are the parties to the contract. They will present their case. If the parties themselves agree to put this person on, then it is their judgment of value, not your judgment of value.

You just take the evidence as I present it. If I were one of the parties there and if I had agreed that this witness could testify and participate, then I am going to be bound by his testimony as you evaluate it. It could very well have been that if I were one of the attorneys, I would have said, "I don't want that man in there. I don't want his testimony given." I think you would be bound by that. I think you would just have to say, "You are representing the union, the party to the contract. It is your case. You are handling your case." If management wanted to put him on as its witness, then it is management's witness. That would be my approach.

Panel Member Barreca: I feel equally as strong, maybe even stronger, about that particular aspect of the situation. I think that arbitrators perhaps have become too concerned about what might happen to their decision after they make it, worrying about whether or not the union has breached its duty of fair representation, or worrying about what might happen in a civil rights suit, and so forth. I think the Supreme Court has spoken in *Alexander* about one aspect of that issue.

On the other hand, I think that if the arbitrator assumes that he or she is able, in a matter of a day or two, to find the ultimate truth beyond that which the parties are willing to present to the arbitrator, it almost becomes arrogance in a way. The fact of the matter is that the process is a two-party process, and if the arbitrator really believes that his ability to find the ultimate truth transcends what those two parties are willing to provide, it takes on a dimension which, in my judgment, is kind of unreal.

(Second Day)

Chairman Christensen: We have viewed our charter to be to try to determine whether what goes on in the mind of the decision-maker differs for a judge and for an arbitrator. Our ultimate conclusion was that the ultimate thought-processes are probably just about the same. If they vary, they vary because of the personality of the decision-maker, whether he or she be judge or arbitrator.

At one of the small workshops that were held for arbitrators and judges on Wednesday morning, one of the items caused several cardiac arrests among the arbitrators present. It was the question of the disciplinary case in which the company, for reasons best known to itself, announces, "We call the grievant as our first witness," and the union immediately vigorously objects.

Now I had thought that while there is a difference among the arbitral community as to whether or not the union's objections should be overruled and the grievant indeed called as the first witness, the vast majority would say no to the company. But what caused the incipient cardiac arrests was the statement, with some sense of outrage and astonishment, by the judge in the room that in that case he felt the company had been denied a full and fair hearing, and he thought that award was probably reversible. Many of us started counting back the number of cases in which we had become suddenly vulnerable. I think it is an apt

point at which to start, because it does illustrate the completely different sense of what is "due process" in the courts and in the arbitration room.

I do not draw an exact parallel to a criminal trial. It's not a Fifth Amendment situation or something like that. But I do draw from that, and my reasoning is that the company has the burden of showing the evidence on which it acted at the time it did and that that evidence must stand apart and away from the testimony of the grievant at this stage. To a judge, I suspect, the absolute opposite is common experience. Any party has the right to call those individuals, hostile or otherwise, who might sustain the position being advanced.

Panel Member Howard: I am interested in whether there would be any difference between how a law-trained arbitrator would carry this out and how a nonlegally trained arbitrator might do it. For instance, I think we are probably in complete agreement that in 95 percent of the cases we would not allow that to happen. But we might reach our decision on different things. I might say, "Is it fair?" I don't know all these legal principles. In fact, I think that gives the nonlegally trained arbitrator an advantage because he can always throw up his hands and say, "I don't know what you're talking about." But suppose the parties said, "But we have always done it this way." Should the arbitrator impose his standard of fairness on the parties?

Without that latter, I would probably say no. The employer took the action; in fairness, let him tell me why he took it. Then later I want to hear maybe from the grievant, or if the grievant doesn't want to testify, I may be able to draw some inference from that. But I think the responsibility is on the employer's back, unless somebody says, "Well, look, we have always done it this way. Nobody's ever complained before." And if that had been the way they had treated it, I would say that the union's vigorous objection at this time might be out of place.

Judge Rubin: I'm curious, Wayne. Why is it unfair to do it one way rather than the other? I don't see how you resolve that particular question on whether it is unfair or fair. It doesn't offend my moral sense of value to do it one way or the other.

Panel Member Howard: I would say that I would put myself in the spot of the disciplined employee, and I would certainly want to know why I was disciplined at the outset before I felt that I had to meet any defense of that.

Judge Rubin: I have one more question. I assume what you are trying is the employer's state of mind?

Chairman Christensen: In part—or the state of his or her record.

Panel Member Barreca: Interestingly enough, while I know that some of my associates would call the grievant first in a discipline case, I personally have never done it. But it's not been on a question of fairness; it's been a question of strategy as an advocate. I don't want the grievant to be my witness. I want the opportunity to cross-examine the grievant as a hostile witness. So it is to me a strategy question rather than a question of fairness.

Panel Member Schulman: I view the arbitration process from the point of view of the individual—what he understands this whole process is all about. My experience has been that employees look at the arbitration process totally differently than they do at the judicial system. They look at a different forum, a very convenient and informal forum where there is a fellow sitting up there, or a girl sitting up there, who is going to hear the issues in the matter. You are going to give him raw justice.

Now, viewed from that perspective, I think that what Wayne is saying is making a lot of sense. It would appear to me that it's not fair, not within the common lexicon that we as lawyers think of as due process and fairness. But to the individual employee, he is being pilloried, and within that context, it has to me a substantial degree of unfairness. When you look within the context of our judicial system, we have pretrial discovery, and all the factors are out before the hearer of the facts—depositions of the plaintiff (who is the grievant), his story; you've got the other side's story. So you can make a comparison.

Chairman Christensen: I can't resist commenting on something Wayne brought up, which rather puzzles me, because I would agree with him that when the parties say, "This is the way we have always done it," we say, "Sure, this is your ballgame." Then I looked over at Judge Rubin and I thought: Suppose he got in disfavor in the Fifth Circuit and was told to go out and try a small criminal case in Steubenville, Ohio, and he got there and it was a murder case and the prosecutor called the defendant as the first witness. Judge Rubin, I assume, would raise his eyebrows at that point. And suppose he were told, "Judge Rubin, this is the way we have always done it in Steubenville, Ohio."

I really would like to know whether I misread the industrial community, as I sometimes do. Is there almost a solid premise in our community that it is up to the company to prove its own case?

Mr. Paul Rothschild: I think that talking about calling the grievant is very useful, but should an arbitrator permit a discharge where the company cannot make a prima facie case without calling the grievant as a witness?

Panel Member Barreca: I think it might be interesting, Tom, to hear if there are any lawyers here who follow the practice of calling the grievant first. I'm told by some who do that the reason they do it is to prevent the grievant from misrepresenting the situation after he has had an opportunity to hear all the other evidence and change his story. I don't know whether that is true or not.

Mr. Bill Lubersky: I have done it on more than one occasion. I think the purpose of the arbitration hearing is a search for the facts, not a search for the decision. That comes after you have gotten the facts out. There are many trial methods by which to get the facts out honestly and accurately. If I had a grievant who I believe would like to stretch the truth, I may want to get him nailed down before he has had a chance to tailor his evidence to what he hears. I think it is an appropriate method because you are searching for the truth; it is not a matter of some kind of moral ethics. He is in there because he claims he has been wronged. If he claims he has been wronged on the basis of some kind of fact situation, you've got to find out what that fact situation is. This is a trial technique designed to get that fact.

Panel Member Schulman: Don't you get the opportunity to nail down the truth when the grievant testifies? He is going to testify, and he may have a story whether you put him on first or he goes on last. Really, what technical advantage is it to you?

Mr. Lubersky: Well, this probably happens in one case out of fifty, but sometimes it is important to find out what he will say about a given fact situation before he has heard what everyone else is going to say so he can tailor his story to make the best excuse. I think we have all seen that happen.

Chairman Christensen: Don't you get that, though, in the process of the grievance procedure itself? What little pretrial discovery we have is going to be in the grievance procedure.

Mr. Lubersky: You have to realize that there are many cases that go to arbitration where there has been really no grievance

procedure at all, just a pro forma meeting and disagreeing. That happens regularly.

Panel Member Howard: I would agree on that, and particularly in a discharge. In order to expedite, they very frequently skip all the intervening steps of the grievance procedure. I can't understand why management would want to put the grievant on first. If he is going to stretch the truth, he is going to fit his story to the story of company witnesses who have gone first. He would be more apt to be trapped if he were on later than on first.

Mr. Lubersky: That may or may not be in any given case, but this choice still ought to be part of the arsenal that's available to present a proper case. If management makes a mistake, if they make a tactical mistake by calling the grievant first and it hurts them, that's their responsibility. What is the reason that there is something sacrosanct about the grievant testifying only when his lawyer calls him instead of when somebody else calls him? Part of that query is due to my background as a lawyer. In the courtroom you know that anyone is fair game as a witness.

Panel Member Howard: Maybe because we don't like the context of an arsenal in the course of an arbitration hearing.

Mr. Lubersky: That is semantic. You are searching for the truth. People lie. People lie on the witness stand. People lie under oath, or they stretch the truth or have different versions of the truth. Two of us see the very same thing. We, in complete honesty and good faith, give different stories of what we have seen. The whole purpose of the hearing is to find out what the facts are, and that is not always an easy process. I found that in discharge cases very frequently it is much more difficult than in contract interpretation cases. So whatever methods there are, isn't the best method the one most likely to get the truth out?

Panel Member Howard: Yes, but who should be the judge of that, the management attorney or the arbitrator?

Mr. Lubersky: I don't think that the arbitrator is the one who makes the decision as to what kind of procedures we are going to follow in the hearing. I'm not suggesting that it isn't his judgment, but I am suggesting that he is making an erroneous judgment if he doesn't let me do it.

Judge Rubin: I think the discussion indicates the reason why I suggested that this is not a question of due process at all. In the Wednesday seminar we discussed this question, and the judges reacted with the feeling that to deprive management of the "right" to call the grievant as the first witness offends due

process. That, I submit, is an erroneous judgment. What we are dealing with is a question of trial strategy, and we might even have a debate about its wisdom. To put it in perspective, let me suggest to you that even in court in a nonjury trial, there is no absolute right to call any witness in any given sequence. The Federal Rules of Civil Procedure make it quite clear that the trial judge can govern the order of proof. Now, commonly, if this kind of case were presented in a court, the judge would let someone call a witness first under cross-examination. He is not obliged to, no more, I think, than the arbitrator is obliged to. But it would seem to me, in a given case, I would not as an arbitrator react with a knee-jerk: management can do it, management can't do it. I would want to know why you want to do it in this case. Is there some unusual significance, something that really affects the decision-making process: Keep in mind that these questions about people changing their stories may be very good tactics before a jury, where you have inexpert and uninformed triers, but when you are trying a case before an arbitrator, I would take it that he ought to be pretty adept at detecting whether there is this kind of change in a story. So if one side strongly objects and the other side has no good reason to advance for why I ought to overrule that objection, I'd say, "Well, let's wait and see." Now, I do think there may ultimately arise a question of due process, but that relates to something that has only been touched on. That is whether management is precluded from ever calling this witness. At the tag end, management persists and says, "Now we want to call him." Do you bar management from calling the witness then, absent a pending criminal proceeding in another forum and a claim of Fifth Amendment rights?

Mr. Harry Swartzen: I think a judge doesn't have the flexibility that an arbitrator has. Judge Rubin, when he considers a case, must consider the statutes. I assume that the statute is the same in its meaning and application in New Orleans, in Dubuque, Iowa, or wherever. Right, Professor?

Chairman Christensen: Right.

Panel Member Howard: So the law is the same, but not so for arbitrators. An arbitrator learns new law wherever he goes. The language may be the same, but the application is Humpty Dumpty. You have to use the law of the shop, and the same words have different meanings in different locales, and the meaning of the language is based upon the practice and experi-

ence and the mutual intent of the parties. So there is a basic distinction. The judge has to apply the law irrespective of geographical areas or persons. An arbitrator has a great deal of flexibility.

Chairman Christensen: Over the years, in England and then in the United States, we built up a body of rules that are legal rules, but really reflect a judgment of what should be depended upon to make a judgment.

For example, all the rules of hearsay, of best evidence, of relevance and all of that are legal rules. They do speak, however, for an awful lot of thought churning over the centuries as to what you can depend upon in deciding what is truth. If that indeed is the quest we are on, if the court of which you are a representative has said it is improper to reach a decision on hearsay, how can we justify an arbitrator's doing the very same thing?

Judge Rubin: Usually the hearsay rule is applied as a criterion for jury trials; we also use it in nonjury trials. But in the courts in Louisiana, influenced by the Civil Code system of the Continent, if an objection is made in a nonjury trial on the basis of hearsay, the customary ruling is, "Well, that goes to the weight." That is just about what an arbitrator does. So I would say that the judicial judgment embodied in the rules of evidence is not that all hearsay is always undependable. It is that, by and large, it is not a very reliable guide in the hands of the inexpert, and it doesn't hurt very much to let it in to be evaluated by an expert. So I would have no trouble sustaining an arbitration award that was based entirely on hearsay, despite the rules of evidence.

Mr. Larry Seibel: I would like to pose a question of the distinction between the way the court may look at something which has the aspects of a penalty as distinct from the way an arbitrator may look at something in terms of fashioning a remedy. A company has a clear provision that says, "You may not take work out of the plant as long as the people in the plant are not fully employed." A year before the contract comes up, the company starts to take work out of the plant. Ultimately, the contract is over. The contract is not renewed. A new nonunion plant is functioning somewhere. Let us forget for the moment any NLRB implications, or what have you. Grievances are filed with respect to the violation of the provision with regard to maintaining work at the plant or contracting out or moving work out while people are not fully employed. You now determine that,

in fact, the company did move work out of the plant in violation of the contract. The people are now scattered all over the countryside; you do not know what damage, if any, has resulted with respect to individual employees.

My question: If an arbitrator looks at something like that and says, "I'm not going to worry about what the individual employee suffered. There was a payroll at the beginning of the period. There was a payroll during the previous year. We know what happened to the payroll during this year. I'm going to use the loss of payroll as the standard for my award."

A court will turn around and say, "Aha, but you have not related that to any specific employee. Therefore it has the overtones of penalty." How may courts, as distinguished from arbitrators, approach that kind of situation where you have a clear violation? You have a sense of what has been taken away, but how would you go about fashioning an award?

Chairman Christensen: I suspect, just off the top of my head, that my award would perhaps cop a plea in a sense. I would probably say, "There is a clear violation and the company is directed to make whole all employees who have suffered loss thereby," simply returning the job of remedy to the parties.

Panel Member Howard: I think I would take the same cop-out you would.

Judge Rubin: In the legal context, that is inescapably the solution. Talk in terms of a breach of contract and then the remedy for breach of contract is to make anyone who is damaged whole, not to impose a penalty beyond the damage. I don't want to be understood as saying that I think no arbitrator can do what you posed in your question; conceivably he could, if that is within his mandate from the parties. But you asked me how I would award damages, and I say you couldn't award damages that way.

Panel Member Barreca: My reaction is much the same. I think it depends really on what authority the parties have given to the arbitrator. I think that probably in this whole question we are talking about, of the process of decision-making, certainly one of the elements that affects is: what have the parties asked the arbitrator to do? And I would presume, if an employer gave that kind of discretion to an arbitrator in that kind of situation, maybe not only that plant should close, but maybe the new one will close shortly, too.

Panel Member Schulman: I subscribe to the remedy you

would prescribe. I would add one other factor to it. I think it is a very easy equation. This is what happens to people who file unfair labor practice charges and you can't locate them and award the damages to which they are entitled. Normally what is done is that the Labor Board, through its Compliance Enforcement Section, undertakes various investigations and so forth to track these people down. In addition to the remedy that Tom prescribed, I would add another factor: The employer is obligated to make all efforts to locate these people so as to compensate them for the damages they sustained. I think that is enforceable; the employer can be held in contempt if he doesn't take all the steps prescribed, and you will then get your remedy. I don't think you take the money, for example, and put it in a fund. It has to go to the people who are adversely affected.

Mr. Alan Walt: Judge, doesn't the federal court have authority, after issuing a decision along those lines, to appoint a special master to handle the remedy? I think this does present a problem for the arbitrator. Do you retain jurisdiction? There's a big split here. Do you want to because of the kind of difficulty that might be involved in each one of these cases in tracking down an individual? What's the best procedure for the arbitrator to follow when there is such a broad brush, where many people may be entitled to monetary damages, where there may be complications involved in each one, where there may be set-off problems? Do you return it? Are you happy with the idea that in each case there should be a new grievant? Does that satisfy? Is that what the parties really want to do?

I have had some remedy problems that are not quite that broad, but they concerned me. There have been a few where they have been more limited, and even where the parties have not directed me to do so, I have retained jurisdiction, but I have wondered whether that was the right thing to do. Also, as I say, the more involved the actual mathematical problem or the location problem becomes, I wonder if it's a good idea for the arbitrator to remain involved.

Judge Rubin: The answer to your question is yes, we can appoint special masters, but no, that doesn't answer the problems. When we appoint a special master, we retain jurisdiction and supervise what the master does.

So I have analogous cases where we get a report every six months, and the report for the first six months has 50 names shown; then for the next six months there are 40 names shown,

and maybe ten years later you end up with five names shown. By this time everybody's sick and tired and they reach some resolution between them on what will be done with the funds for the last five people who can no longer be traced.

Panel Member Schulman: All that we are really talking about is a typical class action. Money is to be paid to a class, and how do you dispense the money? Here a violation has been found affecting a class. All these employees are gone. It would appear to me that the arbitrator should retain jurisdiction. He should so structure his remedy, if need be and if he has it within his power, to appoint someone in the form of master with compensation, or place the burden on the company to do it. The unions are around. They can monitor. They can report back.

Judge Rubin: I think you are right. The primary onus ought to be on the company. But absent some agreement of the parties, I think the arbitrator has to retain some sort of jurisdiction to be sure the company performs its duty.

Mr. Joseph Martin: It seems to me that we arbitrators have a simple solution for this. More frequently and recently the parties have asked me to make sure to state that I retain jurisdiction. So now, at the end of every hearing I say, "If the parties wish me to do so, I will retain jurisdiction over the administration of the remedy." So far everybody says, "Yes, that's a great idea." Both parties like the suggestion.

Panel Member Schulman: You are not alone in that. I have had arbitrators say that to me time and time again.

Chairman Christensen: There is something we should not leave this room without touching upon. If we came close to dissent in the panel, it was over whether or not the arbitrator has a different role than a judge in the sense that he deals with continuing relationships, and this different role would have impact upon how he made a decision. Judge Rubin rightfully challenged the assumption that only arbitrators are concerned with continuing relationships, and he very properly brought out the fact that continuing relationships are not utterly strange to courts. All you have to do is think of a school-desegregation type of matter.

Judge Rubin: I think here, as well as elsewhere, perhaps when we contrast the two adjudicative methods, we emphasize their differences rather than their similarities. It is obviously quite different, whether you be arbitrator or judge, when you are trying to decide whether somebody owed someone damages for

a past episode under a contract that will never be renewed and in which the parties will never see each other again, and whether you are trying to determine the rule that will guide a continuing relationship.

I think that any adjudicative person who has to determine the rule to apply to the continuing relationship has to take into account the effect of his ruling on that relationship. Right now federal courts handle a lot of continuing relationship cases involving institutions, the administration of jails, the administration of hospitals, the administration of homes for the mentally handicapped, and many other institutional cases where, apart from the initial determination that some kind of dominion over that institution must be exercised, there is the problem of formulating day-to-day rules.

In that situation, it would indeed be a stupid judge, as indeed it would be a stupid arbitrator, to say, "I am going to make a ruling I think is good and let the parties live with it any way they like." Obviously, there the judge, like the arbitrator, must take into account, at least to some degree, the impact of his ruling on the parties, its acceptability, its practicality. Now, I don't say that this may be more important in the arbitration relationship and less important in the judicial; those are matters of degree. I'm simply saying that we cannot contrast the two systems completely and say in one the pragmatic concern is important and in the other it is nil.

CHAPTER 7

DECISIONAL THINKING

WASHINGTON PANEL REPORT*

ROLF VALTIN, CHAIRMAN

As is true of judging, reporting is the product of a multitude of influences. So is the nature of the discussions—the topical selections, the directions, the emphases and de-emphases—which form the basis of the report made by any particular group. Some identification of the reporting group should therefore be given at the outset.

You should make nothing of the fact that we are the Washington, D. C., group. This is somewhat ironical, for our Program Chairman, upon first forming three geographical groups, determined that cases reaching the federal judiciary in the nation's capital might be of such special fallouts as to call for the formation of an additional and separate group. He presumably had in mind the judiciary's appellate level.

We considered it a coup when we persuaded Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia—a veteran widely held in great esteem—to become a member of our group. The victim of a heart attack on the tennis court, he died shortly before our first meeting. And, as things turned out, we proceeded without a replacement.

Judge Leventhal would have been a most stimulating participant and would undoubtedly have pushed us into lines of inquiry which we did not in fact pursue and which we might profitably have pursued. But we think it may legitimately be observed that input going to appellate functioning represents a dimen-

*Members of the panel are Rolf Valtin, Chairman, Member, National Academy of Arbitrators, McLean, Va.; Richard I. Bloch, Member, National Academy of Arbitrators, Washington, D.C.; Honorable Harold H. Greene, United States District Court, District of Columbia, Washington, D.C.; Cosimo Abato, Abato & Abato, Baltimore, Md.; and James Vandervoort, Director, Labor Relations, United Technologies Corp., Hartford, Conn. Judge Greene was unable to attend the Los Angeles meeting.

sion which is a full step removed from what we have been asked to look into. The reason is that an appeals court judge is not normally a trier of facts and normally accepts the factual findings made by someone else as that from which he must proceed. And not only is it true that arbitrators rarely function in an appellate capacity, it is also true that the findings of the facts—and, indeed, even the manner in which the facts are stated—are time and again the pivotal element in arbitration decisions. We assume that the disappointments of labor and management practitioners on this score have been of sufficient intensity and frequency to confirm the validity of the point we are making.

Judge Greene is a distinguished jurist with impeccable credentials, enjoys his life in Washington, and handles big corporate lawsuits more frequently than is typical of district judges in other parts of the country. But he does not judge in a peculiarly Washingtonian manner. His inner voices, the legal constraints upon him, and the workload pressures under which he labors are no different than they would be were his seat elsewhere on the federal bench.

Much the same is true of Rich Bloch and myself. We happen to reside in Washington and we do somewhat more federal-sector work than we otherwise would do. But we are both full-time arbitrators with varied practices. Both of us engage in some umpiring and some ad hoc work, and we both get exposed to labor-relations practices and environments of all sorts. Aside from age and talent, the distinction between us is that he is a lawyer and I am not.

The other two members of our group, chosen by Rich and myself, are not Washingtonians to begin with. The lawyer in this instance is Cosimo Abato; the nonlawyer is James Vandervoort.

Cos is from Baltimore. He has been in practice, representing unions, for some 18 years. Most of his clients are unions of the nonindustrial type—building trades, service employees, trucking employees, etc. They are characteristically organizations that operate without well-oiled grievance procedures: there is a lack of stable employment, those elected to grievance-procedure posts are neither schooled nor skilled in fact-gathering, and there are no data-collection and record-keeping systems. Cos thus functions in an environment which is markedly different from that typically found in our mass-production industries. And therein—the nature of his practice—lies the key to many of his observations. Some of them are startling—as, for example,

when he says that 75 percent of his wins are owed to the uncovering of facts which he accomplishes in cross-examination. But Cos's input must be accepted as representative of one segment of collective bargaining and the arbitration which goes with it. And his input illustrates what is constantly to be kept in mind in any light-shedding endeavor involving American collective bargaining: that it is not a monolithic institution.

Jim is a management representative in the manufacturing industry. He is the Director of Labor Relations for United Technologies at Hartford, Conn., and he has long been intimately involved in the arbitration process. He oversees a grievance procedure which overwhelmingly produces settlements and which requires resort to arbitration in but a handful of cases. In that sort of environment, abhorrence for mediation by the arbitrator—one of the differences between Jim and Cos—is to be expected. Also, given the fact that his is a large multiplant company, it is to be expected that Jim is opposed to bench or brief-memorandum decisions. His primary concern is for the law-making which comes out of the decisions, and he needs that law-making to be understood at all of his plants. I am not suggesting, of course, that Jim and Cos are of identical socioeconomic bents. I am saying that they come from different labor relations worlds and that this principally accounts for the differences which we discovered in their inclinations and assessments.

This, then, is the so-called Washington group. It should be apparent that it would be a mistake to view us as special or distinct in relation to the other three groups. Nor, however, would it be fair to view us as the Program Chairman's mere afterthought appendage.

* * *

We report without hesitation that two fundamental conclusions emerged from our discussions. The first is that judges and arbitrators function quite the same when it comes to the process of arriving at their decisions—when it comes, in other words, to the decisional thinking, as the program refers to it. The second is that institutional differences and similarities in the two forums are nonetheless to be appreciated and that it is at least as important to identify some of the institutional factors as it is to undertake the quasi psychiatric examination indicated by the program title. We will proceed along these two fronts in the given order.

Judging Is an Art

Judge Greene characterizes judging as an art rather than a science; rejects the notion that judging is a wholly analytical process; sees himself as a fallible human being; grants that he is influenced by a multitude of predilections—predilections which, though they vary among us, are inescapably part of all of us and inescapably produce such value judgments as we are called upon to make; understands that the predilections are at work both in assessing the reliability of witnesses and in subsequently deciding cases; seeks to be aware of his predilections as a check against wanton biases, but comes back to the realization that he, and no other, has been asked to decide the case; recognizes that precedent and other legal requirements must be observed and may dictate the result in the case, but has found that equitable results are usually achievable within that framework; does not hesitate to spin the inventive wheel where the constraints are not present; tries to decide quickly, believing that it gets no easier two or three months later; does not resort to coin-flipping or other forced means for deciding when he is badly torn—but, rather, ends up in the sort of weighing and reweighing which amounts to brooding but which somehow brings the decisive element in the case to the fore; is subject to time pressures and does not want to become known among his colleagues as the low man on the output totem pole; grants that he decides cases with an eye toward being reversed on appeal, but holds greater concern for doing what *he* believes to be right; occasionally even entertains the thought that reversal is not likely if his holding squares with what he feels comfortable with; nevertheless understands that residual discomfitures in some cases are unavoidable; and unabashedly allows that his first and foremost objective in every case is to make sense—which translates into saying that he wants to do what, to him, is fair and reasonable.

Rich and I are wholly in accord with Judge Greene. All that he says applies equally to us. We, of course, grant, that federal judges face a wider range of subject matters; they function on criminal matters, on tax matters, on constitutional matters, to name some of them. But if this is translated to saying that federal judges deal with public-law cases whereas arbitrators deal with labor-agreement cases, we can return to our emphatic echoing of Judge Greene's observations. And we do it gladly, and with

pride, for we like the candor and realism with which Judge Greene has captured the judging process.

Our group did some reading as part of carrying out our assignment. Our readings included pieces by Jerome Frank and Benjamin Cardozo. By way of elaboration and further elucidation of what all five of us regard as centrally true of the judging process, we want to close this part of our report with a few excerpts:

"As the word indicates, the judge in reaching a decision is making a judgment. And if we would understand what goes into the creating of that judgment, we must observe how ordinary men dealing with ordinary affairs arrive at their judgments."

"The process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another. . . . [But] judicial judgments, like other judgments, . . . in most cases, are worked out backward from conclusions tentatively formulated."

"The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics."

"After canvassing all the available material at his command and duly cogitating on it, [the judge], brooding over the cause, waits for the feeling, the hunch—that intuitive flash of understanding that makes the jump-spark connection between question and decision and, at the point where the path is darkest for the judicial feet, sets its light along the way."

"What are the stimuli which make a judge feel that he should try to justify one conclusion rather than another? The rules and principles of law are one class of such stimuli. But there are many others, concealed or unrevealed. . . ."

"Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions, the habits and convictions which make the man. . . ."

"Judges . . . are far more likely to differ among themselves on 'questions of fact' than on 'questions of law'. . . ."

". . . in learning the facts with reference to which one forms an opinion, and often long before the time when a hunch arises with reference to the situation as a whole, . . . minute and distinctly personal biases are operating constantly. So the judge's sympathies

> are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge's initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness's testimony."

Yet:

> "The courts have . . . repeatedly declared that it is one of the most important functions of the trial judge [serving without a jury] . . . to consider the demeanor of the witness.
>
> "They have called attention, as of the gravest importance, to such facts as the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity."

Lest these excerpts be considered as outdated, we give you an observation found in a recently issued decision by the United States Court of Appeals for the Third Circuit. Referring to the choice which a judge has to make between two seemingly controlling legal precepts as a value judgment, the dissenting opinion (Judge Aldisert, quoting his colleague Freedman) commences with this: "The way you come out in this case depends on how you go in."

We view these excerpts as going to the heart of the difficulties, both for the parties and for the judge or arbitrator, which inhere in adjudication. We would do no more than particularize were we to walk you through the anatomy of any of our cases which have required judging in its true sense—that is, any but the easy cases. And such fine-tuning would not change the basic message: that the process is of endless complexities and uncertainties and that those who search for scientific foundations for outcome predictions are embarking on an exercise of futility. We do not accept the Program Chairman's distinction between intuitive and cerebral judging. Again, except in the easy cases, we think that it is a mixture of the two forces which spells the result.

Institutional Differences

We now turn to a series of institutional comparisons. Our discussions pursued no particular theme, and we ranged freely. We will pass on what seemed significant, but we cannot avoid proceeding in somewhat disjointed fashion.

Tenure and the Lack of It

Federal judges have lifetime tenure. They can be removed only through impeachment. As everyone knows, impeachment is a difficult and cumbersome process. Federal judges have been removed by it in but seven instances in our history. Bills by which to facilitate removal without the impeachment process are occasionally introduced in Congress. And Judge Greene is among those who believe that there should be a way, without the hindrance of impeachment, for dealing with plain bad behavior, alcoholism, and the like. But the recognized difficulty is that the line to be drawn between problems of this sort and disgruntlements over the judge's legal and public-policy views may become obliterated. Up to now, the concern for retaining the voice of federal judges as a free and independent voice has prevailed.

Arbitrators are without tenure. Even those who function as permanent umpires hold contracts of but two- or three-year duration. This is not to say that arbitrators are without security whatever. The volume of the nation's arbitration load has been rising so steeply and steadily as to yield a favorable supply-and-demand situation for arbitrators. Further, as in the case of baseball managers, established arbitrators tend quickly to be picked up by a new set of clients upon the rupturing of the relationship with old ones. Blackballing, once the dread of arbitrators, seems to be a thing of the past. But, in utter contrast to federal judges, arbitrators serve at the pleasure of the litigants.

We discussed some of the fallouts of the contrast, and we pass on the following for your consideration. They flow from the premise that arbitrators are more conservative and more cautious in the performance of their work than are judges.

First, whereas judges are glad to make novel pronouncements and are eager for the opportunity to hand down landmark decisions, arbitrators make the agreement their security blanket and thus come up with technically defensible but unimaginative holdings. Cos deplores it; Jim views it as fitting and consistent

with what he bargained for. The exchange gave Jim the opportunity to ask Cos whether a labor court with tenured administrative law judges might be the better way. The answer was a resounding "no."

Second, judges interject themselves at hearings to a substantially greater extent than do arbitrators. We had in mind chiefly the raising of questions concerning the merits of the case. Cos and Jim were agreed that such question-asking is widely resented by collective bargaining parties and that arbitrators are aware of it and therefore tend to be guarded. Judge Greene allowed that, though normally a listener, he moves in hard when he perceives that there is an uneven match between the two lawyers representing the litigants before him. He linked this to his overriding desire to come up with the right results. Rich and I took the stance that sphinx-like arbitration is bad arbitration and that arbitrators should inquire about anything which they see as requiring clarification—though they should do it without motivation of helping one party or the other. Jim holds no great concern for the differences among arbitrators on the extent to which they inject themselves, but he prefers arbitrators who are essentially listeners and he is skeptical as to whether the pure-motivation distinction is capable of implementation. Cos seems to prefer positive arbitrators, but he was also heard to mutter, "I'm not sure I always want you to have all the facts."

Third, judges are more at liberty to resort to mediation than are arbitrators. Jim's view of arbitrators who seek to mediate has already been given. Here, however, it was his turn to do some muttering. If I heard him correctly, he said something to the effect that mediation is OK where he signals for it! Judge Greene rarely mediates, but confirmed that federal judges are wholly free to mediate and that some among his colleagues do it routinely and habitually. Judge Greene also made the observation that mediation by a judge serving with a jury is one thing, but that mediation by a judge serving without one is quite another: the latter, unlike the former, has to hold concern for becoming infected with prejudice by virtue of learning things which would not be part of the trial evidence. Rich is a consummate mediator. He is likely to resort to mediation, and in more than half-hearted fashion, whenever he senses an opening for it. The only question is whether his sensory antennae are reliable. But he grants the soundness of Judge Greene's admonition—which, by definition, applies to arbitrators. And he heeds it. I am not saying,

however, that this is necessarily a matter of conformance to ethical standards. Rich and I are among several arbitrators who serve on the Foreign Service Grievance Board. There, when one of his mediation efforts fails, he seems rather delighted in disqualifying himself on grounds of prejudice and letting one of the rest of us pick up the marbles. Cos favors forceful mediation in appropriate cases—which, one may gather, is something like half of them in his practice. He holds the conviction that, both as a matter of making sense and as a matter of holding down costs, mediation in arbitration represents true public service. Here again, however, the nature of his practice needs to be understood. In many of the cases which come to his office, it is true not only that there has been no real use of the grievance procedure—which is tantamount to saying that there have been no real settlement efforts—but also that the parties do not properly understand the case until it unfolds at the arbitration hearing. Cos wishes that arbitrators as a whole were more daring and resourceful in assuming a mediating role, but, attributing it to their insecure lot, he does not entertain much hope. As for myself, true to form, I am somewhere in the middle of all this. The only thing I am certain of is that I have been accused both of being a compromiser and of failing to seize the opportunity for compromise.

Fourth, judges are more firm and precise than arbitrators in ruling on objections at the hearing. This is partly the result of the facts that judicial hearings are formally structured, that there is no question about the applicability of the rules of evidence at judicial hearings, and that judges are usually better informed about their cases by the time they commence hearing them than are arbitrators—so that they are in a better position to rule on questions of relevance than are arbitrators. But we submit that tenure versus lack of it plays a substantial role in the willingness versus the lack of it to make clear and dispositive rulings on objections raised at the hearing. Arbitrators tend to be skittish on this score. Judge Greene, by contrast, matter-of-factly said, "That's what I'm there for." He noted, somewhat gleefully, that he has the power to hold recalcitrant lawyers in contempt or to declare a mistrial and to move the case to the bottom of the docket—thereby putting the litigants on notice that theirs will be a wait of a year or so. He added, however, that he rarely exercises these powers. It suffices that it is understood that he possesses them. Rich believes—and has so expressed himself

elsewhere—that the failure to make clear-cut rulings on objections raised at the hearing is a common failing among arbitrators. He shudders at the repeated recourse to "I'll take it for what it's worth," believing it to be no disposition at all and believing it to be bad arbitration because it leaves the parties in the dark as to what they have to meet or can safely let go. The problem, in Rich's opinion, stems from two factors: (1) lack of knowledge of the rules of evidence, and (2) disinclination to take a stance that might offend one of the parties. Cos emphatically agrees with Rich. Jim seems more tolerant and not to have had bothersome experiences on this score. And my unenviable lot is to confess that I have never taken a course on the rules of evidence. I can truthfully say, however, that I have long been impressed by the proposition, which was laid down by a *lawyer*-arbitrator, that: "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."

Bench Decisions and Opinion-Writing

We discussed three means by which to make rulings: bench decisions, brief memorandum decisions, and full opinions.

Judge Greene tells us that federal judges are generally without rules which would require them to go with one route or another. The sole exception is that findings of fact and conclusions of law have to be stated in civil trials without a jury. With this exception, federal judges are free to dispose of any case via any one of the three vehicles—and they freely exercise the choice. To my surprise, many a case in federal district courts is disposed of via a bench decision.

I am in tune with Cos on the objectives of speed and economy, and I have made bench rulings in some cases. But I took the position in our discussions that most of the cases which I hear are cases which I want to study and think about before deciding them and that I would have a hard time working under a system in which bench decisions are mandated, regardless of the nature of the evidence and the arguments presented at the hearing.

This led to the discovery that bench decisions in federal district courts and bench decisions in arbitration are rather different animals. For one thing, the judge, having disposed of pretrial motions and having read affidavits, usually knows something about the case before hearing it. His bench ruling is

akin to one that an arbitrator might make upon a multiday hearing and with opportunity for study prior to the time at which the decision is announced. And for another, the judge's bench ruling and supporting reasons are transcribed, and the judge is given the opportunity to work on the typed version for polishing and elaboration purposes. This is particularly pertinent when it becomes known that the case if going forward on appeal. Indeed, the judge at this stage has the option of preparing a full-blown opinion.

We also discussed what has become my favorite vehicle for accomplishing speed and economy while yet providing the parties with insight into the basis for the decision—to state it otherwise, while yet providing a means for keeping the arbitrator honest. This is the memorandum-type of decision which bypasses a statement of the facts and the parties' positions and which addresses both the facts and the arguments directly only to the extent needed for providing the focal reasoning. There will, of course, be some variations in this format in accordance with the nature of the case. But the constant idea is to avoid elaborate explanations and to keep writing to a minimum.

The upshot of such a memorandum decision is that those who were at the hearing will understand what has been decided and why, but that little of informative value will have been provided for others. Jim, for the reasons already given, does not view the technique as a useful one. He also noted that he is opposed to devices for making arbitration quicker and cheaper; he wants quality and he does not want to encourage expanded recourse to arbitration. Cos expressed different views on the memorandum type of decision. For one thing, he wondered why I raised it for discussion and why I felt that resort to the technique required the parties' prior consent. By his experience, there is nothing special about it—meaning that many arbitrators characteristically give him mere three- or four-pagers. For another, he believes that he has to be a cynic on this score: he has not found such pieces of work to be accompanied by lower bills. And for still another, he sees ours as a result-oriented world. He is convinced that this includes his clients and their management counterparts, and he therefore attaches but secondary importance to either the nature or the length of the opinion. At the same time, however, he cannot be read as willing to forgo the opinion altogether, for he says that his irate moments in arbitration come when he cannot understand how the arbitrator arrived at

the holding. And he adds, once more with the sort of cynicism which is wrought by bitter experience, that long opinions do not necessarily incorporate understandable or persuasive rationale.

For Judge Greene, there seemed to be little usefulness in the discussion of the memorandum decision. It represents the equivalent of what he does when he issues a bench decision.

We discussed quality workmanship in opinion-writing. Here, it seemed to us, the influence of tenure versus the lack of it can cut both ways. As to the judge, it may be that the lack of apprehension as to the litigants' reaction makes for excellence of product. As to the arbitrator, it may be that the concern for survival will be a powerful inducement for striving to achieve the ingredients of good writing. As a longtime colleague of mine once observed: "This is where we sell ourselves." We are not prepared, however, to venture a generalization of superiority in opinion-writing as between judges and arbitrators. Both in the end want to pass muster with their critics and peers, to borrow a phrase from one of our excerpts.

The Role of the Advocates

We want to say a brief word about the role of the advocates in the two forums. We flatly state that advocates with legal training are needed in court trials. The reason is that court proceedings are highly systematized and that the litigants themselves are not likely to be familiar with such areas as the rules of evidence, the appropriateness of one claim or another in relation to the subject matter, the availability of counterclaims, when and how to make motions, the waiving of an affirmative defense, and so forth. Judge Greene says that he could not survive if those before him did not know how to proceed in accordance with the dictates of the system—that the state of his docket is such that he cannot take the time to teach nonlawyers. Arbitration, in these terms, is obviously a different entity. Further, arbitration is concerned with a subject matter—namely, the labor agreement—which represents familiar territory for the participants. We do not, accordingly, view legal training as a requisite condition for effective advocacy in arbitration. We quickly add, however, that ours is a distinction based on *particular skills.* We are not saying that able advocacy is of less impact in the one forum than in the other. To the contrary, we see it as axiomatic that it matters greatly in both forums that the facts

be effectively marshaled and that telling arguments be made as to the proposed application of the facts.

Appeals

We want to touch on the area of appeals. The appeals rate respecting district court decisions is about 20 percent. With respect to arbitration, a distinction must be made between going to the courts for the purpose of having the arbitration decision vacated or modified and going to the courts for the purpose of redress against noncompliance with the arbitration decision. The former is done by the loser; the latter is done by the winner. Stated otherwise, whereas the former amounts to the bucking of the supposed finality of arbitration decisions, the latter, whether or not of lofty purpose, amounts to siding with that precept.

Cos reports that he flatly refuses overtures by his clients for the overturning of arbitration decisions. He does so as a matter of enlightened self-interest—telling his clients that both they and he have to live with the corps of arbitrators commonly used in the Baltimore area. As to going to court for enforcement purposes, Cos reports that he incurred literally no instance in his first ten years as a practicing lawyer, which are roughly the ten years following the *Trilogy,* but that he has been averaging something like two instances per year in recent times. Jim cites examples of what he views as horror arbitration results and plaintively expresses the wish for easier access to the courts for appeal purposes, but he has never gone to court for overturning purposes and he has never refused to comply with an arbitration decision.

Rich and I are opposed to easier access to the courts—not, we trust, to save our hides, but because we are concerned about the undermining of those grievance procedures, still in the hefty majority, which state no exception to the rule that arbitration is final and binding. We think General Motors has it right when it resignedly says: "Arbitration decisions are final and binding—some bind more than others." And what is to be kept in mind about Jim and Cos is that, though each is doing some lamenting, neither wants a labor court and neither wants to return to the days of strikes over grievances. Both are backers of arbitration as a system which soundly balances the interests of inexpensiveness, promptness, and justice.

The Development of Facts in the Courts and in Arbitration

We single out one further institutional comparison before closing. There is a significant difference between the two forums in the manner in which the facts in the case are developed. The courts are aided by interrogatories and depositions—by truly exhaustive discovery procedures. This is not to say that the judge's lot in finding the facts is easier than that of the arbitrator. Nor is it to say that the court system is the clearly healthier one. Indeed, Judge Greene holds substantial concern that discovery procedures are getting out of hand and allowing the richer party to win through administrative harassment. And abuse from both sides, he tells us, turns into the equivalent of pleading wars.

But, these pitfalls aside, we think it should be said that most grievance procedures do not match the courts' discovery procedures in thoroughness of fact-development and that arbitrators are more likely than judges to have to contend with paucity of facts. Further, arbitrators usually have zero knowledge about the case when they start to hear it and therefore cannot reasonably be expected to be alert to particular shortcomings in fact-development while hearing the case. The recognition that particular factual facets are missing usually hits them on the way home or when they start to study the case. Rich and I offer no remedial prescriptions, but we do plead for awareness of the differences between the courts and arbitration when it comes to the possession of factual material. And we do venture the comment that we have worked with some parties who are better at resorting to certified mail to make sure that time limits are being observed than they are at using the grievance procedure as an instrument for adequate fact-development.

Conclusion

We return to the twofold conclusion that we stated at the outset. We think judges and arbitrators are of one cloth when it comes to the judging process—when it comes to the innumerable factors which are at work in the midst of the process and which somehow are brought into confluence to produce the decision. But it does not follow that taking a case to a federal judge is the same thing as taking a case to an arbitrator. As we have sought to show, the two forums are institutionally distinct in important ways.

There is one distinguishing feature which is of fundamental and ever-present influence. We have not gone into it because it has been a repeated theme in the annals of the Academy. But a comparative examination of the kind we have been asked to undertake should not close without at least making mention of it. We are referring to the fact of the continuing relationship of the collective bargaining parties and the contrary posture of the litigants before the courts. And we think it noteworthy that it was Judge Greene, the only one among us without labor relations experience, who spotted and first raised the contrast in our discussions. The outsider identified what is perhaps the most basic ingredient of adjudication in the collective bargaining sphere.

Clearly, the conduct in adjudication of those who must live with each other following the adjudication is bound to be very different from the conduct of those who will be going their separate ways following it. And the difference inescapably reflects itself, in overt as well as subtle ways, in the respective roles of the arbitrator and the judge. There are collective bargaining spokesmen who wish it were otherwise—who want, as they say, judge-like arbitrators. We submit to them that they may be overlooking the judge's greater latitude, not to say free-wheeling, in a number of areas and that they presumably are not prepared to relinquish the tenet that the arbitrator, as the creature of the collective bargaining relationship, is to be the parties' servant.

WASHINGTON PANEL DISCUSSION

Chairman Valtin: Who wishes to lead off? You have heard a series of assessments and conclusions. Do you think they are sound? Do you think they are unsound? Do they vary substantially from your own experience. Who is ready to fire away?

Mr. Ken Schwartz: I represent unions in Los Angeles. I have a problem in regard to one of the topics, the timing of the decision from the time you have the arbitration hearing to the time we get it. We have had situations where we have had a discharge and we didn't get the award until almost 12 months after the discharge occurred. While I understand the problem with bench decisions, there should be some time limit from the time you have that hearing to the time you get the arbitrator's award. In my conversations with arbitrators, socially, they tell me that their mind is pretty much made up by the time that hearing is over, irrespective of the fact that the advocates will file briefs. We would like to have a situation where no briefs are required—not only not required, but not permitted—and the arbitrator hands a decision down in a period of 30 days after the hearing.

Mr. Charles Killingsworth: In a couple of umpire situations in which I operate, I have gotten the parties to agree that in a discharge case, unless there is something very, very unusual involved, I will write a letter within one week following the hearing saying what the decision is going to be. The award is that the grievance is granted or the grievance is denied. If there is a back-pay issue, usually I defer a ruling on the back pay, but at least within one week the man knows whether or not he gets his job back. The parties have found that perfectly workable. And even though sometimes the decisions take two or three months or longer to get out, the decisions are for posterity, whereas the guy that is out of a job wants to know where he stands. I don't see why this system can't be much more generally used than it is.

Panel Member Abato: I think what is being discussed now is just the tip of the iceberg. My experience is that arbitrators may attempt to have the parties agree to a bench decision or a quick letter. But in too many cases I have found that management will not agree, and I am afraid that sometimes it is because the lawyer wants to write a 50-page brief in a very simple discharge

case. But the real problem here is that the *Trilogy*'s pronouncement that arbitration should be a quick, efficient, and uncostly procedure has just not proven to be true. Everybody wants the experienced arbitrator. We find difficulty in getting a hearing, forget the length of the decision. We have terrible problems once you pick an arbitrator in setting a date of hearing because the arbitrator is so busy, the parties are so busy, or what have you. So this entire matter of a speedy decision is just one of the many problems that we have in carrying out the concept of the *Trilogy* that arbitration should be a quick and inexpensive procedure. If something isn't done, we are going to fall from our own weight, because my experience in recent years is that the courts are getting to be faster than arbitration and arbitration was supposed to be the quick way to go.

Far too few arbitrators are willing to risk the wrath in the future of one party or another by coming down on those parties. I recently had an arbitrator take the lawyers out in the hall, after the hearing was all presented and before argument or briefs were going to be presented, and say, "Gentlemen, I think suspension is merited, but I am not going to sustain the discharge." Too few arbitrators will do this. They will charge us for two and a half days of writing a decision when they already know at the end of the hearing what they are going to do. I would appreciate very much if all arbitrators, when they have made up their mind, which is not unusual in a discharge case, would tell the parties. After briefs or at any time, if you have made up your mind, you would do both parties a service by getting it to them as quickly as possible and giving them the results in any form. But I will tell you that most arbitrators won't do it, and most management attorneys with whom I deal don't favor it at all. I see nothing wrong with it. Judges do it for sure.

Mr. William Murphy: I want to add a footnote to the complaint about the delay in rendition of the awards. I simply want to say that the management and union people do not have to accept this unconscionable conduct tamely. The Code of Professional Responsibility sets its face clearly against this delay. If it is an appointment from one of the agencies, you should file a complaint with the AAA or FMCS. If it is an Academy member, you should file a complaint with the Academy. We do the best we can to police this. We have rejected applicants for membership in this Academy because of complaints that the parties have made about delay in rendering awards. So don't just privately

grumble to yourselves about it; at least take this action. There is one other thing, I believe, that might stop this practice to a large extent if management and union representatives would do it routinely. That is, adopt a form letter to the arbitrator which would run something like this: "We have just received your decision in this case and we note it took you one year to reach it. One year from the date of this letter, we will send you a check for your services rendered."

Panel Member Abato: As a practical matter, when you have an important case before the arbitrator and management will not agree to ask that arbitrator how come it is taking so long—because the truth is that they are not in any hurry for this decision, for it may have great ramifications and the contract may be running out within four or six months after we get the decision —it is pretty hard for one side or the other to start writing letters to an arbitrator complaining about his decision. Let's be practical. We live in a real world. If both parties will do it—"it is taking too long"—and we let him know, fine. In a recent case it took eight months to get a decision—unconscionable, no reason, not that difficult a case, four hours of hearing. The parties jointly wrote at least four letters to that arbitrator and finally wrote the Federal Mediation and Conciliation Service. He finally rendered a decision, and within one week thereafter I got a panel of arbitrators with his name on it. So apparently there was nothing being done to this arbitrator, even as a result of both parties complaining to the Federal Mediation.

Mr. William Levin: It has frequently occurred to me that there has not been much of an effort by way of discovery by the parties before the arbitration. And I am not talking about the expensive, burdensome kind of discovery that is characteristic of federal court. I guess I am really talking about a more sophisticated use of the grievance procedure. But since discovery is such a key element today in judicial determinations, I am wondering what the panel talked about in terms of discovery prior to arbitration hearings.

Panel Member Abato: Discovery by use of the grievance procedure is what the Supreme Court envisioned in the *Trilogy*. I have to speak from my experience in representing some 60 unions which are mostly smaller, local unions. Contrary to popular belief, union officials, in my experience, are not omniscient or omnipotent. One day a truck driver, the next day a union official; one day a carpenter, the next day a union official—not

educated, not trained, not intellectually enlightened. So that the utilization of a grievance procedure has to depend upon the parties who are using it. And the problem is that there just is no discovery process in the grievance procedure. It is very perfunctory: "Here's the grievance. We don't think what you did was right or fair." The other side says it was right and fair. Next step: it finally gets to me after they submit it to arbitration. So I think that the problem is in the people who utilize it rather than in the concept that it should be utilized for discovery. This really fits into something that Ted Jones was talking about today which really gave me some thought about the arbitrator's applying rationality, the likelihood of what happened, the probability of what happened, and I give you this instance of something that just happened to me while it is very fresh in my mind.

The grievant was discharged. He was the shop steward. One of the very important issues in this case was whether, in fact, he knew about this document, these rules and regulations of the company which specified that he could be subject to discharge for this offense. He testified that he did not know of those rules, and several other employees testified that they did not know of those rules. On cross-examination, the company attorney showed a series of grievances which this very shop steward had handled in which they talked about the company's rules and regulations. And the inference was, the direct question to him was, "How in the world can you expect us to believe that you, the shop steward, did not know about this document—these rules and regulations—when, in fact, you must have known?" And I am sure that the arbitrator bought that argument. In fact, this almost semi-illiterate shop steward, who had a big mouth but not a great deal of brains, did *not* know and never in the grievance procedure had once asked to see the company's rules and regulations which they had relied upon in these various grievances that he had handled. That's a fact. I sympathized with the arbitrator who was applying the laws of likelihood and the laws of probability and all the other rational laws, but he was dealing with an irrational human being. I don't know how you are going to have discovery in a grievance procedure unless the people who utilize that procedure are sophisticated enough, intelligent enough, to have discovery.

It is not at all unusual when we get sued in a civil rights case or in a failure-to-represent case, and full court discovery comes about, that we discover things that were never known before by

either party, who handle grievances every day, about differentiation in discipline, for example, given to one party and another, because in a hearing of that grievance they didn't go into that.

So that discovery is marvelous! I don't like court discovery; I agree with Judge Greene that it has gotten out of hand and the rich party prevails. But the discovery has got to be by the individuals, and as long as you are dealing with human beings in the grievance procedure, you are never going to have what the Supreme Court said you should have—that the grievance procedure should be that type of procedure. It just is not possible. We are stuck with it. As arbitrators *you* are stuck with it; as attorneys *we* are stuck with it. It just doesn't happen.

(Second Day)

Panel Member Bloch: I must say that I am not much upset over the prospect of employers or unions going to court with our awards. I think that, as a matter of labor relations policy and public policy, it makes sense to make the overturning of an award very, very difficult, not for the sake of the arbitrators, but for the sake of the parties. They have made this contractual bed and now they should lie in it. But the prospect of being overturned has never been of much concern to me and, indeed, in the rare cases, which used to happen more often than they do now, where you would get, for example, a conflict of Title VII, I didn't have the slightest qualms of going ahead and saying, "Well, your contract says this, and that's it." But the prospects of the court review never really bothered. I think in terms of keeping arbitrators in line, the sanction of not eating tomorrow is much more compelling.

Panel Member Abato: I would say that there are arbitrators who don't agree with Rich. I just had a case with a very prominent arbitrator where the company refused to comply with his award and we had to seek enforcement. He was called as a witness, and on the witness stand he came "this close" to being held in contempt because he refused to answer the question on cross-examination of what his process of thinking was with respect to the making of the decision. He had his own lawyer present, and finally, upon the strong advice of his own lawyer, he answered the question. But I think he was absolutely right in terms of being asked to express himself on how he arrived at his conclusion, what his internal thinking-process was, and I think

that that may be part of the reason why arbitrators don't like to have the courts look into what they do. They are asked some very difficult questions.

Chairman Valtin: I just don't know how you can seek reversals of arbitration decisions where you have agreed in the contract that the decision shall be final and binding. It seems to me that what you have to start to do is to write exceptions into the agreement as to that precept. Else he doth have it both ways. You are free to overturn on certain groups; so is the other side. And before you know it, arbitration is a fourth step, with a fifth step yet to come. I just don't know how you can get away from it.

Mr. William Simkin: Most of my experience, as everybody knows, has been at so-called permanent arbitration. Under most continuing arbitration arrangements, over the years dissatisfactions of one kind or another develop, usually on both sides. I think inadequate use has been made of a device that I would like to see developed in those relationships: Periodically there would be a conference set up with a few top people on both sides where they would take their hair down and in no uncertain terms talk with the arbitrator about the problem that they saw developing and the concerns they had about tendencies that he may have. I do assume a relationship where the parties would be willing to discuss with each other, as well as with the arbitrator, complaints that are not identical, to get them on the table, to lay it out in no uncertain terms so that people know where the problem areas are.

Mr. Carleton Snow: Did the group have impressions concerning how widely med-arb is used by arbitrators and how the parties respond to it?

Chairman Valtin: It appears to us likely that judges resort to it more frequently than do arbitrators.

Panel Member Bloch: We did have some very strong responses to a willingness of the arbitrator to step in as the mediator in the midst of a session.

Panel Member Vandervoort: You have got to separate just-cause cases from contract interpretation; just-cause cases are far less significant. But in matters of contract interpretation, we are obviously before the arbitrator now because one party or the other is alleging that the clause means something different than the other one says it does. I don't think mediation is appropriate at all. I think the lines are drawn at that point and the matter has

to be litigated. So I do not welcome mediation at all in contract interpretation cases.

Panel Member Abato: I would disagree very sharply, from a different experience. I find more and more that parties, to avoid a strike or whatever, leave many things unanswered and deliberately draft language that nobody can understand, hoping either that the problem will never arise during the course of the agreement or that, if it does, their view will prevail as to what the language means. I do not find tight-drawn contracts. If the role of an arbitrator, in contract interpretation and certainly in discipline cases, is to fashion a "law of the shop," his function can very well be to mediate, to try to get the parties to agree. Mediation can be of great service there, especially in the great majority of contracts where the parties have deferred, for one reason or another, a resolution of their dispute and drafted language which nobody can understand.

Panel Member Vandervoort: I couldn't disagree more here. He raised something that I am now going to raise with some trepidation, considering the audience. I listened to Professor Morris this morning and I found it a little disquieting, because it seemed to me that he sees the role of the arbitrator, "the proctor" I think he called it, in essence as one who will, in his infinite wisdom, fill in the blank spaces in a contract. That fills me with fear. I have great respect for arbitrators. I work with them all the time, so this is not meant as a derogatory statement. But I have never met an arbitrator who really knows enough about our business that I would be content to have him make a decision about subcontracting or any other business matter. He simply doesn't have the background or the informational base to do that. We try to write agreements that don't leave such great gaping holes. As we live with each agreement, we recognize that it is very imperfect, but I still think it is best for the parties to work these things out in collective bargaining and for arbitrators to follow the contract as closely, at least, as they can.

Chairman Valtin: Jim, it is fair to say, though, in the selection of arbitrators you have managed not to select "proctors." It doesn't really matter what Charlie Morris says or how he characterizes the whole business. The main point remains that the parties are free to select their own arbitrators and that's where it is so different from the judicial system. It is within your people's control, and the control gets well exercised most of the time—the kind of arbitrators whom you are paying.

Panel Member Vandervoort: Certainly that is true. And if we had bad experience, as we have not had, with an arbitrator who wandered way outside of the contract, the only recourse we would have obviously would be to cease to use him.

Mr. Carl Yaller: Judge Greene is attributed as having taken the position that he is willing to act as a mediator in jury trials, but not in nonjury trials, for fear that during the negotiation process certain evidence which would be inadmissible would be presented before him and thereby contaminate the decision-making process. Is that a legitimate concern? Are arbitrators immune, and what percentage and to what extent are advocates in the negotiating process carriers of that contamination?

Panel Member Abato: I think, to be fair to Judge Greene, that he also recognizes that some of his colleagues do not have the hesitation that he has about inserting himself in a nonjury situation. He made it very clear that he has his own compunctions, but that others don't. And in fact, as we all know from practicing in the federal courts, in a status conference and any other kind of scheduling conference, judges do, to a great extent, insert themselves into the process and try to squeeze the parties into a settlement without any hesitation about their role as a mediator or about their role as an enforcer in getting rid of the case.

Panel Member Bloch: It leads to a terribly interesting problem, though, and particularly in the context of med-arb and in the context of how far an arbitrator should go in inserting himself into the process. And you can highlight the problem with a series of hypotheticals.

The first one is where an individual calls—a number of us have had this experience. I have had a call at least once from a union president who said, "We have a son of a bitch on the West Coast who has just been fired and we want to make sure he stays fired. Can you hear the case?" My answer is, "No, I certainly can't. And when you call someone else, you might approach it slightly differently."

The next set-up is not, perhaps, quite as extreme, and this is in the context of the arbitration hearing. You step outside to meet with the parties and one attorney—assume again the union attorney representing the grievant—says, "We've got a bummer today. I am sorry about this, but we really can't go anywhere on settling. You will just have to decide it." To me it is very clear that that is an impermissible comment and that the arbitrator really must make a very stern response to it, including resigning

from the case. I recognize that that may well be a purist attitude. But in the context of mediation, does stuff get in that can't get in in other ways, and what is the arbitrator's obligation? That is a very, very hard issue, and my reaction is that it really has to depend on what sort of evidence you are talking about.

I think that there does come a point where arbitrators and judges have become tainted, to the extent that the mediation has gone so far that they are really kind of hanging it all out and it had better settle because if it doesn't settle, you are no longer in a position to hear the case from an objective standpoint because the parties have made real, heartfelt concessions to you.

You are now getting what, I guess, Ted Jones might have called the "honest to God" facts, as opposed to the found facts. And it seems to me that, yes, there is very reasonably a point where you are just going to have to step down. That's a very difficult judgment call, particularly difficult when you are at a situation where you know the result for this case which both parties would be very satisfied with. But it has nothing to do with the dispute and it all comes about because you have been talking to them out in the hall.

Chairman Valtin: You have to recognize the danger is there even by the mere overture to the arbitrator to step outside and "Let's have a look at this." It could be nothing more than one side broadly indicating, "Yes, we are ready to compromise this," and the other side saying, "Under no circumstances. We think we have a solid case." Back we go into the room, and you have to decide. It is conceivable that that conversation is going to influence the arbitrator. I don't think anybody can stand here and say, "Under no circumstances would that influence me." If that's true, then what you have to decide is whether, by golly, despite that danger, the situation is such that you take the risk. But I just don't think you can say even in the most cautious way that there won't be some prejudice.

Panel Member Abato: I have, again, a problem of the institutionalization of a process caused largely by lawyers.

What I am hearing, and what I am seeing in the arbitration process every day, is that it is no longer like Justice Douglas described it; no longer does it serve the purposes which Justice Douglas said it should serve. In fact, the picking of an arbitrator is even a game now rather than selecting a "proctor." We begin to shop for the "right" arbitrator.

So what we are hearing is that—and I think it is true—we no

longer have a shaping of a collective bargaining process and that's unfortunate because, as I see the role of an arbitrator—maybe it's not practical, but it's the way I would like to see it—is that he serves a greater function than a trier of facts and a decider of the particular case presented to him. If he should do that, then I can see no problems with his attempts at mediation, and no one should feel bad about it and no one should discredit him for trying to do it. If the facts of life are that we have gone too far past that, maybe there ought to be a re-examination of the *Trilogy*.

Panel Member Vandervoort: Of course I represent management, and it is true that in the overwhelming majority of cases, the moving party in an arbitration is the union, which means that I am in a position of defending myself. I am not there to get anything; I am just there to lose as little as I can lose. Mediation implies compromise. Half of something is something. So that's why I am not very keen on mediation.

Mr. William Simkin: I guess I am renowned as a so-called mediator-arbitrator. If there are ways that you can get to what you call the "honest to God" facts of the case, the more the better, and if there is any way that you can get them that is in any way sensible, I think you ought to get them. But I don't know how many times people have come to me in discharge cases with the kind of remark that Rich Bloch mentioned, not so much before the case is scheduled but during the case, and I have a favorite remark that I pursue: "What's the matter? Did he run against you in the last election?" I think if you get a remark in a discharge case, it is your obligation to find out somehow or other if that remark is prompted by interunion politics rather than by the facts of the case.

Panel Member Bloch: What if you do find it was not prompted by interunion politics and he was dead serious?

Mr. Simkin: Let's not kid ourselves. In these last few years unions are taking a high percentage of cases to arbitration which they know are losers and should be losers, only because they are fearful of court procedures. In the old days, the union steward or union president would say, "Look, brother, you know you don't have a case. Forget it." They don't do it very much any more, and we are getting whole hosts of grievance cases that are absolutely silly on the merits. Now, most of the time you don't need a tipoff. The facts are enough, so that will do the job. I have said several times that one of the worst sins that an arbitrator

can commit is to give a union a case, by some means or other, that they want to lose.

It is not so bad to rule against the union on a case they want to win. They have got a contract coming up and they can get it changed in the next contract, if it is a really meritorious case. But if we give a union a case they really want to lose, and it is important to the company, it is extremely difficult in the next negotiation to ever get that case changed because the arbitrator has ruled. This is a psychological factor which makes it very difficult.

Panel Member Bloch: Bill, are you saying that if you heard a case—let's take a case where the union was making an excellent case on the merits in the hearing room, but outside you heard what you refer to as a tipoff that they really want to lose this—are you saying that you would take that into consideration and rule against them?

Mr. Simkin: If it is a contributing factor. If it is an excellent case on the merits, no. I would conclude that there is something wrong with the tipoff. But they don't happen in the excellent cases. In most cases the tipoff is unnecessary, but once in a while it helps.

Panel Member Bloch: There is where we do differ absolutely.

Mr. Frank Kramer: With Alcoa, I feel very strongly about the idea of an arbitrator being a mediator. I would not knowingly ever hire one if I thought that was what he was going to do. I recognize that it can vary, perhaps based upon industries. But if you have a long-standing and a reasonably well-working grievance procedure, it seems to me that what we are talking about in trying to arrive at some compromise settlement should take place during that process. I see a marked change between that point and arbitration. Once I have been unable to resolve it through negotiation, whether it be discipline or contract, then I am going to arbitration really to get a final decision, and I don't want any mediation at that point. I think that that is a strong disservice and I really don't think that an arbitrator can try to mediate and then arbitrate fairly. If the arbitration process is viewed by either the local management people or the local union people as another half-step in the grievance procedure, we just encourage more and more people to go to arbitration because, somehow, up there "They are going to mediate and I will get half a loaf." I am strongly opposed to any idea that they should mediate.

Chairman Valtin: I think over and over again that what we have run into depends so much on what industry it is and who the parties are. With General Motors, for example, it is absolutely proscribed, and it is understood. There are other situations where the contrary is true, and clearly, arbitrators have to be guided by the environment in which they function.

Mr. Elliott Beitner: The focus of this conference is the decisional thinking of arbitrators and judges as triers of fact. I think, with that focus in mind, we are really functioning as juries. We are the triers of fact, and I think it is as unacceptable for an arbitrator, generally, to attempt to find out what is "really happening," or whether you can settle a case, or what each party wants, as it is for a juror to go out on a cigarette break and discuss with the attorneys what they really want and what the jury should really do. I have only once acted as a mediator, and I did that for purely selfish reasons. I walked into a hearing in a remote Michigan area, knowing that I had to be home that evening to take my wife out to dinner, and I saw 75 people waiting to testify. And after the opening statements, it was suggested to me that the union might be technically correct, and if they were correct, it would cost the company a fortune and the union wasn't interested in exacting that fortune. I functioned as a mediator, settled the thing, was completely precluded from hearing the case on the merits if the settlement fell through, and even though I got home for dinner, I vowed never to do it again. I think it is clearly improper.

Panel Member Bloch: But your impropriety is directly proportional to your social life!

Panel Member Abato: I have this terrible feeling, and as I look at Dave Feller, who is largely responsible for the *Trilogy*, I am really having a problem because what I am hearing is that we are now having a court system. The arbitrator is now functioning as a judge when he was never presumed to be a judge. He was presumed to be a "proctor." What I am hearing here today is that everybody has fallen into the institutional trap (not everyone—I have heard some who seem to express what the *Trilogy* is all about) and maybe the whole arbitration concept should go down the drain and we should go back to judges who are probably much more skilled at being triers of fact and we should forget about the concept of the *Trilogy*. I just don't know what I am hearing, but I am not hearing the *Trilogy*.

Mr. David Feller: I don't think the *Trilogy* has anything to do

with it, but I do object to the notion. I have never tried to mediate, except maybe once at the invitation of the parties. But I have seen a past president of this Academy attempt to mediate and then decide the case when it failed. I will tell you the facts of the case because it underlies what is missing from some of this discussion. You have a responsibility to a continuing relationship between the parties; you are concerned about the effect this will have on the continuing relationship of the parties. And that's different than a court; that's a fundamental difference. And sometimes, facts which are not properly part of the case are very important, in terms of the impact of what you do, on the continuing relationship of the parties. And those facts, which maybe you shouldn't know about, come out in this mediation process, and you say that that contaminates you and you can't decide the case because you've got to decide only the particular case.

There's a Steelworker wildcat in one small section of a plant. The company does the usual thing—calls up the union, the district director, and says this is a violation of the contract, get the people back to work. It is a very hot political situation. And he says, "Look, today is Wednesday. Why don't you wait and I will call a meeting on Monday and I will get them back." The company says, "No. They have got to get back right away. You call the meeting now." He says, "All right, I'll call the meeting now." It is a hot and hostile group. They throw tomatoes at him. He says they've got to get back to work. They want to take a vote. He says no, you are not taking a vote on it; you are going back. They go back. And then there is a notice: they are suspended for three days, so they can't go back. Then the whole plant went down because what happened is that the company had undermined the district director. They had put him in a position where, at the meeting, they had said we will go back next Monday. He said, no, you won't, you are going back tomorrow. And they show up and they can't go to work. Then the leaders get fired.

Well, some of this began to come out during the hearing. Now, technically they were fired for going on strike, in plain violation of the contract. There wasn't any question about it. Now the question is, do you sustain the discharge? Well, under those circumstances, that arbitrator decided that he ought to try to get the company to settle this and put those people back because it would greatly damage the relationship between the

company and the union at the plant and it would have a long-lasting impact if he did not put them back to work. He tried to get them to do it. They wouldn't. He said, "Okay, I am going to decide the case." He wrote an opinion that you can't make any sense out of at all; none of this stuff about the district director, of course, is in the opinion. Technically, the opinion is just crazy. How does he reinstate these people? In fact, he did the right thing in terms of the relationship of the parties. I think both parties recognized that.

Now, is that improper or proper? In the technical case—the record he had before him—there was no way he could not deny those grievances; but, in fact, denying those grievances would have done great damage to the relationship between the parties.

Panel Member Bloch: I think that's an easier question than asking whether you give it to the union or take it away from the union in a case they can't live with than it is with one party saying, this is one we have got to have. When you are talking about both parties, surely you can draft an opinion, without regard to what the rest of the world reads it as doing or saying, that they can live with. I don't have much of a problem with that.

Mr. Feller: I get the impression that the company made it clear that they couldn't live with it. I think the company may have wanted to sustain the discharge. They refused to agree to put the people back. The real problem is that what he was looking at was what this would do to the relationship in that plant in the future and deciding the case on that basis.

Panel Member Bloch: You surely would be the first to grant that that is the most inherently dangerous thing an arbitrator can do—to walk into a situation and say, without regard to what this thing is really made of, "I have a feeling of what it good for the parties in the future." That is just pure disaster.

Mr. Feller: It is dangerous, but not necessarily disastrous. These are things you do, and I think you should do it rarely and only when you have a really good sense from a long-term relationship with the parties. You are right, I quite agree, that it is a temptation you should resist except in the most compelling circumstances, but it is one which you should not resist when the circumstances are really compelling and you really know. Now, when an ad hoc arbitrator comes in and doesn't know the parties and what not, I think it is impossible for him to do it. He can't know enough about the relationship.

Panel Member Vandervoort: This is one that really strikes

home. We don't know enough of the background, of course, from what you have told us, but as you described the company's actions in that case, it sounded to me like it was not a very smart move on the part of the company.

Mr. Feller: It was dumb.

Panel Member Vandervoort: But it is very possible that they had been plagued with wildcat strikes and had decided, as a matter of policy, that they would take whatever anguish and whatever pain was involved in order to put a halt to that, and I don't really think that an arbitrator has the right to arrogate to himself that kind of decision.

Mr. Feller: You understand that the problem in the case is not that you want to come down hard on wildcat strikes. The problem is that they insisted with the union that the men come back the next day. Then the district director took the heat and went out and got them to come back, and when they came back the next day, then the company wouldn't let them work. The problem is what it does to the director and the union and the relationship the next time there is a wildcat.

Panel Member Vandervoort: I think you ought to let them worry about that.

Panel Member Bloch: Just to keep it in perspective, it is not necessary to find mediation an evil in our discussions here. The fact is that one of the virtues of arbitration, and perhaps a prime virtue over the court system, is its flexibility—that the parties can select the arbitrator they want, and that the arbitrator who will mediate at the drop of a hat with one group of parties will refrain from it like the plague with the others. That's the way it should be.

Mr. Herb Grossman: I don't have an objection to arbitrators mediating or looking out for the interests of the parties to protect them from each other, if that's what the labor agreement involved says. I have not seen many that require or ask an arbitrator to mediate, or that ask an arbitrator to look out for the interests of the parties because they can't handle them themselves. I think that the relationship of the parties is best handled by them. They are the ones that are responsible for developing and maintaining the relationship.

Mr. Simkin: I think we make a little bit of a mistake sometimes by calling this mediation in arbitration. It is in a sense, but at least what I do is not what I normally call mediation. It is a different kind of function. Broadly speaking, it is finding out in

every way that is legitimate, and some people might call it illegitimate, all the facts of the case and giving due recognition to the effect of the decision on the relationship of the parties. But in many cases it is not normal mediation. As I said, I don't say, "Come now, let us mediate." This is the worst possible approach. But to say that you have to sit up there like a piece of stone and simply listen to a bunch of language and then withdraw into your high tower and write a decision is, I think, the worst possible way to arbitrate.

Mr. Feller: If you have a functioning grievance procedure, then the mediation should take place there, and if you have that kind of procedure, the greatest mistake in the world would be to get into mediation in the arbitration process, because then you undercut the functioning grievance procedures. But in lots of cases and lots of situations where there is no functioning grievance procedure, the parties don't know what the case is about until they get to arbitration, and those you have to deal with differently.

Panel Member Abato: What you are doing is making the parties face what they wouldn't face or couldn't face at five of twelve, and in that context you will come out with what the parties really want, in the final analysis anyway.

Mr. Feller: That's what I am trying to do.

Panel Member Abato: And, in fact, they will indicate to you the proper answer to the problem which they should have come up with at five to twelve but couldn't. So in a sense you are right: it may be more fact-development than it is mediation. It is absolutely necessary that an arbitrator do that, but you would be amazed at how few arbitrators are willing to do it for fear that they will turn the parties off. They are wrong, but there is that fear, because of lack of tenure, that they will turn the parties off. It is rare for an arbitrator to even do what you are talking about.

Mr. Feller: One of the reasons is, of course, that I don't depend on arbitration for a livelihood; therefore I can do things that the parties may not like, and I can understand why there are other people who may not want to do it.

CHAPTER 8

COURTS, ARBITRATORS, AND THE NLRB: THE NATURE OF THE DEFERRAL BEAST

REGINALD ALLEYNE*

The overlapping concerns of arbitrators, the NLRB, and the courts on NLRA-related matters are old issues now—much debated, much written about, much discussed in journals and published proceedings of meetings, including some lively dialogue at past Academy sessions.[1]

As is well known, the combination of the NLRB's *Collyer*[2] and *Spielberg*[3] decisions were the debate-precipitators in 1971 and 1955, respectively, and with the exception of the external-law issue, perhaps no arbitration issues have drawn more print than these two cases—which raises the question: Is there anything more to be said about how overlapping NLRB-arbitral-judicial issues are being and should be handled by the Board, the courts, and arbitrators?

Ted Jones has reduced speculation on that question to zero by coming up with the general topic of comparative thought-processes of arbitrators, judges, and agency members in resolving common questions of fact, a fascinating topic, filled with intriguing questions concerning the methodology of decision-

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[1] *See* McCulloch, *Arbitration and/or the NLRB,* in Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1963), 175; Ordman, *The Arbitrator and the NLRB,* in Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 47; Nash, *The NLRB and Arbitration: Some Impressions of the Practical Effect of the Board's Collyer Policy upon Arbitrators and Arbitration,* in Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), 106. Joining issue over the *Collyer* controversy are the following: Isaacson and Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes,* 73 Col. L.Rev. 1383 (1973); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty,* 49 Ind. L.J. 57 (1973); Schatzki, *A Response to Professor Getman, id.,* at 76; Zimmer, *A Little Bit More on Collyer Insulated Wire, id.,* at 80; Getman, *Can Collyer and Gardner-Denver Co-Exist? A Postscript,* 49 Ind. L.J. 285 (1974).

[2] *Collyer Insulated Wire Co.,* 192 NLRB 837, 77 LRRM 1931 (1971).

[3] *Spielberg Manufacturing Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

making at the incipient cerebral level. The topic has strong *Collyer-Spielberg* overtones, as would any topic on areas of common NLRB-arbitral jurisdiction.

I will not cover the ground Howard Block has gone over in his invocation of the names Llewellyn, Frank, Hutchison, and other students of the judicial thought-process. My rather peripheral use of the decision-making-methodology topic suggests that while *Collyer* and *Spielberg* are old and familiar cases, new progeny of *Collyer* and *Spielberg* show up all the time to give us fresh insights into the thinking of NLRB members on their applicability. *Suburban Motor Freight, Inc.,*[4] decided January 8, 1980, is perhaps the Board's latest *Collyer-Spielberg* variant. There the Board determined that it will no longer defer to an arbitrator's decision in a discipline case if the unfair practice issue before the Board was both presented to and considered by the arbitrator.

Without commenting on the merits of the Board's conclusion in *Suburban Motor Freight, Inc.,* the case represents one of many Board decisions in which the current case "A" overrules an earlier case "B" and returns to the status quo ante of case "C."[5] The case is also a split decision, two to one, with a dissent. *Spielberg* was unanimous, but almost every major Board case applying *Collyer* or *Spielberg* is a split decision.[6] The history is familiar and, without recounting it, we know that *Collyer* survives now by the slenderest of threads. Board members have come and gone, and each change in membership threatens *Collyer's* survivability, so narrow is the majority in its favor.[7] This is a classic example of how differing and fundamental viewpoints on the role of arbitration and the Board in respect to how questions

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[4]247 NLRB No. 2, 103 LRRM 1113 (1980).

[5]Case "A" is *Suburban Motor Freight, Inc., ibid;* case "B" is *Electronic Reproduction Service Corp.,* 213 NLRB 758, 87 LRRM 1211 (1974); case "C" is *Airco Industrial Gases-Pacific,* 195 NLRB 676, 79 LRRM 1497 (1972).

[6]*E.g., Southwestern Bell Telephone Co.,* 212 NLRB 396, 87 LRRM 1446 (1974); *National Radio,* 198 NLRB 527, 80 LRRM 1718 (1972); *Joseph T. Ryerson & Sons, Inc.,* 199 NLRB 461, 81 LRRM 1261 (1972); *United Aircraft Corp.,* 204 NLRB 879, 83 LRRM 1411 (1973); *McClean Trucking Co.,* 202 NLRB 710 (1973); *General American Transportation Corp.,* 228 NLRB 810, 94 LRRM 1483 (1977); *Roy Robinson Chevrolet,* 228 NLRB 828, 94 LRRM 1474 (1977), all of which are prearbitration deferral cases. Some split opinions applying *Spielberg* are those cited in note 5, *supra.* In addition, see *International Harvester Co.,* 138 NLRB 923, 51 LRRM 1155 (1962), *aff'd sub nom. Ramsey* v. *NLRB,* 327 F.2d 784, 55 LRRM 2441 (7th Cir. 1974), *cert. den.,* 377 U.S. 1003, 56 LRRM 2544 (1964).

[7]On October 25, 1977, John C. Truesdale was appointed to the NLRB seat left vacant when Peter D. Walther, a *Collyer* proponent, resigned. At this writing, Member Truesdale's views on *Collyer* have not been publicly made known. His vote in favor of not deferring in prearbitration disputes would overrule *Collyer.*

of forum—where cases should be heard and tried—should be decided.

What kinds of cases spawn these shifting and uncertain majorities? And what are the characteristics of the *Collyer-Spielberg* issues that make them so amenable to widely differing viewpoints at the Board level? Do the opponents of NLRB deferral perhaps mistrust arbitrators and the arbitration process?[8] Or, do deferral opponents take the more neutral-principled view that Congress simply never intended that the Board should decline to hear a class of cases within its jurisdiction, even on the assumption that arbitration might be a better forum for resolving the question[9]—better for the parties (though both parties might not agree) and better for the Board and its ability to cope with a constantly rising caseload?

I offer the notion that among the many reasons raised in opposition to *Collyer* (and less so to *Spielberg*) we might add the view that the Board's indecision, its shifting majorities, its constant creation and re-creation of exceptions to the general rule are also reasons for abandoning *Collyer*'s rule of prearbitration deferral.

As applied to *Collyer-Spielberg* deferral, the NLRB's shifting majorities and variations on the theme rather distort the element of litigation-result predictability that is so valuable an inducer of litigation-avoiding settlements. The *Collyer-Spielberg* doctrine may be creating more litigation time than it avoids for NLRB personnel, arbitrators, and judges. And by "litigation time," I mean the sum total of man-hours spent by parties in deciding whether to litigate, preparing to litigate, litigating, or, in the case of courts, arbitrators, and NLRB personnel, attempting to resolve or decide disputes.

I am not suggesting repeal of all general rules of law that are subject to exceptions. We often gain from a flexible application of exceptions to an otherwise rigidly applied rule, even at the expense of some uncertainty of application. But deferral policies do not fit that mold. Weighing the advantages and disadvantages of a flexible deferral policy against the advantages and

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[8]See the discussion of Chairman Murphy's opinions in *Roy Robinson Chevrolet* and *General American Transportation Co.*, notes 26–40 *infra*, and accompanying text.

[9]That view is part of the rationale of dissenting Members Fanning and Jenkins in *Collyer* and its progeny. *See, e.g.*, 192 NLRB at 853.

disadvantages of an inflexible policy of nondeferral, I believe the net advantage lies with a policy of nondeferral. The advantage of reducing litigation time should be a paramount concern in the face of deferral policies with advantages that are mainly illusory and seriously diluted by the inability of the NLRB to agree upon the basic ground rules.

What is it about the nature of the deferral issue that so often prompts new Board members to bring differing points of view to the Board, and that prompts some old NLRB members to shift their views, all to the detriment of litigation-result-predictability and reduced litigation time for parties, arbitrators, courts, and NLRB personnel? Posing the matter in terms of the allocation of scarce and finite decision-making time, the questions on the merits of whether employee Doe was discharged because of union activity, or whether XYZ Corporation illegally refused to bargain with ABC union, or a union's picketing was illegal under the NLRA, are to me more important questions than the issues of whether and under what circumstances the NLRB should defer to arbitration.

Implicit in *Collyer* itself is the premise that the NLRB saves time by invoking the *Collyer* principle, that some cases which would reach the Board without a deferral policy will never reach the Board because a swift and expert arbitrator will provide a complete and final remedy for a grievant.[10] But does *Collyer* save time, as the NLRB suggests, or cost time? Relevant in attempting to resolve that issue are subsidiary questions concerning the nature of the common jurisdiction cases subject to deferral policies and the manner in which they are resolved by arbitration, NLRB, and judicial processes.

In the beginning, *Collyer* was applied to any matter of common concern to arbitrators and the NLRB. Discipline because of union or concerted activity, a class of cases comprising 70 percent of the NLRB's caseload,[11] concurrently fell within the jurisdiction of an arbitrator interpreting a "just cause" clause in an agreement; certain forms of refusal-to-bargain allegations also fell within the arbitrator's as well as the NLRB's province if, for

[10]In *General American Transportation Corp., supra* note 6, at 819, Members Walther and Penello generalize that arbitration is faster than the Board's processes. Their use of statistical data in support of that view is criticized by this author at note 35 *infra*.

[11]40 NLRB Ann. Rep. 215 (1975).

example, a refusal-to-bargain charge happened arguably to involve a contract term. There were other areas of arbitral-NLRB jurisdictional overlap,[12] but these latter two types of cases dominated the lot.

Before *Collyer,* and before the NLRB began to think about deferral, a party filing an NLRB charge had only to consider whether the charge had arguable merit in alleging a violation of the NLRA. Immediately following the *Collyer* case and for six years thereafter, a party thinking of filing an unfair practice charge in an NLRB regional office had to consider the following: (a) whether the unfair practice charge had arguable merit as an alleged NLRA violation; (b) whether the subject of the unfair practice charge was arguably a subject covered by the grievance-arbitration clause of a governing collective bargaining agreement; (c) whether the NLRB would eventually perceive the subject of the unfair practice charge as a subject also covered by the grievance arbitration clause of a governing collective bargaining agreement and defer on *Collyer* grounds; and, if so, (d) whether those persons who in fact control the decision to seek arbitration might be persuaded to pursue the grievance to arbitration; and, if so, (e) whether, on reaching the arbitration level of the grievance arbitration process, the arbitrator would decide that the dispute was arbitrable and decide it on the merits.[13]

Now, with cases like *Roy Robinson Chevrolet*[14] and *General American Transportation Corp.*[15] on the books, new thinking, and a new exception to *Spielberg,* a potential charging party before the NLRB must consider not only how old law should be applied, but also the meaning of new deferral law and what possible changes still newer deferral law might make in the future.

NLRB *Collyer* proponents assume that arbitration is invariably

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[12]A sampling of cases presenting other than Section 8(a)(3) and Section 8(a)(5) *Collyer* questions for resolution by the NLRB include: *Sheet Metal Workers' International Association, Local 17* (George Koch Sons, Inc.), 199 NLRB 166, 81 LRRM 1195 (1972) (Section 8(b)(1)(B), fine for violating union rules); *Associated Press,* 199 NLRB 1110, 81 LRRM 1535 (1972) (Section 8(a)(2), dues deductions after checkoff authorizations revoked); *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers* (Bigge Drayage Co.), 197 NLRB 281, 80 LRRM 1382 (1972) (Section 8(e), "hot cargo" clause issue).

[13]In *Collyer* itself, the contractual time within which to seek arbitration had expired by the time the NLRB made its decision. See 192 NLRB at 847, 77 LRRM at 1941 (Member Fanning dissenting). *Collyer* proponents discount this as a problem by noting that the party seeking deferral, usually the respondent employer, must agree to waive arbitrability defenses as a condition of deferral. *See* Nash, *supra* note 1, at 138.

[14]*Supra* note 6.

[15]*Supra* note 6.

the swift route.[16] They tend to see the extreme time lag in NLRB dispositions and to compare that with the more expeditious grievance handling. But why should that comparison be made? Why not consider the other extreme of a quick disposition by the NLRB at the regional level, by settlement, withdrawal, or dismissal, as compared with the long-delayed arbitration case, of which there are many?[17] The NLRB's implicit assumption that grievance arbitration is always faster than the NLRB process is not really valid. Indeed, when the Board is criticized for delay in case-handling, its time-honored response is a reference to the small percentage of NLRB filings that reach the Board members[18] and the short time in which most remaining cases are closed through settlements, dismissals, and withdrawals following investigation, and without a hearing.[19]

The *Collyer* Board's easy assumptions concerning the voluntary nature of arbitration are also somewhat skewed, in that they avoid the internal economic and political realities of grievance arbitration, the problems flowing from a union's unwillingness

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[16]*Supra* note 10.

[17]Almost all annual reports of the Federal Mediation and Conciliation Service show that the costs of arbitration have increased annually. According to FMCS data, arbitrators' fees now average $830.54 per case, up from $511.06 in 1969. Fed. Med. & Conc. Serv. Ann. Rep. (1978), 40. During the year 1978, the average time between the filing of a grievance and a request for an FMCS list of arbitrators was 191.1 days. The time from the hearing date until the date of the arbitrator's award averaged 32.4 days, down considerably from an average of 52.2 days in 1977. Thus, the total time from the grievance to completion of the arbitration averaged 223.5 days in 1978, which was down from a high of 268.3 total days in 1977. The figures provided by FMCS do not include the time from the date the list of arbitrators is requested until the arbitration is held. This would include the time it takes the FMCS to compile the list and forward it to the parties, the time required by the parties to select an arbitrator, and the time required by the parties and the arbitrator to arrive at a mutually agreeable date for the hearing. I would conservatively place that time at an average of about 60 days. Adding that figure to the FMCS totals noted above, the total average time from grievance filing to an award was in the vicinity of 283.5 days in 1978 and 328.3 days in 1977. *Ibid.* The data on costs excludes transcript costs, attorney fees, and other arbitration expenses. FMCS reports that parties used transcripts in 24.1 percent of FMCS arbitrated cases in 1978. *Id.*, at 43.

[18]According to annual reports of the NLRB, about 5 percent of unfair-practice filings reach the Board members as contested cases. In 1978, 25 percent of the 37,192 unfair-practice charges were closed by settlement or adjustment in advance of a hearing before an administrative law judge, 33 percent by withdrawal before complaint, and 37 percent by administrative dismissal. 43 NLRB Ann. Rep. 9 (1978).

[19]The Board completes its investigation of unfair-practice charges in a median time of 47 days in investigated cases culminating in the issuance of complaints. *Id.*, at 11. The Board's annual reports do not show the median or average time required by regional offices to dispose of all cases not resulting in a hearing before an administrative law judge. The median time for disposing of all such cases is probably roughly in the vicinity of 47 days. That time, of course, compares more than favorably with the average of 283.5 days required to grieve, complete arbitration proceedings, and receive an award in 1978. *Supra* note 17.

or inability (for economic reasons, for example) to pursue a grievance to arbitration; they overlook the numerous means available to an employer to delay or resist arbitration.[20]

Given the wide-ranging variables that can influence the decision to arbitrate and the often difficult objective considerations that might influence a choice of NLRB over grievance arbitration and vice versa, that tactical choice should be left to the party who owns the charge.

I would argue that when presented with a legal choice between the NLRB and arbitration, a charging party is prompted to prefer one forum over the other, not so much in anticipation of a favorable result in one forum, but by a perception that a result would be more swiftly and efficiently achieved in one forum than in the other. The equities might fall in favor of the NLRB in some instances and in favor of grievance arbitration in others. But the question, it seems to me, of when the time and efficiency equities might favor one forum over the other is not nearly as important as the question of who should resolve that question, the charging party or the NLRB.

That the choice of an NLRB or arbitration forum is best left to the charging party in all instances of concurrent NLRB-arbitral jurisdiction is more easily perceived when the common jurisdiction of the NLRB and arbitration processes is viewed as part of an interlocking labor-management relations dispute-resolution scheme in which the interests of a charging party in the most effective and expeditious resolution of a dispute are at least as great as, if not greater than, the interests of the NLRB in managing its caseload. For even assuming for the sake of argument that *Collyer* proponents are correct in their assumption that *Collyer* reduces the NLRB's caseload, the NLRB caseload reduction would generally be at the expense of increased litigation time for a charging party somewhere in the dispute-resolution system.[21]

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[20]At the Academy's Twenty-Seventh Annual Meeting, speaker Winn Newman suggested that "unions may have to choose two of twenty cases they can afford to arbitrate." In Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), at 149.

[21]If the NLRB itself is splitting two-two-one and three-two in *Collyer/Spielberg* cases, many charging parties can be forgiven for making the incorrect choice of forum. In the extreme case, charging party can file originally with the NLRB, receive an NLRB decision to defer (N1), pursue arbitration to completion and receive an adverse decision from the arbitrator (A), file with the NLRB under *Spielberg*, and receive a favorable decision on grounds of "repugnancy" (N2). Obviously, (N1) + (A) + (N2) would consume more time than (N1) as a decision on the merits. *Collyer* proponents would respond that "Charging party should have known the Board's deferral policies and

Charging parties are surely in a better position than the NLRB to weigh the pros and cons of the NLRB forum versus the arbitration forum: they understand where the tactical advantages lie; they understand the economic and political realities of the grievance-arbitration process, its subtleties, and unwritten rules. The NLRB, in contrast, is far removed from prearbitration grievance maneuvering.

I think my notion that, in choosing an NLRB-arbitration common-jurisdiction forum, a party is seeking an advantage of time and efficiency, tends to be borne out by the nature of the common-jurisdiction cases. In that limited class of cases, there are not enough measurable differences between the arbitration and the NLRB forums to forecast a greater likelihood of final-outcome success in one forum. An attempt to do so would be a speculative shot in the dark. Intuitively, charging parties are so aware and thus seek what the NLRB denies them in those instances: a choice of what they perceive as an advantage of time and efficiency.

We can test some of this by examining the nature of the cases that are subject to the NLRB's deferral rule. We can view that in the context of our conference theme. What are the common jurisdiction cases? How are they being decided by arbitrators? How by the NLRB?

We know that for a period of about six years following *Collyer*, the NLRB deferred in virtually all NLRB-arbitration concurrent jurisdiction cases and that with *Roy Robinson Chevrolet*[22] and *General American Transportation Corp.*[23] the Board limited its deferral policy to unilateral-change allegations. Also, *Robinson* and *General American* marvelously reveal NLRB members' perceptions of how arbitrators decide cases. I think those two cases tend to illustrate that the NLRB is far removed from the nuts and bolts of grievance arbitration and that the Board's erroneous view of arbitration as a swift, voluntary process that NLRB charging parties should always use when it is available—despite the NLRB's jurisdiction over the subject matter—is really a convenient rationalization in support of the Board's enormous

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pursued arbitration as an original forum rather than the NLRB." But that forces a potential charging party to arbitrate or attempt to arbitrate any reasonably close deferral case rather than chance the inordinate delay of (N1) + (A) + (N2). Thus, the degree to which *Collyer* compels arbitration is increased by virtue of a charging party's having to err on the side of arbitration, even in those instances when (N1) alone would consume less time and require far less in the way of expenditure of money than (A).

[22] *Supra* note 6.

[23] *Supra* note 6.

and understandable desire to reduce its mounting caseload.

Roy Robinson and *General American* were companion cases decided by the NLRB on the same day. Three opinions were filed in each case: one by Members Fanning and Jenkins, arguing against all prearbitration deferral;[24] one by Members Penello and Walther, in favor of deferral in all "disputes covered by a collective bargaining agreement and subject to arbitration. . . ."[25] Chairman Murphy cast her vote in favor of deferring in certain refusal-to-bargain cases and not deferring in discipline cases.[26] Thus, the opinions boiled down to a two-two-one split, with Chairman Murphy picking up the votes of Members Fanning and Jenkins, to the extent that they would not defer in discipline cases (since they would not defer in any case), and the votes of Members Penello and Walther, to the extent that they would defer in refusal-to-bargain-type cases (since they would defer in all NLRB-arbitration concurrent jurisdiction cases). In sum, two sets of Board members agreed partially with Chairman Murphy's result; no member agreed with her reasoning in support of limited deferral.

Chairman Murphy's opinion states, among other things:

> "[I]n cases alleging violations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7."[27]

I read in that statement the presupposition that an arbitrator interpreting a just-cause clause in a collective bargaining agreement might not find a contract violation, even though the arbitrator determined that the motivation for the discharge or other discipline was union or concerted activities. I think that is not a valid supposition.[28]

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[24]228 NLRB at 818, 832 (1977).
[25]228 NLRB at 813, 828 (1977).
[26]228 NLRB at 810, 831 (1977).
[27]*Id.*, at 811, 94 LRRM at 1486–1487.
[28]The view that Section 8(a)(3) allegations require an expertise not generally possessed by arbitrators has been expressed at a prior meeting of the Academy. At the 1974 meeting, Professor William Murphy, in posing a question for General Counsel Nash of

Arbitrators are certainly aware that a host of reasons found to have motivated discipline might constitute a breach of a just-cause clause. That NLRB members may find a violation of the NLRA in discipline cases only when discipline was motivated by union or concerted activities surely does not mean that, conversely, an arbitrator is precluded from finding or is unqualified to find such discipline to be without just cause. I believe I am correct in my view that virtually every arbitrator who found union activity or concerted activities to be the motivation behind discipline would sustain a challenging grievance. Indeed, arbitrators are prone to find just-cause violations for any reason that appears to be arbitrary and without a foundation in fundamental fairness. That would include any discharge or discipline that had no satisfactory explanation. That is so much a part of the fabric of grievance arbitration that an arbitrator who had never heard of the NLRA or read an NLRB decision would undoubtedly find discipline action based on union or concerted activities to be without just cause.

Arbitration practice places upon the company in a discipline case both the burden of proof and the burden of going forward with the evidence.[29] In contrast, the burden of proof and of going forward with the evidence is upon the General Counsel of the NLRB in all unfair practice cases. General Counsel could not win an unfair practice case without putting on some evidence. In arbitrated discipline cases, a company could not win without putting on some evidence. We, of course, seldom hear of cases in which a party with the burden of proof presents no evidence. But there are many instances in which the party with the burden of proof puts on insufficient evidence to sustain the burden. The hypothetical zero-evidence cases are useful means of illustrating the consequences of allocating the burden

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the NLRB, said: "If we move to 8(a)(1) and 8(a)(3) cases, a violation may rest on a specific finding of anti-union motivation or may turn on much more subtle and difficult questions of unwarranted employer interference with employee rights protected by Section 7. There, an arbitrator's competence with a contractual standard of just cause gives him no background for dealing with the problem, and the arbitrator without legal training lacks the competence to deal with the statutory language." In Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1974), at 143.

[29]*See* Elkouri and Elkouri, How Arbitration Works. 3d ed. (Washington: BNA, 1973), at 621 and cases cited at note 56 therein: "Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires 'just cause' for discharge."

of proof and the burden of going forward with the evidence.

Further, it is unnecessary in an arbitration proceeding (as it is necessary before the NLRB in all unfair practice cases) to establish some legally required specific motivation for discipline. This means that the NLRB could find all sorts of arbitrary reasons for disciplinary action, but if union or concerted activities were not among them, the Board would have to find no violation of the NLRA. If an arbitrator in that instance found that no union activity motivated the discharge, but also found no rational reasons in support of the discharge, the arbitrator would surely sustain the grievance. On those facts, however, the NLRB would have to dismiss the unfair practice charge.[30]

Chairman Murphy's conclusion that "the arbitration process is not suited for resolving employee complaints of discrimination under Section 7"[31] assumes that the inherent arbitrariness of a discharge because of union or concerted activities has some mysterious quality that is known only to the NLRB, when in fact the arbitrary feature of discipline on account of union activity or concerted activities is but one type of arbitrariness among the hundreds of types of arbitary behavior that are considered by arbitrators when allegations are made under just-cause clauses.

We might also view this from the perspective of remedy. On matters of remedy, arbitrators operate with far more flexibility than do NLRB personnel. Arbitrators commonly—too commonly for many employer representatives—convert disciplinary discharges to suspensions or otherwise reduce discipline penalties, all depending upon the equities perceived by the arbitrator. In contrast, in an NLRB proceeding, evidence either supports or does not support, for example, a Section 8(a)(3) allegation.

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[30]In *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 311, 58 LRRM 2672 (1965), the Supreme Court noted: "It has long been established that a finding of violation under Section 8(a)(3) will normally turn on the employer's motivation. See National Labor Relations Board v. Brown, 380 U.S. 278 . . . Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17 . . . National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1. . . ."

[31]228 NLRB at 811. The view that arbitrators lack expertise in deciding union or concerted-activities discipline cases appears to be based also on the erroneous notion that most Section 8(a)(3) discharge cases, for example, present sophisticated issues of law, when in fact those cases invariably raise disputed questions of fact and no question of law. In short, they are cases which a charging party will win if the facts alleged in the complaint are established at the hearing. Sophisticated questions of law of the kind that are found in law school casebooks on labor law, those that reach the United States Supreme Court, and some of those in the federal circuit courts represent a miniscule minority of NLRB discipline cases.

All of the essential elements of a violation may not be satisfied, including employer knowledge of union activity and discrimination on account of union activity.[32] Given the nature of the allegation, the NLRB has little leeway to reduce a discharge to a lesser penalty. There are, in short, no measurable degrees of union- or concerted-activities-based discrimination. Like pregnancy, it is either all there or it is not there at all. Thus, an NLRB discharge case that falls barely short of satisfying all of the elements of proof required to sustain a Section 8(a)(3) violation would result in a dismissal of the complaint unless some other section of the NLRA were found to have been independently violated. The same facts heard by an arbitrator might well result in a reduction of the discharge to some lesser discipline, not only because the employer's reasons for the discharge were found to be partially lacking in proof, but also for the possible reason that the arbitrator regarded the discharge penalty as being too severe under the circumstances.

In all of these respects it is true that, strictly speaking, an arbitrator would not be resolving statutory unfair practice allegations. But Chairman Murphy was almost certainly wrong when she wrote in *Roy Robinson* that in union or concerted-activities discrimination matters "an arbitrator's resolution of the contract issue will not dispose of the unfair practice allegation." If an arbitrator were sufficiently unwise to dismiss a grievance in the face of disciplinary action amounting to an NLRA violation, an NLRB remedy might be available under the postarbitration *Spielberg* policy. I believe, though, that the possibilities of an arbitrator's making that kind of incorrect decision are not greater than the possibilities of the NLRB's reaching the wrong result in discipline cases—as it surely sometimes must.

On matters other than the allocation of proof and going forward with the evidence, the general methodology of deciding an NLRB and an arbitration union-activity discipline case scarcely differs, as measured by the kinds of evidence that would be introduced and how an NLRB administrative law judge or arbitrator would react to the evidence. For example, it would weigh heavily against the employer in both the NLRB and the arbitration forums if the employer's reasons for discipline—excessive tardiness, lack of productivity, etc.—were found to be not sustained by the evidence. The finder of fact in both the NLRB and

[32] *Supra* note 30.

arbitration forums would in that instance tend to infer that the affirmative defense was merely a pretext and that union activity actually motivated the employer's decision to discipline. That is on the assumption, of course, that the facts were such that the arbitrator found it necessary to find that union or concerted activities motivated the discipline.

In another portion of her opinion in *General American,* Chairman Murphy further revealed her thinking (and perhaps the thinking of other NLRB members) on how the arbitration process is viewed from the offices of NLRB members. Her opinion states: "In [cases alleging refusal-to-bargain violations] the dispute is principally between the contracting parties—the employer and the union—while in [discipline] cases the dispute is between the employee on the one hand and the employer and/or the union on the other."[33] At least implicit here, I gather, is the notion that, as a dispute between contracting parties, the refusal-to-bargain case is more properly the province of those who interpret contracts—arbitrators, and that a dispute between an "individual" and the employer raises individual rights questions which are more properly the province of the NLRB. I find both the premise and the conclusion quite imprecise.

Before the NLRB, the union is most often the charging party in cases alleging discipline because of union activity;[34] the union is the charging party in just about all arbitrated cases and is certainly a party in all arbitrated cases arising under collective bargaining agreements in the private sector. In discipline cases invoking NLRA principles, the grievant's interest in the outcome, while personal and terribly important to the grievant, can hardly be characterized as being less important than the union's interest in sustaining a charge alleging some form of retribution for helping organize the union. The union's survival as a possible exclusive bargaining representative is often at stake in cases alleging union-activity discrimination during an initial or early stage of a union's organizing campaign. The union is a real party in interest in those cases, as well as the nominal charging party.

Somewhat ironically, Chairman Murphy's observations concerning the alignment of parties in discipline cases would have

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[33]94 LRRM at 1486.

[34]During the 1978 fiscal year, the NLRB received a total of 27,056 unfair-practice charges against employers, of which 15,016, or 55.5 percent, were filed by unions. 43 NLRB Ann. Rep. 239 (Table 1A) (1978). The figures provided in Table 1A are not broken down by type of unfair-practice charge filed by individuals, unions, and employers.

had more to commend it as applied to discipline cases not involving union activity. There the union's interest in winning a grievance would generally be comparatively less than its interest in winning a case in which the union's survival as exclusive representative might be at stake. But those are not the NLRB-arbitration concurrent-jurisdiction cases. Thus, Chairman Murphy's view of NLRA discipline cases as being between the employee and the employer is more amenable to criticism when applied to a class of cases—union-activity cases—in which the weakness of that reasoning is most apparent.

Lest I sound unduly critical of one member of the NLRB, I should emphasize that I appreciate Chairman Murphy's effort to limit prearbitration deferral. Discounting the split opinions in *Robinson* and *General American,* and the likelihood of their fragile majorities being upset, we now have at least one important class of cases—at this writing—in which a charging party need not be concerned that its own tactical judgments concerning time and efficiency in achieving a final result will be upset by the NLRB. My disagreement is with the reasoning in support of the decision to limit deferral, as well as the result of not ending all prearbitration deferral. And, as I see it, the flaws in the reasoning used in support of the decision not to defer in discipline cases is inextricably linked to Chairman Murphy's arguments in support of her decision to continue deferring in certain types of refusal-to-bargain cases. All the reasoning in support of deferring in discipline cases is simply conversely applied to support her conclusion in favor of deferring in refusal-to-bargain cases. But let us see what those cases might be. And here we can focus not on one Board member, but on the three who made up the majority in favor of deferral, Members Penello and Walther, with Chairman Murphy.

What kinds of refusal-to-bargain cases are these? How are they decided by arbitrators? How by the NLRB? Are there material differences between the NLRB and arbitration approaches to them that justify their forced resort to arbitration, even though the NLRB has jurisdiction? Is there something about them, other than the manner in which arbitrators might decide them, that justifies their continued deferral to arbitration in advance of arbitration?

These cases arise under Section 8(a)(5) of the NLRA.[35] But

[35]29 U.S.C. §158(a)(5) (1978). Refusal-to-bargain cases could also arise under Section 8(b)(3) of the NLRA, 29 U.S.C. §158(b)(3) (1978), which makes it an unfair practice for

we should classify them more closely, since the deferral policies would have no application at all in many kinds of refusal-to-bargain cases. Section 8(a)(5) of the NLRA may be violated by a party who engages in surface (make-believe) bargaining,[36] or by an employer's unilateral change of working conditions that are within the scope of bargaining, in two situations: (a) during negotiations and in advance of an agreement,[37] and (b) after an agreement has been reached and in arguable derogation of the agreement.[38] Ordinarily, deferral would have no application in surface bargaining cases since they involve conduct allegedly

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a labor organization to refuse to bargain in good faith. Section 8(b)(3) charges, though, are a distinct minority of 5 percent of the total cases filed annually with the NLRB. By comparison, Section 8(a)(5) allegations of refusal to bargain are 19.7 percent of the total number of charges filed annually, or four times the number of Section 8(b)(3) charges. *See* 43 NLRB Ann. Rep. 241 (Table 2) (1978). The Board's report does not show further breakdown of refusal-to-bargain charges by type, but unilateral-change cases of the kind that might fall within the concurrent jurisdiction of arbitrators are undoubtedly a still smaller percentage of the Board's total refusal-to-bargain workload.

Statistics cited by Board Members Walther and Penello, in favor of deferral, appear to have the paradoxical effect of patently refuting the conclusions they would reach in favor of the utility of prearbitration deferral. Dissenting in *General American Transportation Corp.*, they said: "In an unpublished Board study of the effect of Collyer over a 2 ½ year period . . . a total of 1,632 cases had been deferred by the Board's Regional Offices under Collyer. Arbitrators' decisions issued in 473 of these cases. Of these 473 decisions, the Regions scrutinized 159 at the request of the charging parties in light of the Spielberg standards. On 33 occasions, the Regions revoked the Collyer deferrals either because the respondents refused to proceed to arbitration or the arbitration awards were deficient under the Spielberg standards. In 24 of these 33 instances, issuance of a complaint was made unnecessary by the respondents' signing of a settlement agreement. Further, of the 1632 deferred cases, 437 were settled through the contract grievance procedure without the need of a proceeding to arbitration." 94 LRRM at 1494.

To obtain the benefit of 427 settlements through the grievance procedure and without arbitration, the Board had to spend prearbitration *Collyer* time plus postarbitration *Spielberg* time in 159 out of 437 arbitrated decisions, or 33.6 percent of the total. Without *Collyer*, in all of those 159 instances, the time spent on the merits of the charge at the postarbitration *Spielberg* stage would have been spent much earlier (at what was the prearbitration *Collyer* stage), and the dual proceedings before the Board (*Collyer* plus *Spielberg*) could have been a single proceeding on the merits. It is unclear how many of the 33 revoked *Collyer* deferrals were revoked because of refusals to arbitrate, but of that number, whatever it was, there were three levels of consideration by the Board's regional offices: level 1, the decision to defer; level 2, the decision to revoke deferral; and level 3, the decision on the merits. Absent *Collyer*, those levels would have been reduced to one, a decision on the merits. In the 24 instances when issuance of a complaint was made unnecessary by the respondent's settlement of a complaint, that would have been true in a single level 1 proceeding on the merits, in the absence of *Collyer*. It is abundantly clear, I think, that *Collyer* encumbers both the Board and the parties before the Board with additional Board-created work, and that the net effect of *Collyer* is a loss in Board and party time and resources.

[36] *See generally NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401–403 (1952).

[37] *See, e.g., NLRB* v. *Katz*, 369 U.S. 736, 50 LRRM 2177 (1962).

[38] *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 64 LRRM 2065 (1967), and *Collyer* itself, among others, *supra* note 2. An arbitrator might, of course, find that a subject not expressly included in an existing agreement became an implied part of the agreement by way of past practice. I would regard that as a unilateral-change case based on a contract derogation allegation.

taking place during negotiations for an agreement. Likewise, of the two types of unilateral-change cases, deferral would have no application to those cases in which the unilateral change was not alleged to have been in breach of an agreement because no agreement existed, or an agreement existed but was not alleged to have been breached by the alleged unilateral change. It is the contract-term unilateral-change case that appears at this writing to be the sole surviving class of cases for NLRB prearbitration deferral. *Collyer* itself was such a case.

Collyer became a dispute before the NLRB when, during the term of a collective bargaining agreement, the company unilaterally increased wage rates and also changed from two to one the number of employees who worked on a worm gear. The agreement arguably precluded the company from taking either the wage-change or the manpower-change action. In deferring, the Board, among other things, said: "In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by application by this Board of a particular provision of the [NLRA]."[39] Too expert to be avoided in unilateral-change cases; not expert enough to be substituted for the NLRB in discipline cases. That appears to summarize the Board's judgment of arbitrators when *Collyer, Robinson,* and *General American* are read together.

One need not make the case that the NLRB is more skilled than arbitrators in deciding unilateral-change cases, no more so than it was necessary to make the case that arbitrators are more skilled than the NLRB in deciding discipline cases. I think it is sufficient to attempt to demonstrate that in the nature of the unilateral-change cases, the NLRB is no less competent than arbitrators to decide unilateral-change cases involving arguable contract violations. We can test this thesis by attempting to determine what arbitrators and the NLRB do when they decide these cases.

When the Board has before it an allegation of unilateral change that is manifested by a contract breach, the Board must (1) find a unilateral change; (2) determine whether the subject of the change is a mandatory subject of bargaining; and, if so, (3) determine whether the change breached the agreement. The

[39] 192 NLRB at 839.

underlying theory of an NLRA violation in these cases is that a contract, having been mutually arrived at, ought to be changed only through negotiations leading to a mutual agreement to amend. A unilateral change of contract terms is quite the antithesis of a mutually agreed upon contract amendment, and the NLRA protects the bargaining relationship by requiring a threshold attempt to negotiate proposed changes in contract terms.[40] When the NLRB interprets an agreement in such cases, it is only making the determination that "the union did not agree to give up these statutory safeguards."[41] No hiatus separates the contract violation and a finding of refusal-to-bargain in unilateral-change cases. Thus, the essence of the statutory violation is the breach of the agreement. The *Collyer* Board more or less concluded that the essential nature of the unilateral-change case as a contract-breach case is what makes those cases so amenable to the "special skill and experience" of arbitrators. What the opinion fails to answer is the question of why the Board lacks skill and experience in deciding such cases as refusal-to-bargain cases, so labeled.

The only basis for concluding that arbitrators have a special expertise and competence in these cases is that the NLRB decides relatively few unilateral-change cases involving possible contract violations.[42] Arbitrators, on the other hand, always interpret agreements in labor-case grievances. Apart from that obvious inconsistency with the Board's judgment that arbitrators are sufficiently expert to decide contract discipline cases, other factors stand overlooked by the Board in its determination that arbitration is the expert forum for unilateral-change cases.

Overlooked is the Board's experience with other types of refusal-to-bargain cases. Surface-bargaining cases,[43] unilateral-change cases not involving arguable breaches of contract,[44]

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[40] If that is not the underlying theory of a unilateral-change-of-contract-terms violation of Section 8(a)(5), it is difficult to perceive why such allegations should be regarded as violations of the NLRA rather than purely the breach of an agreement requiring interpretation of the agreement, and hence beyond the NLRB's jurisdiction. That view seems to have been rejected by the U.S. Supreme Court in *NLRB* v. *C & C Plywood, id. C & C Plywood* acknowledges that the NLRB lacks jurisdiction generally to interpret collective bargaining agreements, but holds that the Board may do so to the limited extent of determining in a unilateral-change case whether the union waived its statutory protection against unlawful refusals to bargain. *See generally,* Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5),* 50 Texas L. Rev. 225, 246–265 (1972).

[41] *Supra* note 38.

[42] *Supra* note 35.

[43] *Supra* note 36.

[44] *Supra* note 37.

pure mandatory-subject-of-bargaining cases,[45] all raise issues that bring the Board into intimate contact with the collective bargaining process. The Board is familiar with the jargon, the nomenclature of the process leading to an agreement; it has a sense of the dynamics of bargaining-table disputes and, thus, through this unique dimension, a familiarity with the meaning of the contract terms that derive from that process. The Board is at least as generally competent as arbitrators to determine whether a merit-wage increase contradicts the terms of an agreement, whether a subcontracting clause permits or precludes a company from unilaterally contracting out work. From a remedy perspective, the unfair practice and arbitration routes lead to scarcely different results. An arbitrator, on finding a contract breach, would fashion a remedy accordingly. It would be ordered in a wage-change case, for example, that proper wages be paid, per the agreement. The NLRB remedy would not differ materially. There would be an order to refrain from taking unilateral action, and, like the administrative law judge in *Collyer,* the Board would require that the employer reinstate the wage scales set out in the agreement during the period of negotiations.

Given the complete standoff when degrees of NLRB-arbitrator expertise are compared in respect to unilateral-change issues, surely a charging party in such cases, and not the NLRB, should be permitted to determine which forum best suits the needs of the charging party and, incidentally, the system of industrial dispute resolution.

What remains is the question of whether something other than the manner in which arbitrators and the Board decide the class of cases so far discussed, supports the Board's policy of prearbitration deferral. *Collyer* states: "We believe it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed upon procedures."[46]

This statement of the Board, perhaps more than anything else said in *Collyer* or its successors, demonstrates the Board's unfamiliarity with the realities of grievance arbitration. The Board is apparently not only unaware of the complex range of factors

[45] *See, e.g., Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 57 LRRM 2609 (1964).
[46] 192 NLRB at 843.

that must be considered by a union in determining whether a case should be taken to arbitration, but is also apparently unaware that arbitration clauses call for arbitration upon demand and not whenever a dispute arises. Dissenting Member Fanning was surely not overstating the case when he characterized *Collyer* as a case that "verges on the practice of compulsory arbitration."[47]

For a decade now I have told labor law students that "compulsory arbitration" means arbitration on the insistence of the government. Indeed, the Board's response to the Fanning dissent highlights the *Collyer* majority's misconceived distinction between compulsory and voluntary arbitration:

> "We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own *voluntary agreements to submit all such disputes to arbitration,* rather than permitting such agreements to be side-stepped and permitting the substitutions of our processes, a forum not contemplated by their own agreement." [Emphasis added.][48]

Until *Collyer,* no one was aware that an agreement to arbitrate on demand could not be "side-stepped" for any reason short of a breach of the duty of fair representation. And no decision has so far held that seeking a Board remedy rather than an arbitration remedy is per se a breach of the duty of fair representation.

In some—but not complete—fairness to the *Collyer* majority, it should be noted that there are two different levels of arbitration at which the terms "compulsory" and "voluntary" might become an issue. One is at the level of creation of the agreement to arbitrate. The other is at the level of implementation of the arbitration clause. Successful governmental insistence upon an arbitration clause, even though both parties or one party might not want one, would be compulsory arbitration of one kind. It is at that level that the *Collyer* majority finds no governmental or other compulsion to enter into an agreement to arbitrate. But government could refrain from insisting upon agreements to arbitrate and then insist that all agreements to arbitrate *upon demand* be read as requiring arbitration of all contract-term disputes. I think that would be governmental compulsion of a different order, but compulsion no less than governmental insistence that all agreements contain arbitration clauses. Indeed,

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[47] *Id.*, at 847.
[48] *Id.*, at 842.

governmental insistence that a contract clause requiring arbitration on demand be read as requiring arbitration when the government insists upon it in a particular case is quite arguably a higher degree of compulsion than governmental insistence that a contract contain a grievance arbitration clause. At the compelled-arbitration-clause level, a union would remain free to arbitrate when it thought arbitration was in its best interests (short of a fair-representation breach). At the compelled-arbitration-implementation level, the union must arbitrate, though it may not think its best interests would be served by arbitration.

It is the insistence that a party arbitrate (even though it has chosen not to demand arbitration) that the Board has substituted for agreements to arbitrate upon demand. The nature of that form of compulsory arbitration is illuminated when considered in the context of my earlier remarks concerning the ability of charging parties to seek the tactical advantage of time and efficiency when resolving a choice between the NLRB and arbitration. The national policy of favoring arbitration—which the *Collyer* Board has distorted to mean a national policy in favor of arbitrating all disputes involving contract terms—was never intended to do more than make arbitration available as a voluntarily chosen means of dispute resolution.

To conclude, I have omitted from this discussion an analysis of the case law used by *Collyer* proponents in support of their view that the appellate courts support deferral,[49] and the appellate cases of *Collyer* opponents, as cited for the proposition that deferral is not authorized by law.[50] I have done so because of my belief that the deferral issue is not one of legal compulsion. I believe courts will continue to approve deferral if that is what the Board continues to do; I also believe that courts would permit the Board not to defer. In short, a Board decision either way would be regarded as a legitimate exercise of the Board's discretion. All I have said here relates to the Board's legal discretion, which I think has so far been improperly exercised in favor of prearbitration deferral.

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[49] *See generally* the federal circuit court and the U.S. Supreme Court decisions cited by the decision-writers in *Roy Robinson Chevrolet* and *General American Transportation Corp.*, *supra* note 6.

[50] *Ibid.*

CHAPTER 9

COURTS, ARBITRATORS, AND OSHA PROBLEMS: AN OVERVIEW

RAYMOND L. BRITTON*

The Occupational Safety and Health Act of 1970 (herein sometimes referred to as the "Act") created a sweeping national commitment to the protection of the safety and health of workers on the job. The intent of the Act was to halt and reverse the trend in the incidence of occupational injuries and illnesses of the last 50 years.

The Secretary of Labor is given the task of developing standards to eliminate health hazards found in American industry, and this objective can be met only if such standards can be enforced over the full range of industries and technologies covered by the Act.[1]

The Secretary of Labor issues health and safety standards with the advice of the National Institute for Occupational Safety and Health (NIOSH) and the National Advisory Committee on Occupational Safety and Health (NACOSH). The Secretary has the power to enforce these standards and rules by issuing citations and imposing penalties on employers whose workplace is deemed unsafe. As a general rule, when an employer receives a citation, the result is strict compliance with the Secretary's directive to remove the unsafe working condition(s). Likewise, when new standards are promulgated by the Secretary, employers usually proceed to implement the new standards. Difficulties arise when an employer contests an OSHA citation or when a standard is challenged as vague, burdensome, or unreasonable.

The first stage of review for a citation contest or an OSHA standard challenge is a purely administrative one in which an

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[1]Northrup, The Impact of OSHA (Philadelphia: Industrial Research Unit, Wharton School, University of Pennsylvania, 1978), at 3.

administrative law judge makes findings of fact and conclusions of law affirming, modifying, or vacating the Secretary's proposed citation, penalty, or standard.[2] The administrative law judge may render a final decision, but if the ruling involves an important question of law where there are substantial grounds for difference of opinion and an immediate appeal will materially expedite the proceedings, an interlocutory order may be issued.[3]

The second stage of review, which can commence only after a ruling by an administrative law judge, is a discretionary review by the OSHA Review Commission.[4]

The federal courts represent the final stage of review for any party adversely affected by an OSHA citation or standard.

An overview of the various review processes presents the question: Which body is best suited to review the merits of citations, promulgations, and standards issued by the Secretary of Labor? Because of their everyday exposure and expertise in the field, it is reasonable to conclude that the OSHA Review Commission and administrative law judges are the most qualified to resolve such issues. The review machinery itself has resulted in a number of crucial safety and health issues being brought before the federal courts for resolution. This paper will attempt to identify some of the problems the federal courts will encounter as they are called upon to unravel and simplify a number of novel and sometime volatile issues.

Parties adversely affected by OSHA citations or standards must seek redress in the appropriate court of appeals only after their administrative remedies have been exhausted.[5] Any court must, at the outset, define the scope of its review powers, and it is here that the courts are confronted with conflicting authority. The Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."[6] The legislative history of the Act, however, seems to indicate that instead of a "substantial evidence" test, the courts of appeal should use an "arbitrary and capricious" test in reviewing OSHA standards and citations.[7]

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[2]29 U.S.C. §659(c).
[3]29 C.F.R. §2200.75(c).
[4]29 U.S.C. §661(j).
[5]29 U.S.C. §660(a) and (b).
[6]29 U.S.C. §655(f).
[7]Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Safety and Health Act (Comm. Print 1971), at 1189.

Thus, if a court is asked to review a chemical toxicity standard, there is statutory authority which asks the court to pore over the evidence in the records of administrative law courts and the OSHA Review Commission, while the legislative history of the Act merely asks the court to determine whether the Secretary and the various agencies acted in an arbitrary and capricious fashion. This conflict has resulted in the courts of appeal formulating their own tests for determining the validity of OSHA standards.[8]

Continued technological advances will result in the release of increased levels of noxious chemicals and carcinogenic substances into the ecosystem. These chemicals and substances will eventually take their toll on American workers in the form of high cancer rates and other debilitating illnesses, such as kidney, liver, and lung diseases. OSHA and the Environmental Protection Agency (EPA) have undertaken a campaign to remove carcinogens and noxious chemicals from the workplace, and the federal courts have been somewhat supportive of their efforts. It is submitted that this support stems from the recognition that these two agencies are best suited to carry out such a task. However, interested parties have challenged OSHA's decision-making process in the courts, thus forcing a formulation of new tests, rules, and weight factors used to review OSHA's safety and health standards.

A number of legal scholars have attempted to define the concept of "public policy." The term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency as directed to the welfare or prosperity of the state or the community. Certain classes of acts are deemed to be "against public policy" when the law refuses to enforce them on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state. Traditionally, public policy has been the driving force behind the decisions of government administrators, judges, and arbitrators as they carry out their duties for the public good.

Professor McGarity[9] has recognized that in deciding to regulate human exposure to potentially carcinogenic chemicals,

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[8]Proceedings of the ABA National Institute on Occupational Safety and Health, American Bar Association, Section of Labor Relations Law, 1976, p. 111.

[9]*See* generally, McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in E.P.A. and O.S.H.A.*, 67 Georgetown L.J. 732–747 (February 1979).

agencies such as OSHA have been forced to resolve scientific questions that the scientific community itself has been unable to resolve. OSHA and the courts are thereby forced to solve these questions partially on policy grounds. McGarity refers to these issues as "science policy" questions because both scientific and policy considerations play a role in their resolution.

Types of Science-Policy Issues[10]

Trans-scientific Issues

Trans-scientific issues are those issues which cannot be answered by science for a number of practical reasons. Professor McGarity's example is most helpful in grasping the concept: the extrapolation of carcinogenic effects at high-dose levels to low-dose levels.

If a team of scientists sought to show that cancer would result in only one-in-a-million cases as a result of exposure to a carcinogen, there would be need to expose three million rats to the human-dose level and compare the response with that of a control group also comprised of three million rats *not* exposed to the carcinogen. Since it is impractical to carry out such an experiment, scientists usually test much fewer animals, but at much higher dosage rates. Thus an agency (or a court) can never be certain whether a chemical which causes cancer at high doses will cause cancer at the lower doses to which humans are typically exposed. The regulator, whether it be OSHA or the EPA, is forced to make a subjective, or policy-dominated, decision.

Decisions Based on Insufficient Data

Situations may arise where there are insufficient data to reach a scientifically acceptable conclusion. In this event, the courts are required to recognize OSHA's dilemma: Should OSHA wait until the scientific community has reached the point where the data are made available, thus risking continued exposure to a known carcinogen, or should OSHA implement a standard with the available data?

In *American Petroleum Institute* v. *OSHA,*[11] the Supreme Court

[10] *Id.*

[11] 581 F.2d 493 (5th Cir. 1978), *judgment aff'd, sub nom. Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* 448 U.S.___ (1980).

will address such an issue. In that case, the petitioners challenged OSHA's standard for dermal exposure to airborne benzene. While OSHA conceded that it was unsure that benzene could be absorbed through the skin, it nevertheless promulgated that worker exposure be reduced to zero. OSHA took notice of medical opinion that workers risked contracting leukemia as a result of benzene exposure and found, as a matter of policy, that the risk to workers from *any* dermal exposure was unacceptable.

OSHA's fatal flaw, in the words of the court, was that it failed to use a rather simple skin test to determine the skin-absorption levels of benzene: "When such factual information is so readily available, [the Occupational Safety and Health Act] requires OSHA to acquire that information before promulgating regulations which would require an established industry to change long-followed work processes that are not demonstrably unsafe."

The court looked to a previous holding in *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Commission*[12] and said that "[a]n agency must show that a hazard exists and that its regulation will reduce the risk from the hazard . . . and [required] the agency to assess the expected benefits in light of the burdens to be imposed by the standard."

Although the court did not require OSHA to carry out an extensive cost-benefit analysis in the *American Petroleum* case, it did require a determination that the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard.

Economic Feasibility.[13] While some observers have felt that the Act was intended to protect workers regardless of the economic impact on employers, most commentators will agree that an OSHA standard which is cost prohibitive will be labeled not feasible.

The D.C. Circuit has spoken on the matter in *Industrial Union Dept.* v. *Hodgson:*[14] "Congress does not appear to have intended to protect employees by putting their employers out of business."

The D.C. Circuit has not considered OSHA standards invalid

[12]569 F.2d 831 (5th Cir. 1978).
[13]*Supra* note 8, at 116–117.
[14]499 F.2d 467 (D.C.Cir. 1974).

even though, from the standpoint of the employer, "they are financially burdensome and affect profit margins adversely."[15] The Third Circuit has recognized an employer's defense of economic infeasibility of an OSHA standard in *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC.*[16] Employers there contended that the longshoring hard-hat standard, as applied to them, was economically infeasible, and hence invalid, because attempts at enforcement would provoke a wildcat strike by employees. However, the court found that the employer had failed to establish the infeasibility of the challenged regulation, since it did not show it had taken steps to discipline or discharge employees who defied the standard. The court pointed out that employers have other legal remedies available to them. Because of the significance of the language used by the court, its discussion is set out in full:

> "We must face squarely the issue whether the Secretary can announce, and insist on employer compliance with a standard which employees are likely to resist to the point of concerted work stoppages. To frame this issue in slightly different terms, can the Secretary insist that an employer in the collective bargaining process bargain to retain the right to discipline employees for violation of safety standards which are patently reasonable, and are economically feasible except for employee resistance?
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> "We hold that the Secretary has such power. As part IIIA of this opinion has indicated, the entire thrust of the Act is to place primary responsibility for safety in the work place upon the employer. That, certainly, is a decision within the legislative competence of Congress. In some cases, undoubtedly, such a policy will result in work stoppages. But as we observed in *AFL-CIO* v. *Brennan,* supra, the task of weighing the economic feasibility of a regulation is conferred upon the Secretary. He has concluded that stevedores must take all available legal steps to secure compliance by the longshoremen with the hardhat standard.
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> "We can perceive several legal remedies which an employer in petitioners' shoes might find availing. An employer can bargain in good faith with the representatives of its employees for the right to discharge or discipline any employee who disobeys an OSHA standard. Because occupational safety and health would seem to be subsumed within the subjects of mandatory collective bargaining—wages, hours and conditions of employment, see 29 U.S.C. §153(d)—the employer can, consistent with its duty to bargain in good faith, insist to the point of impasse upon the right to discharge or discipline disobedient employees. *See NLRB* v. *American National Insurance*

[15] *Id.*
[16] 534 F.2d 541 (3rd Cir. 1976).

Co., 343 U.S. 395 (1952). Where the employer's prerogative in such matters is established, that right can be enforced under §301. Should discipline or discharge nevertheless provoke a work stoppage, *Boys Markets* injunctive relief would be available if the parties have agreed upon a no-strike or grievance and arbitration provision. And even in those cases in which an injunction cannot be obtained, or where arbitration fails to vindicate the employer's action, the employer can still apply to the Secretary pursuant to §6(d) of the Act, 29 U.S.C. §655(d), for a variance from a promulgated standard, on a showing that alternative methods for protecting employees would be equally effective. *See Brennan* v. *OSHRC (Underhill Construction Corp.)* 513 F.2d 1032, 1036 (2d Cir. 1975). Moreover, under §10(c) 29 U.S.C. §659(c), the Secretary has authority to extend the time within which a violation of a standard must be abated.

"In this case petitioners have produced no evidence demonstrating that they actually discharged or disciplined or threatened to discharge or discipline, any employee who defied the hardhat standard, or that they have petitioned the Secretary for a variance or an extension of the time within which compliance is to be achieved. We conclude that as a matter of law petitioners have failed to establish the infeasibility of the challenged regulation."

Technological Feasibility.[17] Employers can be required to implement existing technology in providing a safe workplace. The more difficult question is whether an employer could be required to develop or implement novel technological changes to deal with newly discovered occupational standards. The Second Circuit has placed such a burden on employers in *Society of the Plastics Industry* v. *OSHA:*[18] "The Secretary is not . . . restricted by the status quo. He may raise standards which require the development of new technology, and he is not limited to issuing standards based solely on devices already developed."

The Third Circuit has characterized OSHA as "technology forcing legislation,"[19] and other circuits have allowed other administrative agencies charged with similar safety and health enforcement responsibilities to "force" technological development through the promulgation of standards, providing additional support for such power in the hands of OSHA.[20]

The Third Circuit has defined its scope of review of OSHA standards in *Synthetic Organic Chemical Manufacturers* v. *Brennan.*[21]

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[17] *Supra* note 8.

[18] 509 F.2d 1301 (2d Cir.), *cert. den.* 421 U.S. 992 (1975).

[19] *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC, supra* note 16; *see also supra* note 8, at 118.

[20] *Chrysler Corp.* v. *Dept. of Transportation,* 472 F.2d 654, 673 (6th Cir. 1972) (automobile safety standards); *Natural Resources Defense Council Inc.* v. *E.P.A.*, 489 F.2d 390, 401 (5th Cir. 1971) (air pollution standards). *See also supra* note 8.

[21] 503 F.2d 1155 (3d Cir.), *cert. den.* 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1970).

In the presence of insufficient scientific data on the effects of exposure to ethyleneimine, the court set up a five-step process for reviewing the Secretary's safety standards as:

"1. determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the actions taken;
"2. determining whether the Secretary's promulgation adequately sets forth reasons for his action;
"3. determining whether the statement of reasons reflects consideration of factors relevant under the statute;
"4. determining whether presently available alternatives were at least considered; and
"5. *if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development,* whether substantial evidence in the record as a whole supports the determination."[22]

The D.C. Circuit, in *Automotive Parts and Accessories* v. *Boyd,*[23] has applied "an arbitrary-and-irrational"[24] reasonableness test in affirming a permanent standard regulating airborne asbestos exposure. While not an OSHA case, the court addressed the quasi-legislative role of an agency and stated: "The paramount objective is to see whether an agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules and general application in the future."

The Second Circuit has used a "non-arbitrary and irrational"[25] test formulated by the D.C. Circuit in upholding an OSHA standard regulating exposure to vinyl chloride. In *Society of Plastics Industry* v. *OSHA,*[26] the Secretary of Labor made a carcinogenicity policy decision based on extrapolation of animal data. The Second Circuit recognized that the Secretary of Labor made a *policy* decision rather than a factual conclusion, and it examined the reasonableness of the Secretary's action. Taking judicial notice of the deaths of 13 workers within a three-year period from overexposure to vinyl chloride, the court found the standard to be overwhelmingly reasonable.[27]

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[22] *Id.,* at 1160, emphasis supplied.
[23] 407 F.2d 330, 338 (1968).
[24] *Supra* note 8, at 112.
[25] *Ibid.*
[26] 509 F.2d 1301 (2d Cir.), *cert. den.* 421 U.S. 992 (1975).
[27] *Supra* note 8.

Varying Scientific Interpretations

Assuming an abundance of scientific data on a given subject, scientists will still disagree as to how the data are to be interpreted. When a court asks two scientists to cite explicit reasons for their respective positions, the reasons may very well be incomprehensible to the lay judge. The court will surely be in a dubious position when scientists of conflicting views also happen to be statisticians arguing the methodology of their experiments.

Professor McGarity suggests that decision-makers should ask scientists questions limited to those issues which require scientific expertise and should not demand that the scientists exercise policy judgment. It is submitted that pure policy judgments should be left to the courts wherever possible.

Disagreements Over Inferences

If the Secretary of Labor receives input from the National Institute for Occupational Safety and Health and from the National Advisory Committee on Safety and Health, that data will no doubt reflect disagreement among scientists over what types of inferences to draw from scientific fact. Most scientists will agree that if a substance is carcinogenic in laboratory rats, it is also carcinogenic in humans. The EPA and OSHA have relied on animal test data because they are the best data available to them.

The core issue posed is whether the courts should take judicial notice of these disagreements over the inferences drawn by scientists from available data. Judge Harold Leventhal of the D.C. Circuit has offered that judges are in fact qualified to evaluate these inferences that scientists draw from established facts. He maintains that testing scientific inferences requires only "knowledge of how matters are proven, and that is a field in which courts have always had a special interest and in which they cannot escape keeping up with the scientific times."[28]

Arbitrators

Arbitrators will begin to hear more OSHA-type safety and health issues, which will be in keeping with the recognized policy

[28]McGarity, *supra* note 9, at 746–747.

under the *Steelworkers Trilogy*[29] and *Lincoln Mills*[30] cases encouraging the arbitration of labor-management disputes. Every arbitrator will be faced with three choices in resolving safety and health disputes: (1) Should the arbitrator look to external law such as OSHA, NLRA provisions, and the holdings of the federal courts? (2) Should he formulate his own standards and policies, based on contract provisions only, thereby refusing to apply external law? Or (3), should he base his decision on a combination of the two alternatives above?

Three different approaches have been suggested as a possible means of solving the external-law dilemma. These may be referred to as the totality approach, the middle-ground approach, and the isolationist approach.

The Totality Approach. Those arbitrators following this general philosophy believe that arbitrators have a responsibility, where possible, to consider any applicable pronouncements. Every collective bargaining contract inherently includes all such relevant external law.

Such an approach has been formulated and promoted by Arbitrator Robert G. Howlett. Its basis is founded on the premise that "a promise" is enforceable at law, directly or indirectly.[31] His position is that "the law is part of the essence [of the] collective bargaining agreement."[32] Therefore, under the totality approach, arbitrators "should render decisions . . . based on both contract language and the law" and "they must be willing to accept the responsibility of . . . deciding issues arising under the National Labor Relations Act."[33]

The Middle-Ground Approach. Arbitrator Richard Mittenthal represents those arbitrators who choose to maintain the most flexible approach to this continuing problem. He states that the "law may . . . serve to implement general contract language" and "may even be used to resolve ambiguity . . . for the parties presumably intend a valid contract."[34] In support of his posi-

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[29]*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[30]353 U.S. 448, 40 LRRM 2113 (1957).

[31]Corbin, Contracts (St. Paul: West Publishing Co., 1960), 3, at 6.

[32]Howlett, *The Arbitrator, the NLRB, and the Courts,* in Proceedings of the 20th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), at 83.

[33]*Id.*, at 83 and 106.

[34]Mittenthal, *The Role of Law in Arbitration,* in Proceedings of the 21st Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), at 43.

tion, Arbitrator Mittenthal points out that the separability clause of a contract (which basically states that if any part of the contract is found to be unenforceable, the rest of the contract should still be held valid) and the final-and-binding clause both indicate that external law should and is intended by the parties to apply to their agreement. In softening his stance, however, Mittenthal is also of the belief that "too great a reliance on the law would encourage a kind of rigidity and uniformity which is foreign to our arbitration system." Statutory law may guide the arbitrator on occasion, but the arbitrator must follow the rule of law established by the contract since "he is part of a private process for the adjudication of private rights and duties."

The Isolationist Approach. At the other end of the spectrum are those arbitrators who believe, as Arbitrator Bernard D. Meltzer does, that the arbitrator should limit himself exclusively to the contract and look no further. It is Meltzer's belief that other issues should be left to the courts and other administrative agencies. Arbitrator Meltzer premises his position on the facts that (1) many arbitrators have no great expertise with respect to the law; (2) arbitrators should generally defer to those with more competence (administrative agencies and courts) in the labor area; and (3) parties utilize arbitration to construe, not destroy, their voluntary agreements.[35]

Obviously, the approach of many arbitrators may not neatly fall within one of these three categories. However, some of the philosophies inherent in these approaches can be found in all awards because, at some time, each arbitrator will be called upon by the circumstances to state his position.

Administrative Agencies and Specialized External Law

Many arbitration cases are intertwined with overlapping issues which fall within the purview of specialized agencies or court pronouncements. Arbitrators are clothed with wide discretion regarding the application of external law. The degree to which an arbitrator may apply or consider such laws varies greatly, depending upon his philosophical approach, the applicable external law, and the specific circumstances before

[35]Meltzer, *Ruminations About Ideology, Law and Labor Arbitration,* in Proceedings of the 20th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), at 16–17.

him. Various external laws which may be considered include:

Common Law and State Statutes. When an arbitrator looks to state common law or state statutes to guide him in making his award, he will generally be guided by specific procedural requirements found in state statutes. If the issue is one that falls within the purview of Section 301(a) of the LMRA, federal substantive labor policies must prevail over any state substantive law, even though state procedure will still apply.

Application to a state court to compel arbitration may be made by motion along with the requested notice and supporting affidavits setting out the details of the disagreement.

The use of state law generally involves more stringent requirements for the enforcement of awards than does federal law. The grounds for vacating an award under state law are derived from common law principles. Some state statutes allow for modification of an award in limited circumstances (e.g., where there has been an obvious miscalculation of back pay). State courts will not review an arbitrator's potential errors of law or fact.

As a rule, arbitrators are unimpressed with previous rulings made by state unemployment compensation commissioners when they are submitted as proof of any particular issue in a later arbitration.

The language of the OSHA Act makes it quite clear that the development of state safety and health plans is to be encouraged, and that the states should assume the burden of enforcing and administering those plans.[36] Section 2(b) of the Act states:

> "The Congress declares it to be its purpose and policy . . . to assure every working man and woman in the Nation safe and healthful working conditions . . . by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . . [and] to develop plans in accordance with the provisions of the Act."

Further evidence of the Act's intent to increase the participation of the states in safety and health plans is presented in provisions calling for the federal government to pay up to 90 percent of the cost of *developing* state plans, and federal outlays to finance the *administration* of such plans.[37]

Notwithstanding the intent of the Act, the matter of state

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[36]Ashford, Crisis in the Workplace: Occupational Disease and Injury (Cambridge, Mass.: The MIT Press, 1976), at 210.

[37]§23(a), (b), and (f); §23(g) of the OSHA Act.

participation in safety and health legislation continues to be an area fraught with dispute between organized labor and the government. National unions, as a general rule, are strongly resisting return of control to the states, while local unions sometimes support the effort. This dispute has created uncertainties for the future of occupational safety and health in the United States.

Valid concerns are often expressed as to the effect of decentralizing health and safety legislation. More specifically, unions are concerned that any protections afforded the worker may be lost or diminished in the changeover from the federal body of law to state plans. Section 18(c) of the Act seeks to allay any fears of underprotection and jurisdictional uncertainties which may develop. The OSHA administration and the Secretary of Labor are required to approve new state plans under development, and the Act itself requires that any new plan meet the following specifications:[38]

"1. It must specify a responsible state agency or agencies to administer the plan.
"2. It must provide for state standards that are or will be as effective as federal standards, and it must ensure that the standards, when applicable to products distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.
"3. It must provide for a right of entry and inspection at least as effective as the federal procedure, and it must include a prohibition of advance notices of inspection.
"4. It must contain satisfactory assurances that the designated agency has legal authority and qualified personnel, and that the state will devote adequate funds to administration and enforcement.
"5. It must contain satisfactory assurances that public employees will be protected to the extent permitted by state law.
"6. It must require employers to make reports to OSHA in the same manner as if the plan were not in effect.
"7. It must require the state agency to supply any information required by OSHA."

After a state plan is deemed to be in compliance with existing federal law and is approved by the Secretary of Labor, Section 18(e) of the Act provides for the new state plan to preempt applicable federal provisions. Even after final approval of a state plan, the Secretary of Labor and the OSHA administration must carry out an on-going evaluation and monitoring of plans to

[38] *Supra* note 36, at 213.

ensure that they are at least as effective as the OSHA Act.[39]

Federal Statutes. Suits to compel arbitration, more likely than not, will be considered under Section 301(a) of the LMRA since state law governs only those disputes which do not involve interstate commerce.

To compel arbitration in a federal suit, a party files suit in federal court and then moves for summary judgment coupled with an order to compel arbitration. The court rules on the summary judgment motion based upon affidavits which set out the circumstances and show that the other party refuses to submit the issue to arbitration.

Federal courts, like the NLRB, will generally abstain from hearing any suit where an arbitration is already in process or where a suit has been filed in a state court to compel arbitration. The existence of an unfair labor practice will not preclude a federal court from considering the suit under Section 301(a) and compelling arbitration. Generally, the requirements for the enforcement of an arbitration award are much less stringent under Section 301(a) than they are under state statutes.

Any suit brought in federal court under Section 301(a) will be governed by state procedural rules, although federal substantive law will apply to the merits of the case. In most instances, an aggrieved employee may bring a Section 301(a) suit only after he has exhausted the grievance in arbitration processes provided for by the applicable collective bargaining contract.

Once an arbitrator has made an award, the courts give great deference to it. They generally will not review the merits of the grievance or the manner in which the arbitrator reached his results. As long as the arbitrator does not order the commission of an illegal act or exceed the scope of his authority, his award will be considered final and binding. Such a result, however, is still circumscribed by the requirements of fair representation and proceedings untainted by fraud or misconduct.

In suits wherein the arbitrator and the NLRB have concurrent jurisdiction, the Board will generally defer to the arbitrator's award, so long as it meets the *Spielberg* test: (1) the proceedings were fair and regular; (2) the parties agreed to be bound; (3) the award violates no public policy; (4) the arbitration resolved the unfair labor practice in disposing of the grievance.

Administrative Agencies. Frequently arbitrators may be faced

[39]For a thorough discussion of state safety and health plans, see Ashford, *supra* note 36, at 209–232.

with deciding an issue which may also fall within the scope of the Occupational Safety and Health Act. In 1974 the U.S. Supreme Court held that such a case was appropriate for an arbitration hearing.[40] Yet the following year, a district court refused to defer to an arbitrator's ruling in a discrimination proceeding under Section 11(c)(1) of the Act.[41] Therefore, it would seem that while concurrent jurisdiction between the arbitrator and the Commission exists, the arbitrator's award may not preclude later challenge—at least where the case involves discrimination under the Act.

In early 1980, the U.S. Supreme Court held that an employer could not discriminate against an employee who refuses to accept a work assignment which he reasonably believes to pose a grave danger to his safety. In the Court's unanimous decision in *Whirlpool Corp.* v. *Marshall, Secretary of Labor,*[42] the Court found that the Secretary of Labor's regulation providing that "an employee has the right to choose not to perform his assigned work because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available,"[43] was consistent with the Occupational Safety and Health Act. In promulgating a test of "reasonableness" on the part of the employee, the Court pointed out that the employer would be safeguarded from abuse in this area in stating that "any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith."[44]

It is submitted that if the arbitrator is asked to settle a highly technical or scientific safety and health dispute, he should not be reluctant to look to external law (i.e., OSHA, the federal courts, and the NLRB) for guidance. This is consistent with the totality approach as to the use of external law in arbitration, and recognizes that OSHA and the Secretary of Labor are well suited to promulgate viable safety and health standards.

Arbitrators hearing discharge and discipline grievances which concern the safety and health of the workplace will be confronted with conflicts between (1) the right of the employer to manage his business enterprise with the expectation that he will

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[40]*Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 85 LRRM 2049 (1974).
[41]*Brennan* v. *Alan Wood Steel Co.,* 3 OSHC 1654 (E.D.Pa. 1975).
[42]40 CCH S.Ct. Bull., p. B997.
[43]*Id.,* at B1000.
[44]*Id.,* at B1017.

receive a day's work for a day's pay, and (2) the right of workers to earn those wages in a safe and healthful workplace.

Conclusion

Multiple forums are available to the aggrieved employee in safety and health cases. This paper has endeavored to show how forums such as OSHA and the courts interface with arbitration as to such matters. Depending upon the individual philosophies of arbitrators and the nature of the case, the various rules and standards fashioned and adopted by OSHA and the courts may be available to aid in the resolution of safety and health grievances presented to the arbitrator.

Comment—

ADOLPH E. SCHWARTZ*

It is a pleasure for me to be here today and to talk to you about the impact of OSHA on our society and to discuss the role of the arbitrator in settling safety and health disputes between unions and managements. Before I discuss the two areas just mentioned, I am going to make some comments on Professor Britton's overview, "Courts, Arbitrators, and OSHA Problems."

Professor Britton suggests that management claims OSHA and its standards are too broad and vague in scope, while labor feels the standards to be too limited in nature. It has been my personal experience that just the opposite is true. I have participated in numerous OSHA hearings which were conducted for the purpose of promulgating standards. It has been the continual position of management that OSHA should not issue a specification standard, but that OSHA standards should be thought of as goals which management should strive to meet in its own way.

In the lead and coke-oven hearings, for example, the companies fought against the specific requirements for engineering controls, work practices, labeling and posting, and medical surveillance. The union felt that these provisions were essential because they provided specific, unambiguous instructions to management, and because they allow our members to monitor compliance easily. Fortunately, our views prevailed. So it has not been our experience that management believes OSHA standards are too vague.

The overview further suggests that contract provisions on safety and health are approximately 85 percent duplications of regulations enforced by OSHA (*Business Week,* on May 19, 1980, stated that 87 percent were duplications of regulations enforced by OSHA). It would be interesting to me to know how these percentages were determined.

I will not attempt to speak to the contracts on safety and health of other unions, but let me assure you that this is not the case with the United Steelworkers of America. Safety and health language appeared in the very first Steelworker contracts, long

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before OSHA—for example, in the 1936 Carnegie-Illinois agreement. It was a meager beginning, to be sure, but through the years it has been expanded on and improved. Today, Steelworker contracts provide for joint union-management safety and health committees as well as for joint union-company plant inspections, quarterly safety and health meetings, accident investigations and reporting, minutes of safety and health meetings, access to the plant, safety and health education and training, alcoholism and drug-abuse rehabilitation programs, and earnings protection. Workers transferred because of an occupational injury or illness, and all workers, have the right to know the names of the chemicals they are exposed to and the right to know the results of air and noise monitoring.

Few of these provisions are mandated by the Occupational Safety and Health Act of 1970. In the few instances where OSHA standards or rules do overlap with our contract language, we believe that our language is significantly broader, and it predates OSHA standards or interpretations.

The overview also suggests that in the 1980 basic steel negotiations, the industry and the union were willing to work out their own safety and health programs *exclusive* of government regulations, such as that offered by OSHA. This is not the case. While we are extremely desirous of developing our own comprehensive safety and health programs, and hopefully we do not have to utilize the provisions of OSHA, nevertheless we believe the OSHA provisions parallel our own and do not duplicate them. OSHA certainly aids us and our local-union safety and health committees in arriving at more significant safety and health programs. For example, the possibility of an OSHA inspection tends to make management deal in good faith with our safety and health committees. Conversely, the union co-chairman of the committee can be an extremely effective walk-around representative in an OSHA inspection because of his experience on the committee. So, OSHA regulations and our contract language are mutually supportive and complementary.

One final comment on the OSHA portion of Professor Britton's overview. It is suggested that, as a general rule, when an employer receives a citation, the result is strict compliance by the company with the Secretary of Labor's directive to remove the unsafe working conditions. Likewise, when new standards are promulgated by the Secretary, employers usually proceed to implement the new standards. I only wish the foregoing were

true. Too often when citations are issued, the company contests each and every one. When standards are issued, company attorneys usually race to the courthouse, attempting to stay the standard and finally to have it revoked. Our union, in most instances, assists our local unions in Review Commission procedures when citations are contested, and our attorneys, in some cases, join with the Department of Labor solicitors in turning back company challenges to standards. Unfortunately, this is an area that is rapidly expanding, and as far as the Steelworkers are concerned, is a waste of manpower and resources that could be better spent in correcting the unsafe conditions found during an inspection.

The Total Impact of OSHA

I agree with Professor Britton that OSHA created a sweeping, major commitment to the protection of the safety and health of workers on the job. I also believe that the total impact has sent positive waves around the world on safety and health. Environmental groups, public health groups, educators, labor, representatives of industry, and certainly our membership are paying more attention to safety and health issues now than before OSHA came into being.

Very few days go by when there are not items relating to safety and health in our nation's newspapers or on television. Recently, the chemical-waste dump in New York, the Love Canal, has been receiving much attention. DBCPs and PCBs, lead, arsenic, and asbestos are written about and talked about rather frequently by scientists in the media. This does not go unnoticed by our members. The Steelworkers' Safety and Health Department is in daily receipt of requests for information on toxic substances or Occupational Safety and Health rules and regulations. Certainly OSHA has had a great impact in this area.

And recently we have had delegations visit us from Australia, New Zealand, the Philippines, Malaysia, South Korea, Japan, Spain, Canada, Norway, Sweden, and Poland. These delegations are desirous of finding out from us how the Occupational Safety and Health Act is working, what standards have been promulgated under the Act, how they are implemented, and what significant improvements we believe OSHA has made for the safety and health of American workers. Some of the specific

areas of our visitors' interest are coke-oven emissions, lead, arsenic, beryllium, benzene, noise, and toxic substances. We do our best to answer all their questions and to provide them with copies of the Act, rules, regulations, and standards, and such other information as they may be seeking.

I think it is also significant that the International Labor Organization has reviewed OSHA and its rules and regulations for the purpose of possibly making them part of the ILO program. I know that the provinces of Ontario and Quebec, in Canada, have recently enacted significant improvements in their provincial safety and health laws, some of which are along OSHA lines. I do not know specifically how well other nations are doing, but I do know that it is the desire of their labor unions to have OSHA-type safety and health laws in their countries. That is why I believe that OSHA has had a worldwide impact on the safety and health movement.

Union-Management Safety and Health Disputes, and Arbitrators

When a safety or health problem or dispute develops in any of our local unions, the International Safety and Health Department strongly recommends that certain procedures should be utilized before filing a grievance, which may go to arbitration, or before filing an OSHA complaint, which would result in an inspection.

During the past 11 years, the Steelworkers have held well over 300 safety and health training seminars throughout our jurisdiction. The very first order of business is always a statement and discussion of our philosophy—to try to resolve safety and health problems and disputes between the union and the company rather than resorting to outside sources for help.

We begin by telling our safety representatives that the worker should call the problem to the attention of his immediate supervisor. We do this because nobody with a position of responsibility or authority likes to be circumvented. Hopefully, at this point the issue is resolved.

I do not have statistics to prove that this is where the great majority of safety and health problems *are* resolved. However, from personal experience, I believe this to be a fact. If the problem is not resolved at that stage, most of our contracts,

under the dispute section, provide that an employee can either file a grievance in the third step for preferred handling or request relief without losing his right to return to such job if the issue in question is whether or not workers are being compelled to work under conditions which are beyond the normal hazard inherent in the operation.

When the dispute section is utilized, union representatives from the safety committee, including the chairman, local union officers, and the staff representative become involved. Also, their counterparts from management are involved in an attempt to resolve the issue. If the issue is not resolved as a result of the foregoing procedures outlined in the dispute section, then a determination must be made on how to proceed. Should a grievance be filed, or should an OSHA inspection be requested?

This is a serious decision to make, because there are pluses and minuses on either option. If an OSHA inspection is requested, it does take place, and citations are issued, that may be a quick solution to the problem. However, if a company contests the citation, considerable time—up to a year or more—could go by before the issue is resolved by the Review Commission. If it goes beyond that, to the courts, years can go by before the issue is resolved.

On the other hand, if the issue goes to arbitration, the decision of the arbitrator might be quicker than an OSHA inspection, citation, Review Commission procedure, and court proceedings, and, of course, the decision of the arbitrator is binding.

If the issue is going to be arbitrated, the crux of the case is usually whether or not the job or working procedures questioned were beyond the normal hazard inherent in the particular operation. This is the decision that an arbitrator must reach after hearing all of the facts in the case.

At this point it might be well to ask the questions: What does the term "beyond the normal hazard inherent in the operation" mean, and how should it be applied? Where does one draw the line to make a determination as to when buildings, equipment, and work practices are "beyond the normal hazard"?

Plants are built; equipment is installed, if this is a new installation; and people are properly trained. We have every reason to believe that the operation is as safe as we can make it. Age, wear, and tear do set in. Blast furnaces, BOFs, overhead cranes, ground cranes, trucks, railroad equipment, and all of the other

equipment used in the manufacture of goods in this country do deteriorate.

A situation facing an arbitrator, for example, may be one involving a truck that has been in service in a particular plant for several months. On a given day, the driver advises his foreman that there are mechanical difficulties with the truck—no brakes, no lights, no back-up lights, no turn signals, etc. He believes the truck should be taken out of service. It is a few hours until the end of the shift, and the supervisor tells the truck driver, "You can operate this truck until the end of the shift. Be extremely careful. You are a good driver, and I am sure you won't have any problems." The truck driver does as requested by the supervisor.

Several weeks or months later, the same situation arises, only this time the truck driver is adamant in his position that the truck must be taken out of service and repaired. He asks for, and is granted, relief from the job, and a grievance is filed. Ultimately, the grievance reaches the arbitrator, and the issue must be resolved: Was the truck in such a condition as to fall under the definition of "beyond the normal hazard inherent in the operation"?

By and large, companies usually argue that the operator could have operated the truck (or other equipment) in a safe manner until the end of the shift, if he had been careful. They are quick to point out that he, on a prior occasion, had operated the truck, and perhaps they also introduce into the record the names of other people who had operated the truck under like conditions. In addition, they argue that nobody was hurt on the prior occasions, and nobody was hurt on this occasion; therefore, the operation of the truck on the date in question was certainly not a situation which was beyond the normal hazard in the operation.

The union, on the other hand, usually takes the position that if the truck had been operated as the company states, that does not mean that it was in a condition which made it safe within the meaning of the normal-hazard language. They emphasize that the arbitrator should view and decide this issue on the merits of the case as they currently exist, and not rely on the history of the job to make the determination. The union also stresses the fact that many unsafe acts and many unsafe conditions may have existed, and still do exist, in the plant, but this does not mean that this is acceptable. The unsafe conditions should be corrected. If they are not, death can result.

There are many other areas which fall under the provisions of the dispute section where an arbitrator may have some difficulty in arriving at a decision. For example, wherever hot metal is handled in steel-producing, aluminum, and foundry operations, with water present, there is always the very real potential for a violent explosion. One and a half years ago in a foundry in Chicago, there had been complaints about water in the furnace pit. On some occasions, management pumped out the water; on others they didn't. One day a ladle of steel turned over and poured directly into the pit. A violent explosion occurred, killing five of my union brothers. This tragedy should never have happened; yet throughout the hot-metal industries mentioned, it is not uncommon to see standing water where hot metal is handled—under blast furnaces, in O.P. basements, in the steel-pouring aisles, and in a variety of areas of factories. If the workers and the local union safety and health representatives who attend our safety and health conferences are told of these dangers—and they are—and if they go back into the plant and utilize the provisions of the dispute section of the contract to ask for relief from the job, and are discharged, what will the decision be?

So far I have dealt primarily with imminent-danger situations where workers could be killed or maimed if the conditions were not corrected. There is another area which has not seen very many arbitrations. That is the *health area*—one that is of great concern to the Steelworkers. The same procedures of the dispute section are available for handling health-problem questions. However, these problems are going to be far more difficult to solve than those I have just been discussing. If the point is reached where a decision must be made as to whether or not a dispute should be arbitrated or an OSHA inspection should be called for, in matters dealing with health we advise our people to request either an OSHA inspection or a health-hazard evaluation from NIOSH. We do this because OSHA and NIOSH have the personnel and equipment to come in and conduct the necessary environmental sampling and testing as well as the back-up resources to make a determination whether there are overexposures to a substance or the exposure is within OSHA standards. If the issue were to be arbitrated, there would have to be investigation and testimony by hygienists and medical doctors, who would be satisfactory to the union and the company, to enable the arbitrator to reach an informed decision. This could prove

to be far more costly and time-consuming to the union and the company than if the federal agencies just mentioned were used to conduct the investigation.

There are many other areas concerning the health of our workers where the problems would be very difficult for the arbitrator and the arbitration process. For example, many thousands of our members are exposed to lead. We have a lead standard which is currently partially stayed by the courts. I am not going to get into the argument of whether the standard is too stringent, as claimed by management, or too loose, as we feel it is in some areas. I am just going to raise the issue. Most scientists and medical people agree that lead is cumulative in the body. A person can have so-called normal lead levels in his blood and yet have stored enough lead in his system to cause damage to the brain, the nervous system, and the kidneys. In time, if the worker has his blood tested often enough, the level will get above the permissible limit. There is only one way besides chelation in which blood lead can be reduced, and that is to remove the worker from lead exposure. That is why we fought so hard to obtain rate-retention language in the current lead standard.

If the issue of excessive exposure to lead were to reach arbitration, the arbitrator would have to decide when the worker must be removed from the job and awarded rate-retention, and when it is safe for him to return to his job. Arbitrators would face similar determinations in cases involving other toxic substances, such as asbestos, coke-oven emissions, beryllium, arsenic, cotton dust, benzene, and noise. To the best of my knowledge, our local unions have not utilized arbitration very much for these problems. However, that may change, and it was my purpose in raising the issue today to stimulate your thinking about possible solutions.

As I suggested earlier, American workers generally, and our members in particular, are becoming more and more aware and concerned about their safety and health on the job. In the old days, my father used to say, "Where you see smoke, there is work and that is good." Today, where there is smoke, there is probably work, but it is not necessarily good. The primary example that comes to mind are the conditions of our coke ovens where for over 50 years workers were contracting lung diseases at a rate far in excess of that of the general public.

Because workers are more knowledgeable and concerned in

matters of safety and health, they are now taking a far more critical look at their immediate surroundings and their place of employment, and safety and health issues that have lain dormant for years are surfacing in increasing numbers. I believe that the issues that will be forthcoming to arbitrators under the dispute section of our agreement are going to be increasing, and arbitrators will be asked to make decisions in the areas I have touched on today—namely, is a job safe or unsafe, keeping in mind the normal-hazard terminology of the dispute section.

I know that the arbitrators present today are often faced with very difficult decisions—decisions that require much agonizing and strain. During my years in the safety and health field, I have come across some medical advice for the strain and anguish you face: Don't worry, don't hurry. It's a short trip. Take time to smell the flowers.

CHAPTER 10

ARBITRATION OF DISCRIMINATION GRIEVANCES

WILLIAM P. MURPHY*

The most dramatic development in labor law and industrial relations in recent years has been in the area of employment discrimination. The Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972; and the Age Discrimination in Employment Act of 1967, as amended in 1978, are all based primarily on Congress's power to regulate commerce. With limited exceptions, these statutes cover all private employment, and they prohibit discrimination because of race, color, sex, religion, national origin, and age. In addition, there is Executive Order 11246, which includes the same prohibitions and applies to employment under federal contracts and federal financial-assistance projects. The Vocational Rehabilitation Act of 1973, as amended in 1978, prohibits discrimination against the handicapped. As of now, the VRA applies only to federal employment and private employment under federal contracts and federal financial-assistance projects. Bills are pending in Congress to bring the handicapped under the general coverage of Title VII, and there seems little doubt that this will be done in the early 1980s.

These federal programs have generated a staggering amount of compliance and enforcement activity. The amount of litigation is voluminous and shows no sign of abating. Indeed, when Title VII includes the handicapped, a substantial increase seems likely.

Collective bargaining agreements have long contained a section prohibiting discrimination on the basis of union activity, tracking a statutory prohibition in the National Labor Relations Act. As no-discrimination statutes have been enacted by Con-

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gress, the no-discrimination sections in the labor agreements have been expanded to include the prohibited statutory bases. Thus, in many instances, an allegation of discrimination may be processed both under a statute or as a grievance under a collective agreement. In the leading case of *Alexander* v. *Gardner-Denver,*[1] the Supreme Court held that the arbitration of a discrimination grievance did not constitute a waiver of the Title VII cause of action, and that the plaintiff was entitled to trial de novo in the federal court. The Supreme Court stated, however, that "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." The Court here added its well-known footnote 21 discussing the factors the court might consider.

Gardner-Denver created early fears that employers, in order to avoid having to defend twice or more, would seek to negotiate no-discrimination sections out of the labor agreements. This has not happened; to the contrary, as noted, these sections are generally being expanded to parallel the statutes. From the employer view, this brings such grievances within the scope of the no-strike clause and the *Boys Markets* injunction. Unions feel impelled, because of their fair-representation obligation, to negotiate such contractual prohibitions. It has even been argued that the failure to make discrimination claims grievable under the agreement would constitute a violation of Title VII.[2]

The arbitration of discrimination claims has been discussed at previous annual meetings of this Academy in 1971, 1972, 1974, 1975, and 1976. The subject has not been on the program for the past three years. These earlier papers have evaluated arbitration awards in sex- and race-discrimination cases,[3] discussed *Gardner-Denver* and whether and how the arbitration process might be modified accordingly,[4] recracked the old chestnut

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[1]415 U.S. 36, 7 FEP Cases 81 (1974).

[2]Hill and Sinicropi, *Excluding Discrimination Grievances from Grievance and Arbitration Procedures: A Legal Analysis,* 33 Arb. J. 16 (1978).

[3]McKelvey, *Sex and the Single Arbitrator,* in Proceedings of the Twenty-Fourth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1971), 1; Gould, *Judicial Review of Employment Discrimination Arbitrations,* in Proceedings of the Twenty-Fifth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1973), 114.

[4]Coulson, *Black Alice in Gardner-Denverland,* in Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1975), 236; Aksen, *Post-Gardner-Denver Developments in Arbitration Law,* and Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims,* in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 24, 36; Williams, *Arbitration and Discrimination: A Modest Proposal for the*

whether arbitrators of discrimination claims should consider public law,[5] and in one empirical study raised questions as to the competence and knowledgeability of arbitrators to decide discrimination claims.[6] None of the previous discussions, however, has catalogued in summary fashion the numerous practical limits to the utility of the arbitration process under collective bargaining agreements in the resolution of discrimination claims.

1. Arbitration is available only to employees in a unionized work force. The acts of Congress apply without reference to unionization as broadly as Congress has chosen to use its commerce-regulation power. Roughly accurate estimates are that about 30 million employees are covered by collective agreements, whereas Title VII reaches almost three times that number. And, even if the employer is unionized, the statutes apply to many employees not included in the bargaining unit, and to whom the grievance procedure is not available. An outstanding example is found under the Age act, which has been referred to as the discrimination statute for advantaged white males, since the typical plaintiff is a middle-level executive of advancing years who has been replaced by a comparative adolescent. It can be noted that the American Arbitration Association has tried to encourage individual-worker arbitration of discrimination claims in nonunion work forces,[7] but the program has not gotten off the ground. Last October Bob Coulson told me that only one employer had adopted the AAA format.

2. Arbitration under labor agreements will reach only employer, but not union, discrimination, and in many situations the union may have covertly participated in the discrimination.

3. Arbitration is limited to actions taken under the labor agreement, and the grievants are incumbent employees. But the more pervasive and socially harmful discrimination is in the hiring practices themselves, which are beyond the reach of the grievance procedure. Thus, arbitration has no role to play in the

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Immediate Future, in Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 34.

[5]Meltzer, *Arbitration and Discrimination: The Parties' Process and the Public's Purposes,* in Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 46. *See also* Robinson and Neal, *Arbitration of Employment Discrimination Cases: A Prospectus for the Future, id.,* at 20.

[6]Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 59.

[7]See Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims,* 33 Arb. J. 23 (1978).

cardinal objective of achieving equality of initial employment opportunity.

4. The concept of discrimination is no longer confined to actions directed at particular individuals, but more broadly embraces systemic practices that affect large numbers of people. The distinction between disparate treatment and disparate impact is now well recognized in discrimination law. Systemic discrimination is usually dealt with under the disparate-impact branch, and typically through the legal device of the class action. Arbitration does not provide anything comparable to the class action in the federal courts, and is therefore confined almost altogether to individual claims of disparate treatment.

5. With respect to the development and preparation of cases, arbitration provides to the advocate no counterpart to the methods of discovery which are normal to the federal courts under their rules of civil procedure. Nor is there in arbitration anything comparable to the pretrial conference which is so widely used in the federal courts. Even though the case may have legal overtones, the grievant may not be represented by an attorney. In many cases there is no transcript.

6. The remedial power of an arbitrator, though equitable in nature and accorded considerable latitude under the Supreme Court's decision in *Enterprise Wheel,*[8] one of the 1960 *Trilogy,* could not realistically be equated with the equitable power of a federal court operating under a broad statutory mandate. Federal courts possess a remedial power arbitrators do not enjoy—the power to enforce their own orders.

7. Questions have been raised as to the competence of arbitrators generally to decide discrimination claims, at least when the case includes public-law dimensions. Discrimination grievances raise in perhaps its most important context the much-discussed question of the power/duty of the arbitrator to consider/apply public law in deciding a grievance under the contract. The various views of this issue have been expressed many times at these meetings and will not be regurgitated here. Suffice it to say that many collective agreements today expressly authorize the arbitrator to resort to public law, and many arbitrators do so whether expressly authorized or not.

In recognition of the foregoing considerations, former pro-

[8] *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

fessor Edwards developed a two-track arbitration system, one track for traditional contract grievances and a second track/procedure providing for a limited use of arbitration in discrimination grievances.[9]

Whereas the federal courts continue to be flooded with discrimination cases under the modern statutes, there has been no comparable upsurge in the arbitration area. In the *Labor Arbitration Reports* (LA) *Cumulative Digest* covering volumes 61–70 and the five-year period 1974–1978, the section digesting discrimination cases runs only 12 pages out of a total of 578; the number of discrimination cases is about 150. Volume 71 of LA contains only 18 such cases, and Volume 72 only 12. The AAA's Summary of Arbitration Awards for the period January 1979–April 1980 reports only about a dozen cases. One assumes that the publishers would be eager to report cases in such a highly publicized area. But if the published cases are a fair reflection of the unpublished ones, then it is apparent that discrimination grievances represent a very small percentage of the total arbitral product. And conversations among arbitrators do not indicate widespread arbitration of discrimination claims. And as for that famous footnote in *Gardner-Denver,* a study last year found only two cases in which a federal court had given weight to an arbitration decision.[10]

In sum, the subject may be one whose importance has been inflated by excessive discussion. The published awards reveal that, with few exceptions, arbitration is confined to individual claims of disparate treatment.[11] While important to the individuals concerned, such cases in the aggregate do not match the significance of class actions reaching systemic discrimination under the statutes. Thus, it seems clear that the national policy against employment discrimination must continue to find its primary enforcement in the federal courts. But, with judicial and EEOC backlogs being what they are, the arbitration process can perform a useful role, even though a modest and subordinate one, in the resolution of disputes arising out of the implementation of that national policy.

Most of the reported arbitration cases deal with alleged dis-

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[9]Edwards, *Arbitration as an Alternative in Equal Employment Disputes,* 33 Arb. J. 23 (1978).
[10]Wolfson, *Social Policy in Title VII Arbitrations,* 68 Ky. L.J. 101 (1979–80), 137.
[11]Oppenheimer and LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis,* 34 Arb. J. 12 (1979).

crimination in discipline, work assignment, promotion, and other individual decisions. There is a fair number of cases dealing with the denial of pregnancy benefits, an issue now largely laid to rest by act of Congress.

I would like to focus on a newly emerging problem, one in the area of sex discrimination. In line with the theme of this year's meeting, it is a problem area that poses sensitive and difficult issues of fact. It is the problem of sex harassment, and it surfaced for the first time in federal court under Title VII only five years ago. In *Corne* v. *Bausch & Lomb, Inc.*,[12] female plaintiffs alleged that they had been repeatedly subject to verbal and physical sexual advances by their supervisor, and had ultimately been forced to resign because of his unwelcome activities. The district court held that there was no cause of action under Title VII, that the supervisor was not an employer but rather a fellow employee, and that the company was not vicariously liable because the supervisor's acts served no company policy and accrued no benefit to it. The court viewed the supervisor's conduct as "a personal proclivity . . . satisfying a personal urge." The court reacted to the floodgate syndrome, stating that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another." Subsequent cases have repudiated this early restrictive view.

In 1977, courts of appeal for the Third, Fourth, and District of Columbia Circuits recognized causes of action under Title VII for sex harassment. Perhaps the leading decision is that of the Third Circuit in *Tomkins* v. *Public Service & Gas Co.*[13] In this case plaintiff, secretary to a company supervisor, alleged that he told her she should lunch with him at a nearby restaurant to discuss his upcoming evaluation of her work, as well as a possible promotion; that at lunch he stated his desire to have sexual relations with her and that this would be necessary to a satisfactory working relationship; that when she attempted to leave, he threatened her with recrimination and told her that no one in the company would help her if she complained; that subsequently she was transferred to an inferior position in another department; that she was subjected to false and adverse performance evaluations, disciplinary layoffs, and threats of demotions; and that the company knew or should have known of, and

[12] 390 F.Supp. 161, 10 FEP Cases 289 (D. Ariz. 1975).
[13] 568 F.2d 1044, 16 FEP Cases 22 (1977).

had acquiesced in, the supervisor's actions. The district court dismissed the complaint, characterizing the supervisor's acts as an "abuse of authority . . . for personal purposes." This, the court of appeals said in reversing, "overlooked the major thrust of Tomkins' complaint, i.e., that her employer, either knowingly or constructively, made acquiescence in her supervisor's sexual demands a necessary prerequisite to the continuation of, or advancement in, her job." The court distinguished between "complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances . . . ," a distinction which "recognizes two elements necessary to find a violation of Title VII: first, that a term or condition of employment has been imposed and second, that it has been imposed by the employer, either directly or vicariously, in a sexually discriminatory fashion." Applying these requirements to the complaint, the court stated: ". . . we conclude that Title VII is violated when a supervisor, with the actual or constructive knowledge of his employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge."

Bear in mind that all the court of appeals did was to reverse the district court's dismissal of the complaint for failure to state a course of action. In such an action, the allegations of the complaint are accepted as true. At trial, the allegations will have to be proved. As an advocate or as an arbitrator, consider the evidence which must be adduced and will be probative on any number of critical issues: Were the sexual advances actually made and made as a condition of employment; what constitutes actual or constructive knowledge of the employer (and, parenthetically, who is the "employer" for this purpose); what constitutes prompt and appropriate remedial action? In many if not most cases, there will be conflicting one-to-one testimony on whether the sexual advances were made. Adverting to the "difficulty in differentiating between spurious and meritorious claims," the court opined that "we are confident that traditional judicial mechanisms will separate the valid from the invalid complaints."

In March of this year, the EEOC issued its guidelines on

sexual harassment. They state that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature is a violation of Title VII when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

In several respects the EEOC guidelines go well beyond the judicial decisions. First, they impose liability on the employer "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." Second, they go beyond the supervisor/employee context and include in the definition of unlawful harassment sexual conduct which "has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." This concept of sexual harassment was advanced in the *Tomkins* case, but the Third Circuit declined to pass on it. The EEOC guidelines state that, with respect to conduct by persons other than its agents and supervisors, the employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

Third, the EEOC guidelines emphasize prevention as the best tool for the elimination of sexual harassment. Steps which should be taken by an employer are affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment, and development of methods to sensitize all concerned. As I read the guidelines, these steps are not legally required, but are factors which certainly will be taken into account in determining whether a violation has occurred.

Given the judicial decisions sustaining a cause of action for sex harassment under Title VII and promulgation of the EEOC guidelines, increased compliance and enforcement activity under the statute seems inevitable. Last fall the House Civil Service Committee held three days of hearings on sex harassment in the federal service, several federal agencies have already

issued directives, and at least one union has prepared a handbook on the subject.

What is the utility of the arbitration process in sex harassment cases? Obviously it will not be available if neither the female nor the harassing male are members of a bargaining unit. In the collective bargaining context, there may be a number of complicating factors that will affect the availability or utility of the grievance and arbitration system. Has the company adopted a procedure for dealing with complaints of sex harassment? Is the harassing male a nonunit supervisor or a member of the unit? What is the purpose of the grievance—to end the harassment or to obtain some employment opportunity denied for failure to cooperate?

A recent study of arbitration decisions in sex-harassment cases,[14] the first such published to my knowledge, demonstrated that arbitration has been invoked in almost all cases by male employees who have been disciplined by management for harassing females. The study covers the period 1958–1978, thus ending just as the new legal developments under Title VII are beginning. The study shows that at least some employers were responding to sex-harassment complaints even before the law required it, that unions were frequently placed in a role-conflict situation in the processing of grievances with both females and males in the unit, that complaining females sometimes receive the cold-shoulder treatment or worse from fellow employees, and that arbitrators have given variable responses and rationales.

Recently I have arbitrated two cases involving sex harassment. One case was of the model just discussed: the grievant was a male employee who was disciplined for harassing fellow female employees. The other was also a discipline case, but here the grievant was a female who had been discharged for walking off her Saturday 4 P.M.-midnight shift. Part of her defense was that her supervisor who imposed the discipline had made sexual advances. In both cases there was sharply conflicting testimony. I suggest to you that sexual-harassment cases pose especially difficult and important problems of factfinding, since the decision for all, but especially the male and female, may be more pervasive and far-reaching in personal as well as job conse-

[14]Marmo, *Arbitrating Sex Harassment Cases,* 35 Arb. J. 35 (March 1980).

quences than such issues as insubordination or absenteeism.

As a reprise on my original theme, the arbitration forum in sex-harassment cases for many reasons cannot be considered equivalent to the judicial one, but it does seem clear that there are situations in which it is appropriate and may play its subordinately useful role.

If time permitted, I would explore with you briefly another emerging area of discrimination—the handicapped. Here again federal law and forums will be predominant, but in certain situations arbitration will be appropriate and can make its contribution, and I think we can predict safely that in the 1980s issues involving handicaps will emerge more frequently in arbitration cases. Arbitrators, of course, are not totally unfamiliar with the problem. Cases involving epileptics and alcoholics, for example, have been around for a long time. But new developments, such as the expansion of the definition of a handicapped individual and the requirement of reasonable accommodation, will demand new thinking. We may even be required to make reasonable accommodation at our hearings in order to afford procedural due process to persons with auditory, visual, and speech impairments. I hope my fellow members of this panel will contribute their wisdom to this matter of discrimination against the handicapped.

In conformity with the factfinding theme of this meeting, let me in closing remind you of a basic fact that tends to be forgotten. As advocates and decision-makers in the broad field of employment discrimination, we become absorbed in the details of our specific problems and individual cases. The larger purpose of the no-discrimination laws becomes obscured. That purpose is to provide equal employment opportunity to our people by eliminating artificial and unfair factors that are unrelated to work performance. The honest differences as to fact and law, the spurious claims and obstructionist defenses, are natural and inevitable. They do not gainsay the basic facts that the United States is engaged in a national and human effort unique in our history and I think unmatched in any other country, that this effort is a noble and idealistic one, and that as Americans we can take pride in it.

Comment—

J. LEON ADAIR*

As pointed out by Bill Murphy, there are certain practical limitations in the utilization of arbitration in regard to discrimination claims. Certainly, there are particular discrimination claims better suited for courts than for arbitration. But, from a practical standpoint, it is the vitality of day-to-day grievance-arbitration machinery, giving meaning and life to rights and obligations in a well-reasoned collective bargaining agreement, that provides an employee with the very best vehicle for vindication of most discrimination claims.

Without even considering a no-discrimination provision, a collective bargaining agreement embodying meaningful seniority, transfer, promotion, layoff, and disciplinary clauses provides a means by which most discrimination claims can be resolved. In fact, in most instances sound collective bargaining agreements provide much broader coverage to those in the bargaining unit than does the combination of the relatively few meaningful discrimination statutes.

For example, in the South Central Bell-CWA agreement, the parties have embodied job-bidding selection and transfer provisions. Moreover, an "arbitrary action" standard by which selections and transfers are measured has been included. Pursuant to this selection provision, a female employee was denied a frame person's position due to her weight. The arbitrator, in finding "arbitrary action," based his decision in large part on the fact that overweight men were satisfactorily performing the duties of that same position.

Pursuant to an identical provision in the Southern Bell-CWA agreement, the company's selector selected a junior employee for promotion over the senior grievant in part because the grievant was "distractingly overweight." Again, while the company urged the soundness of its action because of the face-to-face customer contact required by the job, the arbitrator found "arbitrary action," based primarily on the unreasonableness of the selector's utilization of weight as a factor.

Again, under the "just cause" provision of the South Central

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Bell contract, the discharge of a female employee, who refused to move light fixtures up steps because they were too heavy and bulky for her five-feet-four-inch, 105-pound frame to carry, was challenged to arbitration. The arbitrator, in alluding to the reasonableness of the grievant's safety-hazard belief, sustained the grievance. It is submitted that this decision is but an acknowledgment that in the industrial setting there are many types of handicaps among the work force for which reasonable accommodations must be made to avoid discrimination against those so handicapped.

These are basic examples of the day-to-day operation of the grievance-arbitration machinery giving meaning and life to employee rights under a collective bargaining agreement. Not only was a female protected from disparate treatment on the basis of sex in the first example (which protection would also have been afforded under Title VII), but also in both weight-related cases grievants were protected from disparate treatment based on their weight (concerning which discrimination there is no statutory protection). In all three examples, female employees were protected from being discriminated against because of their physical handicaps.

Moreover, the grievance-arbitration procedure, as compared to court action, allows valuable flexibility in the handling of a grievance situation factually intertwined with both discrimination and basic contract claims. Consequently, many potential discrimination claims are headed off by traveling an entirely different route in arbitration.

For example, in another selection case wherein certain senior female grievants were not considered for a job requiring climbing solely on the basis of their failure to make a passing score on a Physical Abilities Test Battery (PATB), the challenge in arbitration was directed to a contractual provision requiring consideration of "all necessary qualifications" rather than to the fact that the company's own validation study disclosed that this test would eliminate 50 percent of all women candidates as compared to less than 10 percent of all male applicants. (And, one of the PATB tests designed to determine stamina was a measurement of body fat, even though women are generally conceded to possess, on the average, approximately 10 percent more body fat than men.) This matter was resolved by the parties short of court action by the arbitrator's finding that the contract had been so violated. Again, this underscores the utility of arbitration in discrimination-related matters.

Moreover, we all know of examples of arbitration wherein discrimination was *the* main issue. One such case involved Georgia Power and the IBEW. A grievance was filed on behalf of a black male claiming that he had been discharged because of his race. In that particular case, the grievant was discharged upon destroying office equipment and throwing certain objects at his supervisor. Evidence was presented to the effect that the grievant had been the object of racial slurs and insults by fellow employees for an extended period of time and that management had done little to stop this alleged behavior. The arbitrator, while asserting that the grievant's action could not be tolerated, sustained the grievance on the basis of this racial provocation.

Much has been written regarding the shortcomings of the arbitration process in the area of case development and preparation. While it is certainly true that the Federal Rules of Civil Procedure provide for a broad range of discovery not available in arbitration, much information, including documents and statistical studies, can be obtained for grievance arbitration. The Supreme Court in *NLRB* v. *Acme Industrial Co.* [1] held that the duty to bargain unquestionably extends beyond the period of contract negotiation and applies to labor-management relations during the term of the agreement, including the processing of grievances. The Court further held in *Acme* that the employer's duty to furnish relevant information needed by a union for the processing of grievances includes all information having a "potential" relevance to the union's evaluation of a contractual claim.

Parties can utilize the NLRB in obtaining data relevant to the handling of grievances for arbitration, including information pertinent to discrimination claims. In two relatively recent cases, *Westinghouse Electric Corp.* [2] and *East Dayton Tool & Die Co.*, [3] the Board held that the union was entitled to a wide range of statistical data regarding race and sex matters including, among other items, the number of employees in each job classification by race and sex, their seniority, their wage rates, and the number hired and promoted during certain periods of time. In addition, the Board concluded that the union had the right to copies of all complaints and charges alleging discrimination with respect to bargaining-unit employees filed against the company pursuant

[1] 385 U.S. 432, 64 LRRM 2069 (1967).
[2] 239 NLRB No. 19, 99 LRRM 1482 (1978).
[3] 239 NLRB No. 20, 99 LRRM 1499 (1978).

to various federal and state fair employment practice laws, along with information pertaining to the status of each. And, finally, the Board held that the company was under an obligation to produce data disclosing the race and sex of job applicants.

In both of these cases the parties had negotiated antidiscrimination clauses into their contracts, and in one of these contracts the discrimination clause included the phrase, "The Company and Union agree to provide equal employment opportunity without regard to race, color, creed or national origin."

The Board based its decisions not only on the antidiscrimination clauses themselves, but also on the very nature of the collective bargaining representative's status as representative of all unit employees, which imposes an obligation on the representative to represent the interests of minorities with due diligence, fairly, and in good faith.

In addition, any relevant data in connection with a discrimination claim not forthcoming prior to arbitration can, in almost every case, be obtained by a request of the arbitrator. Who among us would chance an adverse impression or inference by refusing such a request?

In short, there are ways and means by which most relevant information can be obtained in discrimination-type grievances being handled in arbitration.

And, finally, much has been said and written about the effect on arbitration of the Supreme Court's action in *Alexander* v. *Gardner-Denver.*[4] Further, there have been many suggestions, some which appear to be quite extreme, as to how the arbitration procedure may be changed and improved so as to place the proceeding in the best possible light when viewed by a judge in a trial de novo of a discrimination claim.

In the first place, arbitration just does not lend itself to a proper treatment of certain discrimination claims. This does not mean, of course, that we should do other than give it our best in arbitration. In fact, we'd better give it our best or we'll be facing a meritorious fair-representation suit. *Gardner-Denver* is an ever-present reminder to give such a grievance as thorough treatment as reason and the circumstances of the case permit. However, once we have given it our best, we shouldn't worry about the weight that a court will give the job that has been done

[4]415 U.S. 361, 7 FEP Cases 81 (1974).

in arbitration. The goal is to stamp out discrimination in the workplace.

In regard to the suggestions that the parties either eliminate or broaden to a much greater extent antidiscrimination clauses in the collective bargaining agreement in order to accommodate the problems created by *Gardner-Denver*, I disagree. Arbitration is what it is today because it is designed to handle grievances in an uncomplicated, inexpensive, and expeditious fashion. To eliminate the antidiscrimination clause is to invite litigation; and to broaden this provision to include, among other items, the arbitrator's rewriting provisions found by him to be discriminatory would greatly complicate the collective bargaining process. In my opinion, both of these suggestions are in the category of overreaction. We don't endure a heart transplant to improve our appearance.

It would be my suggestion that we not alter the method now used, just improve our performance thereunder. In closing, I would suggest that we view *Gardner-Denver* as Mark Antony viewed Caesar when he said: "The evil that men do lives after them. The good is oft interred with their bones" [Julius Caesar, Act III, Scene ii].

And I would add: "And, so let it be with *Gardner-Denver*-type cases."

Comment—

ROBERT W. ASHMORE*

In responding to Bill Murphy's remarks, I will first make a few general comments on the arbitration of discrimination cases. Then I will talk briefly about the possible uses of arbitration in handling sexual harassment cases and cases involving the handicapped.

I.

I agree with Bill that, although the role of arbitration in resolving claims of discrimination is limited, it serves an important function within its limited sphere. Arbitration should be as simple a process as it can be made to be: a private resolution of a dispute by an individual selected by the parties, rendered reasonably promptly and economically, and final and binding absent very unusual circumstances. It would be a mistake to attempt to modify the arbitration of discrimination cases to make arbitration, in effect, an enforcement arm of the EEOC. To the extent that employers are denied the right to participate in the choice of the arbitrator, they are going to want, and deserve, a right of appeal from the decision, and the resulting expenses and delays would destroy much of arbitration's value in such cases.

Certain comparisons between arbitration and litigation, it seems to me, miss the point. Commentators often forget that the vast majority of Title VII cases are resolved short of litigation by EEOC personnel, many of whom have limited experience and very heavy caseloads. Frequently, administrative resolutions are delayed for years.

I believe that many more discrimination cases are resolved through grievance procedures than are reflected in published decisions. Employers are not as willing to take a questionable case to arbitration where the issue involved is discrimination, since the publicity generated by a company's losing a discrimination case is considerably more likely to affect the employer adversely than in the case of a discharge for other reasons.

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Because the grievance and arbitration process brings together in a routine way management and union people accustomed to dealing with each other, there is likely to be less emotionalism than there is when a government agency is involved. Arbitration offers a far more realistic opportunity for an employee actually to get his job back, where there is evidence of discrimination in connection with the discharge decision.

While the union's duty of fair representation will be discussed in a further session today, I want to say a word about it in connection with the arbitration of discrimination cases.

In *Vaca* v. *Sipes,*[1] the Supreme Court said that fair representation includes a duty to "serve the interests of all members without hostility or discrimination toward any, to exercise . . . discretion with complete good faith and honesty, and to avoid arbitrary conduct." In *Hines* v. *Anchor Motor Freight, Inc.,*[2] however, a Supreme Court majority clouded the issue of the extent to which a union will be held liable to one of its members for breaching its fair representation duty in processing a grievance through arbitration. Some attorneys representing unions have taken the position that under *Hines,* where a union's gross breach of duty in processing a grievance "taints" an arbitration decision, and the grievant eventually wins reinstatement in an "untainted" arbitration years later, the employer is liable for back wages for the *entire* period, including the period of delay caused by the union's misconduct.

I don't read *Hines* that way, and I think that the courts will ultimately hold unions liable for breaches which cause a delay in a grievant's reinstatement. At present, however, the Supreme Court has failed to spell out the union's liability in such instances. The resultant confusion in legal obligations does little to promote effective union representation in discrimination cases. That is particularly true since discrimination cases often involve conflicts between members of the bargaining unit.

II.

Concerning the problem of sexual harassment in the workplace, as with other kinds of employment discrimination, many cases will *not* be resolved in arbitration.

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[1]386 U.S. 171, 64 LRRM 2369 (1967).
[2]424 U.S. 554, 91 LRRM 2451 (1976).

Many such cases will involve allegations of supervisory harassment. Where such a charge is found valid by management, the supervisor is likely to be fired or otherwise severely disciplined. Action against supervisors, of course, will generally not be subject to arbitration. Even where a supervisor is not involved, management's response in disciplining the unit employee engaged in misconduct will in many cases resolve the grievance or potential grievance of the victim of harassment.

On the other hand, such discipline of, typically, a male employee considered to have engaged in sexual misconduct may itself give rise to a grievance by the male. These will be troublesome for unions because of the internal conflict between male and female members of the bargaining unit. Such cases point up the need for holding unions accountable for arbitrary, discriminatory, or bad-faith actions in processing grievances.[3]

Some special problems are likely to arise in the arbitration of sex harassment cases. Defining just what "sexual harassment" is will be an initial problem. Obviously, physical assault or improper physical contact should be included in the definition. Obscene gestures or taping obscene pictures to a woman's locker will, in many instances, be included. A more troublesome area is that of verbal harassment. To what extent does actionable sexual harassment encompass words (or actions) not directed at a female employee but inadvertently overheard (or observed) by the female? The answer in a particular case may depend on such factors as whether the employee engaging in offensive conduct could have reasonably expected to be overheard (or observed), where within the facility the incident occurred, and whether the employer had, or had not, taken corrective action in response to prior similar complaints. A further problem is whether arbitrators should reject employer policies which are not "sex blind," or should approve policies which impose upon male employees more stringent standards of acceptable behavior when women are present. I predict that arbitrators are going to expect an employer's sex harassment policy to be "sex blind" on its face, since males as well as females could be subjected to actionable sexual harassment. But I also predict that the application of such "sex blind" policies will in many cases require male employees to speak and behave differently

[3]*See Vaca* v. *Sipes, supra* note 1.

when they are around women employees from the way they behaved around other male employees in the past. In other words, as in the case of race discrimination, past practice—"we've always talked that way"—will often not be a valid defense to a grievance claiming sexual harassment.

On the other hand, I suspect that in many cases there will continue to be a valid distinction between what is considered unacceptable vulgarity in an office and what is considered unacceptable in a steel mill. The sensitivity (or oversensitivity) of a particular grievant, however, may also be relevant, even in a steel mill, and employers are going to have to struggle with questions of how far they will seek to defend a sex harassment case by impugning the character and reputation of a grievant. Obviously, where such a defense is presented, there will be some difficult questions of admissibility for arbitrators.

A further potential problem relates to the matter of remedies. What remedies are available if management discounts the grievant's story, or finds provocation, and refuses to act? Where a grievant can show some money loss due to unlawful retaliation by a supervisor, as through discipline or failure to promote, in cases where the employer knew or should have known of sexual harassment, an employee will often be able to obtain a make-whole remedy.

On the other hand, what if the employer has a long-standing and widely disseminated policy against sexual harassment, a policy which has been consistently enforced? In that context, let us say that a lower level foreman with an impeccable prior record refuses to promote a female who has rejected his sexual advances. The victim of this misconduct then waits 30 days to report the incident. At that point the foreman is fired and the promotion error is corrected. Must the employer be absolutely liable for back wages for the intervening 30 days—that is, for the sexual deviations of all its supervisors, without regard to whether the employer knew or should have known of the problem and where the employee failed to report it promptly? I think not, but the EEOC's guidelines would impose absolute liability on the employer in such cases.[4] This question will ultimately have to be resolved in the courts.

In various other situations involving sexual harassment, such

[4]29 C.F.R. §1604.11.

harassment is likely to be unrelated to any specific monetary loss. If the employer rejects the complaint of an alleged victim, the grievant will, I believe, be limited to seeking a cease and desist order against management. Arbitrator Ralph Seward said: "The ordinary rule at common law and in the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured party 'whole.' Unless an agreement provides that some other rule should be followed, this rule must apply."[5] Claims of damages for mental anguish are too speculative to be resolved in arbitration.[6]

Aside from the problems of absolute employer liability and damages beyond a make-whole remedy, I believe that arbitration is better suited for handling sexual harassment cases than are the backlogged courts. The matter of delay could be a particular problem in such a case. And an arbitrator having an understanding of an industry or of a particular company will be in a better position than the courts to define sexual harassment in a particular employment context.

III.

The applicability of arbitration to cases involving the handicapped is a considerably more complicated problem. Here, as elsewhere, many issues will be outside the scope of arbitration, particularly in the area of hiring. Other matters may just not be suited for arbitration, or even litigation. I will talk first about traditional arbitration and then about affirmative action involving the handicapped.

For years, arbitrators have dealt effectively with the many difficult problems of when a handicapped employee is qualified to retain or to bid for a particular position. In other words, the question has been whether the employee meets the minimum standards of the job. Cases such as those involving epilepsy, personality disorders, back problems, and alcoholism, while often involving medical testimony, are nevertheless well suited for decision by arbitrators.

As affirmative action leads to the hiring of more and more

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[5]*International Harvester Co.*, 15 LA 1, 1 (Seward, 1950); accord, *National Lead Co.*, 36 LA 962, 964 (Marshall, 1961); *Bearings Co. of America*, 35 LA 569, 573 (Abersold, 1960).

[6]*See Walker Manufacturing Co.*, 42 LA 632 (Anderson, 1964); *Sylvania Electric Products, Inc.*, 37 LA 458 (Jaffee, 1961); *Sears, Roebuck & Co.*, 35 LA 757 (Miller, 1960); *Permutit Co.*, 19 LA 599 (Trotta, 1952).

handicapped individuals, there is bound to be a substantial increase in the number of arbitrations requiring individual determinations of fitness to perform a particular job. I doubt that the mental processes of an arbitrator in deciding such cases are likely to differ in any significant respect from those of a judge faced with the same issues. Particularly since these cases usually concern a single individual having a unique disability, arbitrators can serve a valuable role in resolving many of them.

One difficult issue likely to arise is whether an individual is eligible to bid for a position if he has the necessary seniority and is otherwise eligible, but has a debilitating disease that will predictably require his demotion or termination within a few months or within a few years. Certainly, the length and expense of any training problems involved are relevant and important factors to be considered in deciding such cases.

A further problem that may arise in the arbitration of handicapped cases is that more and more employers are likely to refuse to accept an arbitration award as final where a ruling in favor of a handicapped employee conflicts with what the employer considers to be its statutory duty to provide a safe place for employees to work or, in the case of airlines, a statutory duty to maintain the highest degree of safety in the public interest.[7]

The matter of affirmative action is an entirely separate problem. Under the Rehabilitation Act of 1973, almost all federal contractors must include clauses in which the contractor agrees (1) not to discriminate, and (2) to undertake affirmative action to provide employment opportunities for the handicapped. Responsibility for enforcement presently rests with the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor.[8]

While Bill Murphy may be correct in predicting that handicap discrimination will soon be brought within Title VII, the desirability of such a change is very questionable.

First, the EEOC finally appears to be making some progress in eliminating its extraordinary backlog of cases. With 12 million or more handicapped adults in the population, the influx of charges of handicap discrimination could hardly fail to disrupt

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[7]*See* 29 U.S.C. §654(a)(1) (OSHA requirements); 49 U.S.C. §1421(b) (1970) (Federal Aviation Act requirements); *World Airways, Inc.* v. *International Brotherhood of Teamsters*, 578 F.2d 800, 99 LRRM 2325 (9th Cir. 1978).

[8]41 C.F.R. §60-741(28).

the ongoing enforcement programs of the EEOC under its existing statutory authority.

Second, a very important aspect of the affirmative action obligations, and a difference from the cases decided traditionally in arbitration, is the duty to accommodate the physical and mental limitations of employees and applicants "unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business."[9] The extent of this obligation is unresolved. The Supreme Court interpreted "reasonable accommodation" very narrowly in *Trans World Airlines* v. *Hardison*[10] a religious discrimination case arising under Title VII. However, the extent to which the Court's decision concerning religious discrimination may apply to the Rehabilitation Act is not clear.

Certainly the approach of the Department of Labor goes far beyond the de minimis concept used by the Supreme Court in *Hardison.* One Labor Department spokesman has said that what the Department will consider "reasonable" will vary depending on the nature of the handicap involved, the size of the contractor, and the size and frequency of his government contracts.[11] This leaves a substantial amount of discretion to the Department of Labor's compliance personnel. Some examples of the kinds of accommodation which the Department is seeking to include are:

> "Modification of building architecture to include wheelchair ramps, wider bathroom stalls, and raised door numbers for the blind; the installation of alternative warning devices for the deaf and blind; restructuring of job duties; and the purchasing of special aids for the handicapped to help them do the job (such as special telephones for the blind)."[12]

In my opinion, questions of whether an employer has made "reasonable accommodation" through the kinds of changes presently being sought through the affirmative action programs of the OFCCP are not well suited either for arbitration or for private litigation.

The Department of Labor already has considerable power to bring about accommodation of the handicapped. Where a com-

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[9]40 C.F.R. §60-741.6(d); *cf.* 42 U.S.C. §20003(j) (religious discrimination under Title VII).

[10]432 U.S. 63, 14 FEP Cases 1298 (1977).

[11]*Daily Labor Report,* No. 64 (April 1, 1977), A-4.

[12]*Ibid.*

plaint investigation reveals a violation of the affirmative action clause or of the regulations, the OFCCP's regulations provide that the matter should be resolved by informal means, including, whenever possible, conciliation and persuasion. If the apparent violation is not resolved informally, the OFCCP may then seek appropriate judicial action to enforce the affirmative action contract provisions, including appropriate injunctive relief. Alternatively, the OFCCP may impose sanctions, including the withholding of progress payments, termination of the contract, and declaring the contractor ineligible to receive future contracts. Such existing powers are better suited to effecting changes in building architecture, restructuring of job duties, and other matters involving variations in expense related to the size and frequency of his government contracts. An arbitration involving such issues would be closer to interest arbitration than to grievance arbitration.

One of the advantages of allowing the Department of Labor to serve as the principal enforcement agency is that the Department would be expected to resolve in advance any impeding agency demands upon employers, such as those which might arise between OSHA and OFCCP. The government would then be in a better position to deal constructively with employers in improving opportunities for the handicapped. As John Dunlop has said:

> "Legislation, litigation, and regulations are useful means for solving some social and economic problems, but today government has more regulations on its plate than it can handle. . . . In many areas the growth of regulations and law has far outstripped our capacity to develop consensus and mutual accommodation to our common detriment. . . . Trust cannot grow in an atmosphere dominated by bureaucratic fiat and litigious controversy: It emerges through persuasion, mutual accommodation, and problem-solving."[13]

IV.

In conclusion, I believe that arbitration will continue to play a valuable role in the resolution of discrimination cases, offering in discharge cases the most realistic prospect of actual reinstatement. Moreover, an increasing number of discrimination grievances will be filed as more employees become sensitive to real

[13]Dunlop, *The Limits of Legal Compliance*, 27 Lab. L.J. 67, 74 (1976).

or imagined discrimination, and as they become more aware of the delays and deficiencies in the administrative and judicial remedies.

Sexual harassment cases are well suited for arbitration, as are many cases involving handicapped persons. On the other hand, many "reasonable accommodation" issues, such as those involving whether the employer has spent enough money to accommodate a particular individual to a particular job, do not appear to me to be appropriate for arbitration, at least where they involve the major changes being sought by the OFCCP.

CHAPTER 11

DUTY OF FAIR REPRESENTATION: THE ROLE OF THE ARBITRATOR

WILLIAM LEVIN*

The Problem—How the Arbitrator Knows

I want to discuss the legal doctrine of the duty of fair representation in arbitration proceedings, in terms of the role of the arbitrator. The articles and the court decisions, increasing in number, generally discuss the impact of that duty in terms of the union's responsibility and, to some degree, management's responsibility.[1] Less has been said, however, as to the role of an arbitrator when an employee is challenging, or is threatening to challenge, the quality of his or her union's representation.

Let's begin at the beginning. How do we, as arbitrators, discover that at some point the employee-grievant may claim he has not been fairly represented? Here are a few situations, in arbitrations I have heard in the past few years, when it became clear, at the commencement of the hearing or even earlier, that the grievant questioned whether the union would fairly represent him:

1. The grievant-employee, white male, felt that the affirmative action program of the employer-television station "discriminated" against him and that the union supported the program. On the first day of the hearing, a private attorney, who represented the grievant in a related matter, introduced himself and asked permission to be present.

2. Prior to the hearing, I received copies of covering letters

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[1]An excellent collection of papers on the subject, in terms of the legal history and practical consequences, is McKelvey, Duty of Fair Representation, New York State School of Industrial and Labor Relations, Cornell University, 1977.

sent to the union's counsel by the grievant's private attorney, raising questions about how the arbitration would be handled. When the hearing began, I realized that the private counsel was present. At that point, both employer and union counsel sought the exclusion of private counsel.

3. At the commencement of a hearing involving a black, 20-year employee seeking a promotion at a major defense-industry plant, I noted that the union was represented by at least four business agents. The issue was whether the employee should have been given a promotion to a higher machinist classification.

The Overlook of the Situation From the Arbitrator's Point of View

A legitimate question is whether we, as arbitrators, should have any concern that, at some later time, an award we make (or, more accurately, an award we make against the grievant, because if the grievant is successful, there is little probability of litigation) will some day be challenged in court. Arbitrators are generally a self-righteous group. We believe we are fair. We believe we are open-minded. We believe we have no bias or self-interest that will prevent our reaching a reasonable conclusion, based on the facts and argument presented to us. We cannot conceive that we would be involved, even peripherally, in a hearing about which a court, at a later date, will raise questions of fair representation.

But the fact is that the arbitration we hear—what was said, what evidence was presented, what arguments were made, what we deemed controlling in our written decision—may someday find itself challenged in a judicial or administrative forum. Arbitrators are generally not in a situation in which, either by contract or by stipulation, they are asked to make a finding as to an alleged failure by a union to fairly represent an employee. But if that duty becomes a matter of litigation after an arbitration, the courts may examine the entire arbitration, with the arbitrator, in a sense, a participant in that process. Therefore, the manner in which we conduct a hearing may ultimately be examined by a court in determining whether a union has appropriately met its duty of fair representation.

The Law

The Courts

The two United States Supreme Court decisions in recent years which discussed the obligations of a union to provide "fair representation" to employees covered by collective bargaining agreements are *Vaca* v. *Sipes*[2] and *Hines* v. *Anchor Motor Freight, Inc.*[3]

The *Vaca* decision arose out of the union's refusal to take a grievance to arbitration. The Court stated that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." According to the Court, a union may not arbitrarily ignore a meritorious grievance "or process it in perfunctory fashion." The Court noted, however, that: "We do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."

After reviewing the importance of preserving the union's right to settle grievances short of arbitration, provided it does so in "good faith," the Court concluded that: ". . . a union does not breach its duty of fair representation and thereby open up a suit by the employee for breach of contract merely because it settled the grievance short of arbitration."

The *Hines* decision reviewed the sustaining by a joint employer-union committee of a discharge based on the claimed falsification of expense vouchers presented after the employees' return from over-the-road trucking assignments. Pending the hearing, the employees had suggested to the union that the motel clerk be investigated, but were assured "there was nothing to worry about" and they need not hire their own attorney. The Court held that if both an erroneous discharge and the union's breach of duty "tainting" the decision of the joint committee could be proved, the plaintiffs were entitled to an appropriate remedy against the employer, as well as against the union. The Court appears to be holding that an erroneous arbitration award should not be permitted to stand when the employees'

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[2]386 U.S. 171, 64 LRRM 2369 (1967).
[3]424 U.S. 554, 91 LRRM 2481 (1976).

representation by the union had been "dishonest, in bad faith, or discriminatory."

The Ninth Circuit, in 1976, had occasion to contemplate the interaction between an arbitrator and the courts, and the handling of a fair-representation dispute, and to respond to an arbitrator's effort to unravel the complexity entangling an employer, a union, and an employee when the employee charged the union and the employer had collusively denied him benefits to which he was entitled under a collective agreement.[4] It would take longer than the entire time allowed me to explain what occurred in this dispute. I can only summarize it by stating that the arbitrator, by the nature of his interim award, caused the parties to obtain a judicial review of the proposition that a grievant claiming unfair representation can be made a party in an arbitration and "shall have all the rights pertaining thereto and shall be bound by the decision of the arbitrator disposing of all his claims and circumstances." The court held that the employee could be made a party and that an ultimate award, even if the grievant charging failure of fair representation refused to participate, would bind the employee, absent exceptional circumstances such as fraud and breach of duty of fair representation.

A more recent Eighth Circuit decision, one already sharply attacked by two distinguished members of the Academy, William Murphy and Benjamin Aaron, is *Smith* v. *Hussmann Refrigerator Co.*[5] The court upheld a district court jury verdict for damages. The case arose out of a claim by displaced junior employees in a seniority dispute in which the issue before the arbitrator was whether the more senior employees were substantially equal in skill and ability to the junior employees. The junior employees, though aware that a hearing had been scheduled, did not ask to be invited and did not attend. The court stated:

> "While we do not suggest that a union must hold internal hearings to investigate the merits of every grievance brought to it, in certain situations it might be inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees."

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[4] *Hotel Employees* v. *Michaelson's Food Services*, 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

[5] 103 LRRM 2321 (8th Cir. 1980).

The court was critical of the failure of the union to notify the displaced junior employees of the initial arbitration hearing or to invite them to attend.

NLRB

It is well-settled law that a union violates Section 8(b)(1)(A) of the LMRA if it breaches the duty of fair representation.[6]

In a detailed, thoughtful policy memorandum in July 1979 to all NLRB regional directors on the subject of Section 8(b)(1)(A) cases involving a union's duty of fair representation, the Board's then General Counsel stated his office's guidelines in determining whether a complaint should issue. He concluded that the following conduct represented actions on which the Board should move:

1. If the union's actions are "attributable to improper motive or fraud," such as refusal to process a grievance because of an employee's efforts to bring in another union.
2. When the union's conduct is "wholly arbitrary," with "no basis" on which it can be explained.
3. When the union's negligence is "so gross as to constitute a reckless disregard of the interests of the unit employee."
4. When a union has chosen to process a grievance for an employee, "then undercuts the position of the employee in the grievance process."

There appears little likelihood, at least based on these guidelines, which are, of course, subject to revision by the Board's new General Counsel, that the Board will be asked to consider a complaint involving a charge of failure to represent fairly in those situations when a grievance proceeded to arbitration before an impartial third party.[7]

Role of the Arbitrator in a Situation Involving Duty of Fair Representation

What, then, is the arbitrator's role when it becomes clear that there is pending, or that there may be filed at a later date, a claim that the union failed in its duty of fair representation?

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[6]*Vaca* v. *Sipes*, *supra* note 2; *Miranda Fuel Co., Inc.*, 140 NLRB 181, 51 LRRM 1584 (1962).

[7]*See Teamsters Local 542* (Golden Hills Convalescent Hospital), 233 NLRB at 533, for discussion of an NLRB charge in which the matter was arbitrated.

In a sense, we are back to that traditional question as to the role of an arbitrator: Should we be actively involved in the proceedings, or is our role a passive one—that of a finder of fact and an evaluator of the contract, based on the facts and the arguments as presented by the parties? And we are back to the "traditional" answer: the better the quality of representation by union counsel, the less we should become involved.

But it seems to me that in view of this new element—whatever our general reluctance to become an active participant in a hearing—we must now be more willing than we may have been in the past to participate. Are we not doing less than we should, as professionals, if a court can make a finding that a grievant was not given appropriate representation in an arbitration we heard? Are we not closer to the situation than the court, and can't we much more easily become involved when it becomes clear in a hearing that evidence is not being properly presented or that the arguments are not being properly made?

In *Vaca,* the Court questioned whether the NLRB "brings substantially greater expertise to bear" than do the courts on a review of the union's handling of the grievance machinery because such matters "are not normally within the Board's unfair labor practice jurisdiction." The Board may or may not have the "expertise"; others are better qualified than I to make a judgment. But arbitrators do have "expertise," at least in evaluating the manner in which a case is presented before them.

And further, if the duty-of-fair-representation concern is such a threat to the arbitration process, do we have a self-interest in lessening the possibility that our decision will ultimately be reviewed by a court, if we can do so without jeopardizing our impartiality? (This concern that we have exceeded the bounds of impartiality can be a significant one if court enforcement of an award is sought.)

Here are some situations that have occurred, or could occur to an arbitrator in a hearing next week. In considering them, we should keep in mind the "perfunctory processing of grievances" about which the Court was concerned in *Vaca:*

1. If the grievant seeks to have private counsel participate at a hearing, should we insist on such participation, even if one of the parties, or perhaps both of the parties, are opposed?

2. If, in a promotion dispute, the less senior employee who would be displaced from the promotion he received is not at the hearing, should we, as suggested by Ben Aaron, "call the incum-

bent whom the grievant seeks to displace as my own witness, if neither party elects to call the incumbent as its own witness"?[8]

3. If there is clearly a duty-of-fair-representation element and the parties take no steps to have the hearing reported, should we suggest a transcript?

4. If the contract provides that warning notices more than one year old may not be introduced to support subsequent disciplinary action, should we refuse to permit the introduction of such warning notices even if the union representative fails to challenge their introduction?

5. If the union fails to argue a contract provision which supports its position, should we raise the question of the applicability of that contract provision and ask the parties to comment on it?

6. If, at the commencement of a hearing, we note the absence of the grievant and the union representative insists that he wants the matter to proceed, should we insist on a continuance (or, as I did a year or so ago, decide, perhaps erroneously, that the union must have consulted the employee and made a conscious decision not to have him present)?

7. If we believe certain relevant facts are not being developed by the union's representative, should we actively question a witness after examination by the parties?

8. If the union representative in a discharge case is trying his first case and agrees to a submission agreement which "hangs" the grievant, should we suggest a rewording?

9. Assume that, as the hearing is about to begin, the grievant asks to be heard, states that he tried to have a voice in the selection of the arbitrator but was refused, and says that he, the grievant, has no reason to trust an arbitrator whose income is substantially dependent on his being selected by labor and management representatives. He then asks the arbitrator how many arbitrations he has heard involving the same attorneys in the past five years. How should we respond?

10. The record reflects that the union representatives acted in an extremely negligent fashion in processing the grievance. As a result, it missed at least two collective bargaining agreement deadlines. The arbitrator sees no basis for rejecting the company's contention that, because of the union's failure to comply

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[8]Paper delivered at the Labor Law Symposium of 1980, Southern California Labor Law Symposium, p. 80 of program materials.

with the time limitations, the grievance should be dismissed. Should we ask the union why it failed to meet the deadlines?

11. Assume that the collective bargaining agreement of the parties provides that at the discretion of both parties—in certain limited situations—the arbitration will be handled on an expedited basis, with no transcript, no briefs, and limited right to introduce testimony. At the commencement of the hearing, the grievant states that he would like to be heard. He informs the arbitrator that he is objecting to the expedited arbitration and believes he is entitled to a complete hearing, with counsel, a transcript, and briefs. How should we respond?

12. Assume that on the morning of the arbitration union and company counsel negotiate a settlement. At that point, they ask the arbitrator whether he would put the settlement "on the record" and ask the grievant whether he was satisfied and felt the union had fairly represented him. The arbitrator asks the grievant whether he believes the settlement was reasonable. The grievant responds, "Well, I am agreeing to it reluctantly, but I will agree to it." The arbitrator asks the grievant whether he feels the union did a reasonable and fair job in representing him. The grievant responds, "No, I don't." What response, if any, should we make?

I have heard the suggestion that the arbitrator should go so far as to make a finding, in his award, as to fair representation. Though this has obvious appeal for the union's advocate, I now believe this is not appropriate. Absent a clear mandate in a submission agreement, and independent representation of the grievant in connection with that submission agreement, any finding as to fair representation is beyond both the powers and wisdom of the arbitrator. How do we know, for example, the degree of investigation undertaken by the union—investigation required by the court decisions?

Some union counsel have suggested that even if an arbitrator makes no findings as to fair representation, he should, at the conclusion of a hearing, ask the grievant whether he feels he has been fairly represented. But can the grievant really know the legal subtleties involved when he responds to such a question? As one experienced labor practitioner commented to me, "This creates more problems than it solves."

On the other hand, I have no problems in a hearing when the element of fair representation is "in the wings" in asking the grievant at the end of his testimony whether there is anything

else he wants to say, even though the union representative might wince a bit when such a question is asked because it could open the door to an admission damaging to the grievant's case.

Another step we might consider taking, at the beginning of the hearing and as it proceeds, is to explain the procedure and our basis for rulings.

Whatever an arbitrator's ultimate decision in terms of a particular case, whether he decides to play an active or inactive role, there is one basic responsibility he must assume. The arbitrator must so handle the grievant that he is convinced—not by "games" played by an arbitrator or by an arbitrator's gratuitous statements made without substance or conviction—that the arbitrator is really listening, that he is not simply a necessary appendage to the "establishment" represented by management and labor. This is easier said than done. The fact is that arbitrators are selected by the labor and management "establishment." The grievant, in these cases, does not trust the union or the union's representative at the hearing. It is realistic, therefore, to expect the grievant to be just as suspicious of the arbitrator as he is of the union representative. It is our responsibility to overcome this skepticism as to our good faith. Are we courteous? How do we demonstrate that courtesy? Do we, for example, express impatience with a union's efforts to present a great deal of testimony? Are we open-minded? How do we demonstrate that open-mindedness? Do we, for example, explain our basis for ruling on the admissibility of evidence? Are we alert? How do we demonstrate that alertness?

And arbitrators have a significant responsibility in the manner in which we write the opinion. We can meet that responsibility by the way we evaluate the testimony and reach significant findings. We can demonstrate it by the words we choose in describing the conduct of the grievant and fellow employees. We can demonstrate this by making certain we fully consider the arguments raised by the parties and by making it clear our weighing of those arguments contributed to the ultimate result. We can say kind words about the quality of representation if we are convinced the words are merited; we cannot be concerned with protecting union counsel, even though they play such a critical role in our selection as arbitrator.

If we do these things, then the grievant is much more likely to be convinced he had a fair hearing, whatever the outcome.

Where Is It All Going?

First, as I observed earlier in this paper, in a sense we are back to the "traditional answer" in terms of whether an arbitrator should become actively involved in a hearing. When the union representative is competent, the less we become actively involved, the better. As one particularly able labor practitioner expressed his private opinion to me: "From the union's point of view, we would prefer the arbitrator to interfere as little as possible. Call them as he sees them and let the union and its counsel deal with the allegations of failure to represent."

Second, assuming adequate representation and a conscientious arbitrator, I question the appropriateness of any judicial or NLRB review of an arbitration award. Increased judicial or NLRB review, given these assumptions, could lead to the destruction of the arbitration process as a means of settling disputes arising out of an existing bargaining agreement.

And third, by way of defining that "conscientious arbitrator" whose award would not, or at least should not, be challenged by courts or the NLRB, and putting aside the question of an arbitrator's active participation in a hearing, as discussed earlier, the way the arbitrator relates to the grievant and writes his decision is critical.

But there still remain problems—problems directly the concern of the arbitrator. For example:

1. I trust that arbitrators are not beginning to feel that because of the duty of "fair representation," unions are arbitrating claims that are "losers" and, as a result, we are more disposed to ruling against a grievant, even in a case with merit. And how does the presence of independent counsel affect our thinking? (It goes without saying that we should not lean toward a ruling for the union because of any concern we feel that we might become involved in duty-of-fair-representation litigation.)

2. I trust we, as arbitrators, are not moving to make hearings more formal in situations when there is a question of fair representation. The fact is that an informal hearing may be more of a contribution to meeting the duty of fair representation than a formal one, at least in terms of the grievant's reaction to the process and the arbitrator.

My son suggested a different conclusion to this paper than my original one. He speculated that the increasing number of duty-of-fair-representation cases was simply one more manifestation

of the unhappy fact that many in our society today trust no one, and that as a result they seek more "due process." He quoted one of his law school professors who wrote:

> "Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."[9]

As arbitrators, we may become involved with great reluctance in duty-of-fair-representation concerns. But we *are* involved. The question before the house, then, is how we handle the involvement—how we handle the distrust felt by grievants who appear before us.

[9]G. Gilmore, The Ages of American Law, 110–111 (1977).

Comment—

JAMES H. WEBSTER*

Bill Levin has reviewed the general framework of principles governing the doctrine of fair representation from the standpoint of the courts and the National Labor Relations Board, and he has suggested a number of ways in which an arbitrator becomes aware that fair-representation problems may exist in a case which he is commissioned to hear and decide. It goes without saying that we are all concerned for the integrity of the arbitral process for resolution of labor disputes. Moreover, inasmuch as the finality of a particular arbitral award and perhaps the ultimate social acceptability of the labor arbitration process depend in part on the ability of that process to deal effectively with problems raised by the occasional failure of unions to fulfill their duty of fair representation, it is appropriate for us to inquire about the proper role of the arbitrator in situations which present questions concerning a union's breach of that duty.

Both Bill's paper and the Fair Representation Syllabus describe a number of archetypal situations which arbitrators encounter from time to time in which fair representation inquiries may be pertinent. I wish to discuss a number of those factual situations and offer you my firm guidance on how they should be disposed of by the arbitrator, and why.

Before turning to these factual situations, however, I believe it is helpful to review several "fundamental principles" of labor arbitration and the law governing the union's duty of fair representation.

First, the labor arbitrator's jurisdiction is conferred (and may be rescinded) by agreement between the employer and the union. Thus, although the arbitrator may look to " 'the law' for help in determining the sense of a particular agreement,"[1] he may not do so for the purpose of overriding their joint direction.

Second, under our federal statutory scheme, the union is the *exclusive* representative of employees in bargaining units covered by its labor agreements (National Labor Relations Act, as amended, Section 9(a)). Indeed, it is out of the exclusive nature

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[1] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

of this representative status that the duty of fair representation arises.[2]

Third, the employer is not absolved of responsibility for the consequences of its breach of a collective bargaining agreement, simply because the union has failed to meet its duty fairly to represent a grieving employee.[3] Accordingly, in situations where the union has conducted itself arbitrarily, discriminatorily, or in bad faith toward a member of its bargaining unit, or processed the member's grievance "perfunctorily," the employer may still be required to make good the harm suffered by the grieving employee(s) as a result of its breach of the agreement.

Fourth, the arbitrator may (and should) look to all three of the above principles for assistance in determining hearing procedures, ascertaining the sense of the agreement, and fashioning appropriate remedies.

And finally, the arbitrator should be sensitive to the mediative role he can often play (either at the parties' request or upon their agreement at his cajoling), in which he may be able to assist them in finding practical solutions to disputes which are literally fraught with problems arising out of possible lack of fair representation.

Bill Levin suggests, and I concur, that arbitrators "must now be more willing than [they] may have been in the past" to take a more active role than a mere finder of fact and evaluator of the contract. As with most generalizations, however, it is appropriate to add "within limits."

The Grievant Brings "His Own" Attorney—Party Status

One archetypal situation which presents "fair representation" issues is where the grievant shows up with "his own" attorney who seeks to participate in the hearing. Obviously, if both the union and the employer consent to the participation of private counsel for the grievant, the arbitrator should have no difficulty accommodating the grievant's wishes. Likewise, the arbitrator should find no difficulty in refusing to permit the participation of private counsel if both the employer and the union object

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[2]*Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967) and cases cited therein.

[3]*Vaca* v. *Sipes*, *supra* note 2; *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2451 (1976).

thereto, although he might properly first probe the strength of their convictions in his mediative role.[4]

Less immediately apparent is the proper decision when the employer and the union do not agree concerning the participation of the grievant's counsel. In such a case, the union's wishes should normally be followed.

The union is statutorily privileged under Section 9(a) of the National Labor Relations Act, as amended, to function as the grievant's "exclusive representative." Accordingly it should be able to do so to the exclusion of any other employee representative, such as the grievant's private counsel, even if it thereby increases its exposure to potential litigation over the adequacy of its representation. The arbitrator's judgment as to the union's wisdom in exercising this privilege is irrelevant, except perhaps in his mediative role.

If only the employer objects to the participation of the grievant's private counsel, then the arbitrator should allow such participation absent a clear showing of substantial prejudice. The union's authority to designate its representatives may suffice in most cases to require that participation by the grievant's counsel be permitted. Even where the union reserves the right to take positions in the hearing which are at variance with positions advanced by the grievant (either as to the facts or the proper contract interpretation), the employer will rarely, if ever, suffer any prejudice, and many questions concerning fair representation at the hearing will be effectively precluded.

For example, if the grievant's private counsel has had a full opportunity to call and examine witnesses, it is difficult to see how the grievant may later claim that he had been denied a fair hearing or that the union had failed to present a complete case. Moreover, and perhaps more importantly, the grievant will in all likelihood believe that he had a fair hearing and will voluntarily acquiesce in the result or accept it as "binding."

The question arises as to the proper status of the grievant and his counsel under such circumstances. Is the grievant a "party"

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[4]A recent case comes to mind in which an arbitrator overruled the joint objection of counsel for the union and the employer to the participation of a grievant's "private counsel" in a discharge hearing. Thereupon counsel for the union and the employer requested a brief recess and, upon their return, thanked the arbitrator for his efforts and requested that he bill them for his services to that point. They thereafter selected another arbitrator to hear the matter who ordered the grievant's "private counsel" excluded from the hearing.

to the proceeding? Should he be made a party? How should the arbitrator rule on a motion by the grievant's attorney to "intervene" in the proceedings?

Ted Jones recently found it appropriate, with subsequent judicial approval, to make the grievant a "party" to the proceeding and to give him all the "rights pertaining thereto" so that he would be "bound by the decision of the arbitrator disposing of all of his claims." The Ninth Circuit approved the order making the grievant a party and held that the ultimate award would bind him, even if he declined to participate in the proceeding, absent exceptional circumstances such as fraud and breach of the duty of fair representation.[5]

It is difficult for me to see just how much light was shed on the basic problem by the *Michaelson* litigation. After all, the standard prescribed by the Supreme Court for review of an arbitral award, without regard to the "party" status of the grievant, is that he is bound by the award, absent unusual circumstances such as fraud or breach of the duty of fair representation.[6] Accordingly, I suggest that extended discussion of the value of the grievant's being awarded "party" status is unwarranted, except for the practical and psychological considerations which I have suggested attach when the grievant's private counsel is given full opportunity to call and examine witnesses and present argument in support of his cause.

My own practice as union counsel is to welcome the participation of a grievant's attorney at the earliest possible stage of the grievance procedure and to seek the attorney's assistance in the investigation of the facts, analysis of the contract, research for helpful precedent, and even arbitrator selection. As a result of this approach, I have found in every case that the grievant's attorney has acquired such confidence in the adequacy of the union's representation that he has withdrawn from the case, even though the union has often determined not to proceed with the grievance to arbitration. It is this experience which causes me to conclude that the union is wisest which takes care that each grievant (or the grievant's attorney, who usually is retained for a contingent fee) perceive that the union has fairly investigated the grievance, evaluated it rationally on the merits,

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[5]*Hotel Employees* v. *Michaelson's Food Services,* 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

[6]*See, e.g., Hines* v. *Anchor Motor Freight, supra* note 3.

made a principled decision as to whether it should be pursued, and, if so, made reasonable efforts to prevail.

The Overlooked Contract Provision

Another archetypal situation is when the union fails to argue the applicability of a contract provision which appears to support its position—for example, if the contract provides that disciplinary warnings more than one year old are to be disregarded, and the union representative fails to object to the introduction of such notices.

The arbitrator should be somewhat cautious about intervening in the presentation of such evidence. After all, the union may be saving its objections until a later time with the intention of arguing that the employer improperly considered the outdated warnings in determining to impose discipline on the grievant. Unless the facts surrounding the outdated warnings are being hotly litigated (a good sign that the provision has been ignored), the best approach would seem to be to wait until the hearing is about to close and then to inquire whether the parties wish to offer their views concerning the applicability of the provision.

Incomplete Development of the Facts

An arbitrator may believe that certain relevant facts are not being adequately developed by the union's representative and ask himself to what extent, if any, he should actively question a witness after the parties have completed their examination.

I am reminded of Ted Jones's description of his feelings as an arbitrator under such circumstances, likening his position to a visitor sitting in the middle of a large unlighted warehouse; as each question is posed and answered, it is as if someone were shining a flashlight with a pinpoint beam on some particular object in the darkened structure, and no participant seems to want to turn on the lights. The "traditional" conclusion concerning the arbitrator's proper degree of involvement seems correct: it is an inverse function of the capability of union counsel.

The fact is that employer and union representatives often agree to present issues to an arbitrator for decision on less than a complete factual basis, and the degree of incompleteness may be both carefully negotiated and for good purpose. I am familiar with cases, for example, in which the parties essentially agreed

to limit their testimony concerning the bargaining history of disputed contractual provisions, so as to avoid potentially embarrassing disclosure of inconsistent positions taken with respect to other contracts with identical language involving different employers with whom the union also deals.

I suggest that this type of "negotiated" record is most likely to occur in connection with a dispute over the proper interpretation of contract language governing working conditions for union employees generally, however, and not as to facts concerning an individual grievant's work performance or the existence of "just cause." In the latter type of inquiry, an arbitrator may have the urge to "turn on the lights" by asking those one or two questions which seem so obvious but which appear carefully to have been avoided by the union's counsel, such as "Why do you believe the employer treated you so unfairly?" or "Is there anything else you want to say?"

Bill Levin comments that he has no problems with an arbitrator's asking such questions in hearings in which fair-representation questions may be present, "even though the union representative might wince a bit when such a question is asked, because it could open the door to an admission damaging to the grievant's case," and I suppose that I concur. There is nothing inherently wrong with a result adverse to the grievant under such circumstances.

In fact, the union might well prefer in some circumstances that the case be blown, although it has sincerely attempted to present the grievant's case in its best light by failing to elicit certain testimony. Perhaps it is best to let the grievant blow his own case, so that when the matter is viewed with the hindsight of a plaintiff's fair-representation attorney, he can't blame the union for having done it through inadequate representation.

The Missing Preferred Junior Employee

Another of the emerging archetypal factual hypotheses for discussion of fair-representation issues resembles the circumstances which brought about the litigation in *Smith* v. *Hussmann Refrigerator Co.*,[7] a decision which, in my judgment, displays an almost perfect lack of understanding of collective bargaining and the arbitration process. There the union grieved on behalf

[7]619 F.2d 1229, 103 LRRM 2321 (8th Cir. 1980).

of senior employees who were denied promotions under contract language which favored seniority among employees of equal skill and ability.

The preferred junior employees were not called as witnesses by either the employer or the union at the arbitration hearing, nor were they invited to attend, although they were aware that the hearing had been scheduled and had not asked to be invited. The Court of Appeals for the Eighth Circuit held that the union had breached its duty fairly to represent the preferred junior employees, through "blind adherence to a policy favoring seniority" and "discriminated against employees receiving promotions on the basis of merit."

Time and space do not permit a full discussion of the errors of the majority in *Hussmann.* I think the absurdity of the result is clear, however, by its logical implication that a junior employee may grieve the promotion of a senior employee under such contract language, and the union must fairly investigate and, if substantiated, litigate the junior employee's claim of superior merit and ability. Every promotion (as well as other personnel actions, such as layoff, which are governed by the same standard) then becomes the subject of a potential grievance, and the arbitrator must become the plant boss.

Place these principles into a bargaining unit such as was involved in *Hussmann* and pure chaos must surely result:

As the court noted, "[Hussmann] processes approximately 35,000 bids annually. From these bids, about 2,000 jobs are awarded. The Company's practice is to waive skill and ability with respect to most jobs." Instead of having a handful of grievances which arise when a junior employee is preferred, in which the employer must demonstrate that it properly disregarded seniority, each employee who bids unsuccessfully may now grieve the employer's failure to promote him or her, and the union is placed under a "fiduciary" obligation to investigate and fairly evaluate each grievant's relative skill and ability.

The truth is that the union always wants seniority to govern, and the employer always wants to be able to choose based on its perceptions of relative skill and ability. They have found the accommodation with which each "can live" by permitting seniority to be bypassed when the employer is able and chooses to demonstrate the superior skill and ability of a junior employee.

The union's "blind adherence" to the principle of seniority is rationally related to its goal, in negotiations for and in the ad-

ministration of the contract, to make seniority the sole effective determinant in promotional bids. The dissenting opinion in *Hussmann* quoted appropriately from Chamberlain,[8] as follows:

> "It is difficult to overstate the importance attached by the workers to union controls of this nature. The feeling of independence, the relief from insecurity attendant upon the rationalization of personnel policies can be appreciated only when contrasted with the feeling of subservience and the despised need for bootlicking of previous days. Nowhere is this truer than in the large corporation.
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> . . .
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> "To eliminate such favoritism and willfulness, the unions have sought and obtained a sharing of authority in the areas of concern. The seniority principle is its answer to situations such as that described above. To charges that seniority gives no heed to a man's ability or even his need, a union man will reply that at least it is objective. He knows where he stands. There is a rule and a union to enforce it on his behalf." (Dissenting opinion, fn. 3.)

We should have no doubt that a union may honestly, rationally, and nondiscriminatorily pursue a policy of fostering personnel actions in accordance with strict seniority, even though it may compromise its position in contract negotiations for any number of relevant considerations.

Hopefully *Hussmann* will quickly perish as precedent either through outright disapproval, or by being distinguished on the basis of one of its peculiar characteristics: While seeking the union's recognition of their allegedly superior skills and ability, two of the preferred junior employees (later plaintiffs) sought unsuccessfully to be able to speak on the issue at a local union membership meeting. This colorable denial of their opportunity to speak to the membership concerning the proper policy for the union to pursue tends to undermine the union's position that the policy it followed favoring seniority was rationally adopted.

The Uncooperative Grievant

Several situations have been suggested in which the grievant appears not to be cooperating with the union in the presentation of his case. For example, the grievant fails to appear at the arbitration hearing, although union counsel states on the record that he was notified of the time and place of the hearing and instructed to attend. Or the grievant refuses to consult with

[8]Chamberlain, The Union Challenge to Management Control 93–94 (1948).

union counsel, or perhaps even participate in the hearing, on the advice of "his own" attorney. Representatives for the union and the employer state that they wish to proceed with the presentation of the evidence.

In situations like this, the arbitrator should proceed to hear the case, after having made the circumstances clear on the record. I believe a grievant has an obligation to cooperate reasonably with his statutory representative or face the consequences either of default or, if the union so elects, a trial of his case in his absence or without otherwise adequate preparation. By analogy, this is essentially the policy followed by the General Counsel of the NLRB in dealing with uncooperative charging parties in unfair labor practice cases.

Arbitral Findings Concerning Adequate Representation

The last area I wish to discuss involves situations in which the arbitrator is called on, expressly or by implication, to make a finding as to the adequacy of the union's representation of a particular grievant. In most cases, I agree with Bill Levin that such findings are improper, absent a clear mandate in the submission agreement and independent representation of the grievant in connection with the submission agreement.

There are situations, however, in which I believe an arbitrator can and should deal squarely with the issue of the adequacy of the union's representation and, if necessary, make an appropriate finding. The situation which most readily comes to mind is where the union has negligently allowed the time limits to expire before filing a grievance over the wrongful discharge of a member of the bargaining unit.

I find it odd that 13 years after the Supreme Court decided *Vaca* v. *Sipes,* and four years after its decision in *Hines* v. *Anchor Motor Freight,* arbitrators have not found it necessary to make findings as to the inadequacy of a union's representation so that they may excuse compliance with the time limits or other procedural impediment as to the grievant and apportion liability between the employer, based on its breach of the agreement, and the union, based on its failure to comply with the procedural requirements.

Under *Vaca* and *Hines,* an employee may bring suit against both the employer and the union together for the employer's breach of the contract and the union's failure adequately to represent. In such cases the Supreme Court has made it abso-

lutely clear that the employer must not be relieved of the liability for its breach of contract. Rather, liability must be apportioned according to the circumstances of the case. I know of no valid reason why arbitrators should be unable to understand and apply the principles established in those cases.

The Court in *Vaca* stated:[9]

> "The damages sought by [the grievant] were primarily those suffered by [him] because of the employer's breach of contract. Assuming for the moment that [he] had been wrongfully discharged, [the employer's] only defense to a direct action would have been the Union's failure to resort to arbitration . . . , and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay.
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> . . .
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> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the union had breached its duty [by refusing to process the grievance over the grievant's discharge], all or almost all of [the grievant's] damages would still be attributable to his allegedly wrongful discharge [by the employer]."

The Court in *Vaca* also made it clear that an order compelling arbitration, one of the available remedies when a breach of the union's duty is proved, and equitable relief of other sorts, as well as damages, may be appropriate. Nor is the employer's lack of implication in the union's malfeasance exculpatory for the consequences of its breach of the agreement.

For in *Hines* the Court determined that an arbitration award, based on an erroneous factual finding, which sustained an employee's discharge, must be set aside and the employer held liable for its breach of the agreement if the employee was able to prove a breach by the union of its duty of fair representation affecting the decision. The Court stated: "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union."[10]

If a grievance, otherwise meritorious, is dismissed for the

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[9]*Supra* note 2.
[10]*Supra* note 3.

union's failure timely to have filed it, then the courts are open to the grievant to remedy the employer's breach of contract and the union's breach of duty. There appears to be no reason why an arbitrator should not be able to deal with these issues in the first instance.

I believe that in cases in which a union has failed to meet the procedural requirements of the grievance procedure and the employer urges that such a failure is a bar to the arbitrability of the grievance, the arbitrator should examine the circumstances and make a finding as to whether the union failed to represent the grievant adequately. If the circumstances so warrant, the arbitrator should proceed to determine the grievance on its merits, apportion liability as between the union and the employer, and issue an appropriate order.

In a typical wrongful discharge case, the proper order against the employer should be reinstatement with full back pay and without loss of seniority or other benefits. A proper award against the union (if the contract or submission agreement permits liability to be assessed against the union) might include the grievant's additional reasonable expenses in the arbitration proceeding. The fact that the arbitrator may lack jurisdiction under a particular submission agreement or labor contract to assess liability against the union should not prevent him from determining the correct liability of the employer and the appropriate remedy for such liability. Presumably the grievant will be able to pursue his cause of action, if any, against the union independently, without prejudice to any of the parties.

Bill Levin states, and I agree, that, as arbitrators, you may become involved with great reluctance in duty-of-fair-representation concerns, but that you *are* involved and that the question before the house is how you should handle that involvement. I hope I have provided you with some assistance in developing a proper approach to that involvement.

CHAPTER 12

TWENTY YEARS OF TRILOGY: A CELEBRATION

CHARLES J. MORRIS*

I. An Occasion to Celebrate

This month marks the birthday of the Supreme Court's *Steelworkers Trilogy* decisions. The three cases, *American Manufacturing,*[1] *Warrior & Gulf,*[2] and *Enterprise Wheel,*[3] represent an integrated legal doctrine which is still very much alive and in relatively good health. The decision was a robust infant when it was delivered 20 years ago with the able assistance of lawyer David Feller. It was thus of considerable concern to the many friends of the *Trilogy* that four years ago Professor David Feller examined the subject, which he saw as a continuation of a "golden age of labor arbitration"[4] that had begun to flourish in the forties, and diagnosed its condition as critical. However, the following year the Academy received a second opinion—a diagnosis by Dean Theodore St. Antoine, who pronounced the subject in excellent health.[5] I concur with Dean St. Antoine's basic observation, though I must disagree with some of his findings and conclusions, about which I shall have more to say later.

My own examination of the subject indicates that this is indeed the occasion for a celebration, not a memorial service. The *Trilogy* doctrine is still robust. It has grown; it has matured; it has come of age. Its acceptance in private-sector labor relations is now commonplace; it has long ceased to be the subject of seri-

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[1]*Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414 (1960).

[2]*Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960).

[3]*Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

[4]Feller, *The Coming End of Arbitration's Golden Age,* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 97.

[5]St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny,* 75 Mich. L. Rev. 1137 (1977).

ous criticism. Nevertheless, there are some disquieting signs which should be watched carefully and even some dangerous outgrowths which should be checked before they spread. I shall discuss these worrisome conditions later in this paper.

First, however, I wish to say how honored I am to be assigned the task of reviewing the *Trilogy* for the benefit of this distinguished audience of *Trilogy* users. But the experience is also very humbling. The process of reexamining the case law and assembling these remarks put me face-to-face with the realization of the symbiotic nature of the relationship between arbitrators and judges—a special relationship which the Supreme Court decided was necessary if the American collective bargaining contract was to be protected as the basic institution of industrial self-government. The experience is humbling because you, the judges, the arbitrators, and the parties to whom I am speaking, are not only knowledgeable about the subject at hand, but are also the active participants—the movers and shakers—who are engaged in this joint venture for which the *Trilogy* is the charter.

This evening's dinner-dance will provide the revelry appropriate for a birthday celebration. But birthdays are also the occasion for serious reflection and reappraisal.

II. Pre-*Trilogy* Arbitration and Judicial Intervention

I shall begin the reflective part of this paper by recalling the nature of arbitration as it existed before the *Trilogy*. Recall with me both the state of the art and the state of the law. The state of the art was at its peak. Among its practitioners were the giants of our profession—the very arbitrators who founded the National Academy. Arbitration procedures were generally informal. Arbitration had achieved high acceptability among almost all of the union and employer parties who used the process. Grievance arbitration had become the standard adjunct to collective bargaining, and the reason for its adoption was plain to see. Addressing the Second Annual Meeting of this Academy, George W. Taylor[6] observed the truism that grievance arbitration is "very hardy," that it persists despite many shortcomings,

[6]Taylor, *Effectuating the Labor Contract Through Arbitration,* in Selected Papers from the First Seven Annual Meetings, National Academy of Arbitrators, 1948–54, ed. Jean T. McKelvey (Washington: BNA Books, 1957), at 20.

but that its strength derives from the much greater disadvantages of the alternative "principal method of settling day-by-day disputes, i.e. by work-stoppages."[7]

For a considerable period in the recent past, conventional wisdom tended to idealize the collective agreement as an entirely consensual arrangement between an employer and a labor union—a relationship in which the judiciary had no business intruding. Indeed, that was the philosophy which led to passage of the Norris-LaGuardia Act[8] in the early thirties, for it had been widely believed that if courts—particularly the federal courts—would no longer issue injunctions in labor disputes, the parties and the public would benefit from the agreements which labor and management would reach by themselves through the interplay of voluntary negotiations and the use of traditional economic means.[9] I am not prepared to say that such conventional wisdom was wrong. But it is too late to seek that laissez-faire condition, for that was not the direction in which American labor relations ultimately moved. With the passage of the Wagner[10] and Taft-Hartley[11] Acts, the law and the legal process became deeply imbedded in the structure of the labor-management relationship. The 1944 *J.I. Case*[12] decision, establishing the supremacy of the collective agreement over the individual contract of employment, followed as the night follows the day. And after watching and participating in ten years of judicial fumbling[13] to find the meaning of Section 301,[14] the Supreme

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[7]*Id.*, at 24.

[8]47 Stat. 70 (1932), 29 U.S.C. §§101–15 (1964). *See* Frankfurter and Greene, *The Labor Injunction* (1930).

[9]*See generally*, I. Bernstein, The Lean Years (Boston: Houghton-Mifflin, 1960), 391–415.

[10]49 Stat. 449 (1935), 29 U.S.C. §§151–68 (1952).

[11]61 Stat. 136 (1947), 29 U.S.C. §§141 et seq. (1952).

[12]*J.I. Case* v. *NLRB*, 321 U.S. 332, 14 LRRM 501 (1944).

[13]*E.g.*, *Steelworkers* v. *Gallanel-Henning Mfg. Co.*, 241 F.2d 323, 325, 39 LRRM 2384 (7th Cir. 1957); *Signal-Stat Corp.* v. *Local 475*, 235 F.2d 298, 300, 38 LRRM 2378 (2d Cir. 1956); *ILGWU* v. *Jay-Ann Co.*, 228 F.2d 632, 37 LRRM 2323 (5th Cir. 1956), *semble*; *Rock Drilling Union* v. *Mason & Hanger Co.*, 217 F.2d 687, 691–92, 35 LRRM 2232 (2d Cir. 1954); *Ass'n of Westinghouse Employees* v. *Westinghouse Elec. Corp.*, 210 F.2d 623, 625, 33 LRRM 2462 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437, 35 LRRM 2643 (1955); *United Elec., Radio & Machine Workers* v. *Oliver Corp.*, 205 F.2d 376, 384–85, 32 LRRM 2270 (8th Cir. 1953); *Milk and Ice Cream Drivers* v. *Gillespie Milk Prod. Corp.*, 203 F.2d 650, 651, 31 LRRM 2586 (6th Cir. 1953); *Textile Workers Union* v. *Avista Mills*, 193 F.2d 529, 533, 29 LRRM 2264 (4th Cir. 1951); *Hamilton Foundry* v. *Int'l Molders and Foundry Workers Union*, 193 F.2d 209, 215, 29 LRRM 2223 (6th Cir. 1951); *Mercury Oil Ref. Co.* v. *Oil Workers Union*, 187 F.2d 980, 983, 16 LA 129 (10th Cir. 1951); *Schatte* v. *Int'l Alliance*, 182 F.2d 158, 164, 26 LRRM 2136 (9th Cir. 1950); *A.F. of L.* v. *Western Union*, 179 F.2d 535, 25 LRRM 2327 (6th Cir. 1950).

[14]61 Stat. 156, 29 U.S.C. § 185 (1952).

Court in *Textile Workers* v. *Lincoln Mills*[15] finally recognized the federal law of the collective agreement, which in hindsight now seems to have been a natural consequence of the direction in which labor relations was moving—a direction which Congress had set when it turned away from the Norris-LaGuardia philosophy and erected instead an elaborate system of legal machinery and statutory conditions[16] that were specifically designed to govern the collective bargaining process.

Despite the steady movement toward the direction of governmental intervention, many wise observers and participants in the system raised their voices in warning, seeking to retain or achieve a labor arbitration process that would be independent of judicial control. In his famous 1955 Holmes lecture,[17] Dean Harry Shulman argued that the institution of labor arbitration could best flourish without judicial intervention. He viewed legal enforcement of the agreement to arbitrate in a collective bargaining contract as "an unwise" limitation on the parties' autonomy.[18] He conceded that the intensely practical system of grievance arbitration which he described relied upon the wholehearted acceptance by the parties of the autonomous rule of law and reason which the collective agreement established. He summed up the utility of the process by saying that it required a congenial and adequate arbitrator, and despite the fact that arbitration might be resented by either party as an impairment of its authority, that it was susceptible to buck-passing and face-saving, and that it sometimes encouraged litigiousness, he reminded us that

> ". . . when the system works fairly well, its value is great. [But to] consider arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but in the sense in which a transport airplane is a substitute for a stagecoach."[19]

He viewed arbitration as an integral part of industrial self-government—a means to make collective bargaining work for managerial efficiency, for union leadership participation in the enterprise, and for securing justice for the employees. But above all, he wanted the law to stay out. He said that when the

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[15]353 U.S. 448, 40 LRRM 2113 (1957).
[16]*Supra* notes 10 and 11.
[17]Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955).
[18]*Id.*, at 1002.
[19]*Id.*, at 1024.

process "works fairly well, it does not need the sanction of the law of contracts or the law of arbitration."[20] And when the autonomous system which he described breaks down, he preferred that the parties be left to "the usual methods for adjustment of labor disputes rather than to court actions. . . ."[21] He closed his lecture by suggesting "that the law stay out—but, mind you, not the lawyers."[22]

That lecture had an enormous impact on the shape of the law of labor arbitration, though, paradoxically, not in the manner which Dean Shulman proposed or would likely have foreseen. His description of a relatively autonomous arbitration process within a system of industrial self-government was preserved from excessive intrusion of the law only because the Supreme Court used the law to keep the law out. I am referring, of course, to the law relating to enforcement of the parties' own collective agreement, not to the hotly debated issue of the increasingly important role of external law as regulator of the employment relationship as to which David Feller attributed the coming demise of the golden age of labor arbitration.[23]

While Dean Shulman's pristine conception of labor arbitration found much favor with his colleagues,[24] and presumably with many of the participants who thought seriously about the process, it did not find favor in the courts. Regardless of the state of the art of arbitration, the state of the law of arbitration before the *Trilogy* was an entirely different picture. The law was more restrictive both as to the duty to arbitrate and as to the enforcement of the arbitration award. I read the historical evidence differently from Dean St. Antoine, who contends that the *Enterprise*[25] rules regarding judicial enforcements of awards were "preordained,"[26] and that the decision "did not mark a departure from prevailing doctrine."[27] I do not believe that meaningful prevailing doctrine, for comparison purposes, can be gleaned from the items on which he relies: the hortatory

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[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] Feller, *supra* note 4. The impact of external law is not within the scope of this paper. *See* text preceding note 132 *infra*.
[24] E.g., Aaron, *On First Looking Into the Lincoln Mills Decision*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 1.
[25] *Steelworkers* v. *Enterprise Wheel and Car Corp.*, *supra* note 3.
[26] St. Antoine, *supra* note 5 at 1146, n. 39.
[27] *Id.*, at 1144.

language of Section 203(d) of the Taft-Hartley Act[28] that encouraged voluntary arbitration, or the later enacted 1966 Railway Labor Act Amendments[29] relating to court review of arbitration under the statute, or even to the United States Arbitration Act,[30] which at the time was generally deemed inapplicable to labor arbitration,[31] though it did provide some guidance by analogy. The nature of the law that was of greater significance was that which prevailed in most of the states, that is, the application of common law concepts[32] which at the time were followed in most of the states[33] and, before *Lincoln Mills,* prevailed unrestrained. At common law, an award was unenforceable not only for fraud, partiality, and misconduct on the part of the arbitrator;[34] it could also be set aside for "gross mistake,"[35] which in a labor case was often an open invitation for a court to substitute its judgment for that of the arbitrator. "Want of jurisdiction" was also a common rubric by which collective agreements were construed by courts as a means to reverse an arbitrator's determination on the merits.[36] Illustrative of the extent to which some courts intervened in the decisional process in those pre-*Trilogy* days was a case in the early fifties which I well remember, *Rice* v. *Southwestern Greyhound Lines, Inc.,*[37] where a Texas appellate court affirmed the judgment of a district court, setting aside three garden-variety arbitration awards in which an experienced labor arbitrator had reviewed the evidence and construed a clause requiring "sufficient cause" for discharge. The district court examined the transcripts of the arbitration hearings and baldly found that the majority of the arbitration board erred in deciding that the evidence was insuffi-

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[28]29 U.S.C. § 173(d) (1970).
[29]Pub. L. No. 89–459, 80 Stat. 208 (1966) (codified in 45 U.S.C. § 153 (1970)).
[30]9 U.S.C. §§ 1–14 (1970).
[31]*E.g., Tenney Eng., Inc. v. United Elec. Workers Local 437,* 207 F.2d 450, 21 LA 260 (3rd Cir. 1953); *Pennsylvania Greyhound Lines* v. *Amal. Ass'n of Street Elec. Ry. & Motor Coach Emp. Div. 1063,* 193 F.2d 327, 17 LA 688 (3rd Cir. 1952); *Amal. Ass'n of Street Elec. Ry. & Motor Coach Emp. Div. 1210* v. *Pa. Greyhound Lines,* 192 F.2d 310, 17 LA 372 (3rd Cir. 1951); *United Furniture Workers* v. *Colonial Hardwood Flooring Co.,* 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); *Gatliff Coal Co.* v. *Cox,* 142 F.2d 876, 14 LRRM 732 (6th Cir. 1944). *But see Hoover Motor Exp. Co.* v. *Teamsters Local No. 327,* 217 F.2d 49, 35 LRRM 2301 (6th Cir. 1954).
[32]*See* Jones, *Judicial Review of Arbitral Awards—Common Law Confusion and Statutory Clarification,* 31 S. Cal. L. Rev. 1 (1957).
[33]*Id.,* at 8, n. 26.
[34]6 C.J.S. Arbitration § 153.
[35]*Id.,* at § 154.
[36]*Id.,* at § 150.
[37]244 S.W.2d 245, 17 LA 468 (Tex. Civ. App.—Fort Worth 1951, Ref. N.R.E.).

cient to support the discharges. I would like to think that the *Rice* case was merely a throwback to Texas frontier justice—a modern version of Judge Roy Bean's "Law West of the Pecos." But, unfortunately, many state courts elsewhere were also willing to intervene in labor arbitration cases after awards were rendered, notwithstanding the long tradition at common law concerning judicial enforcement of awards without review on the merits.[38] Recall the 1955 decision of the California Supreme Court in *Black* v. *Cutter Laboratories.*[39] An arbitration board had reinstated a grievant under a "just cause" for discharge clause, but because the grievant was a member of the Communist party the award was deemed unenforceable as contrary to "impelling public policy."[40]

It is true, however, that judicial intervention was more of a problem at the pre-arbitration stage than at the postaward stage. Dean St. Antoine noted that "the courts had come only slowly and grudgingly to hold legally enforceable"[41] executory agreements to arbitrate. And Professor Benjamin Aaron, in his essay *On First Looking Into the Lincoln Mills Decision,*[42] reminded us that

> ". . . each week the advance sheets [would bring] fresh examples of the judicial mind at work on disputes over arbitration. . . . Some of the[se] decisions involving arbitrability . . . are based on reasoning not dreamt of in any arbitrator's philosophy, and the list of Horrible Examples grows longer and longer; from *Cutler-Hammer*[43] to *Warrior & Gulf Navigation Company*[44] the story is the same: under the guise of determining arbitrability, the court disposes of the merits of the case, usually by finding the relevant language of the collective agreement so clear in meaning and so ineluctable in effect that, it would seem, only idiots and arbitrators could profess to see in it a lurking ambiguity giving rise to an arbitrable issue."[45]

Those "Horrible Examples" contributed to Professor Aaron's widely shared concern that the *Lincoln Mills* decision might lead

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[38]St. Antoine, *supra* note 5 at 1147, n. 42. *See generally* Jones, *supra* note 32; Aaron, *supra* note 24 at 7–10.

[39]43 Cal.2d 788, 278 P.2d 905, 35 LRRM 2391, *cert. granted,* 350 U.S. 816 (1955), *cert. dismissed,* 351 U.S. 292, 38 LRRM 2160 (1956).

[40]*Id.,* at 916.

[41]St. Antoine, *supra* note 5 at 1146.

[42]Aaron, *supra* note 24.

[43]*Machinists* v. *Cutler-Hammer Inc.,* 271 App. Div. 917, 67 N.Y.S.2d 317, 19 LRRM 2232, *aff'd,* 297 N.Y. 519, 74 N.E.2d 317, 20 LRRM 2445, *aff'd,* 297 N.Y. 519, 74 N.E.2d 464 (N.Y. Ct. App. 1947).

[44]168 F.Supp. 702 (D.C.S.D. Ala. 1958), *aff'd,* 269 F.2d 633 (5th Cir. 1959), *reversed,* 363 U.S. 574, 46 LRRM 2416 (1960).

[45]Aaron, *supra* note 24 at 8.

to an arbitration system governed from above by the federal courts applying a federal law of arbitration. He felt that "under such a system the pressure on the losing party in an arbitration case to appeal the decision to the higher authority of the courts would be almost irresistible."[46] But in many cases the pressure in the state courts to do just that was already almost irresistible. The dockets of many state courts were filled with actions for stays of arbitration.[47] *Lincoln Mills,* therefore, did not impose federal law where no law had existed; it imposed federal law in place of state law. The Supreme Court's rulings on preemption and supremacy under Section 301, articulated in the *Lucas Flour*[48] and *Smith* v. *Evening News*[49] cases, insured that result.

That idyllic condition of labor arbitration and collective bargaining envisioned by Dean Shulman, which Professor Aaron originally feared might be paradise lost if the federal courts intervened,[50] was not in fact the reality of labor law as it was viewed through the eyes of state judges. Which is not to say that the Shulman description served no purpose. On the contrary, it served a high purpose, for it became the guiding principle toward which the Supreme Court eventually gravitated.

III. *Lincoln Mills*—The New Common Law of the Collective Agreement

As we celebrate the *Trilogy* cases, we recognize that they were but the offspring of the *Lincoln Mills* case, which in my judgment was the happiest accident that ever occurred in American labor law. Therefore, homage is due to *Lincoln Mills,* as it is due to the late and great Mr. Justice William O. Douglas, the author of all four of these landmark opinions. Congress is also entitled to a little credit. If awards were given for legislative serendipity, the 80th Congress would have won hands down for having included in the Taft-Hartley Act[51] an obscure provision designed to make

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[46] *Id.,* at 14.

[47] *See* Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass,* 2 Buffalo L. Rev. 1 (1952); Mayer, *Judicial Bulls in the Delicate China Shop of Labor Arbitration,* 2 Lab. Law J. 502 (1951); Scoles, *Review of Arbitration Awards on Jurisdictional Grounds,* 17 U. Chi. L. Rev. 616 (1950); Comment, *Judicial Deference to Arbitrable Determination: Continuing Problems of Power and Finality,* 23 U.C.L.A. L. Rev. 941–42 (1976).

[48] *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962).

[49] 371 U.S. 195, 51 LRRM 2646 (1962).

[50] Aaron, *supra* note 24.

[51] *Supra* note 11.

it easier for employers to sue unions for breach of no-strike provisions in collective agreements.[52] This was Section 301.[53] It was so poorly drafted that it required ten years of litigation, including two major decisions of the Supreme Court,[54] to solve the problem posed by the constitutional requirement that federal judicial power applies only to federal substantive law, save for diversity and other inapplicable types of cases.[55] In Section 301, however, Congress provided a federal forum but no obvious federal substantive law. American industrial relations will be long indebted to Justice Douglas for his choice of solutions. His decision was deceptively simple, but brilliant. He found the missing federal substantive law, the jurisdictional sine qua non, in the bare statutory language of Section 301(a) which made agreements between employers and labor organizations enforceable in the federal courts. He said that the provision "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained in that way."[56] Since Congress failed to define the law to be enforced, or to indicate its source, it remained for the Court to fill the void. Justice Douglas therefore asked and answered the question: "[W]hat is the substantive law to be applied . . . ?"[57] As every student of labor law quickly learns, his answer was "federal law, which the courts must fashion from the policy of our labor laws."[58] Thus was born the judicial basis for the common law of the collective agreement.

Congress may not have consciously intended for the courts to play such a dominant role in shaping the contours of the collective agreement, but history is full of determinative accidents, and this one happily contributed to a better definition of the nature of the collective agreement than Congress would have devised had it sought to enact a legislative code, for in its consideration of legislation affecting labor-management relations

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[52]S. Rep. No. 1656, 79th Cong., 1st Sess., 9 (1945); H.R. Rep. No. 267, 1430, 80th Cong., 1st Sess., 1 (1947).

[53]61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

[54]*Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 35 LRRM 2643 (1955) and *Textile Workers* v. *Lincoln Mills*, *supra* note 15. *See* cases cited in note 13 *supra*.

[55]U.S. Constitution, Art. III.

[56]353 U.S. at 455.

[57]*Id.*, at 456.

[58]*Ibid.*

Congress has usually responded only to polarized political pressure.[59] The confluence of Section 301 and *Lincoln Mills* thus compelled that the legal nature of the collective agreement would be what the Supreme Court decreed, and Congress has evidently been satisfied with that arrangement.

With scant reliance on theoretical preconceptions, the Court, led primarily by Justice Douglas, proceeded pragmatically to construe the collective agreement to fit the circumstances required by the bargaining partners and by the public interest, as the Court saw that interest embodied in congressional labor policy. And because the Court was and still is fashioning common law[60]—a quasi-legislative process—it has been free to move with both large and small steps, and free to employ trial-and-error methods, even reversing itself[61] or altering direction.[62] This is not the occasion to explore the full dimensions of the collective agreement as the Court has defined it in a series of interrelated decisions. But it is the occasion to focus on the central features of the collective agreement, for the Court intended the *Trilogy* to provide the basic documentation on the legal nature of that agreement.

As a student and teacher of labor law, I have naturally read those three decisions countless times. So I did not expect that in rereading them for the preparation of this paper I would find

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[59]*E.g.*, "Wagner Act," 49 Stat. 449 (1935); "Taft-Hartley Act," 61 Stat. 136 (1947); "Landrum-Griffin Act," 73 Stat. 519 (1959); and the aborted "Labor Law Reform Act of 1978," H.R. Rep. 8410, 95th Cong., 1st Sess., 19 (1977); S. Rep. No. 2467, 95th Cong., 2d Sess., 8 (1978); Labor Relations Year Book—1978, at 4 (1979).

[60]*E.g.*, *Nolde Bros.* v. *Bakery Workers*, 430 U.S. 243, 94 LRRM 2753 (1977); *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 92 LRRM 3032 (1976); *Howard Johnson Co.* v. *Detroit Joint Board*, 417 U.S. 249, 86 LRRM 2449 (1974); *Arnold* v. *Carpenters*, 417 U.S. 12, 83 LRRM 2033 (1974); *Granny Goose Foods* v. *Teamsters Local 70*, 415 U.S. 423, 85 LRRM 248 (1974); *Gateway Coal* v. *UMW*, 414 U.S. 368, 85 LRRM 2049 (1974); *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 67 LRRM 2881 (1968); *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2545 (1967); *UAW* v. *Hoosier Cardinal*, 383 U.S. 696, 61 LRRM 2545 (1966); *Republic Steel* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964); *Carey* v. *Westinghouse*, 375 U.S. 261, 55 LRRM 2042 (1964); *Truck Drivers Local 89* v. *Riss and Co.*, 372 U.S. 517, 52 LRRM 2623 (1963); *Smith* v. *Evening News*, 371 U.S. 195, 51 LRRM 2646 (1963); *Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254, 50 LRRM 2440 (1962); *Atkinson* v. *Sinclair Ref. Co.*, 370 U.S. 238, 50 LRRM 2433 (1962); *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 50 LRRM 2420 (1962); *Lucas Flour Co.* v. *Teamsters Local 174*, 369 U.S. 95, 49 LRRM 2717 (1962); *Retail Clerks* v. *Lion Drygoods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 49 LRRM 2619 (1962); *Steelworkers* v. *American Mfg. Co.*, *supra* note 1; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 2; *Steelworkers* v. *Enterprise Wheel and Car Corp.*, *supra* note 3.

[61]*Compare Sinclair Ref. Co.* v. *Atkinson*, *supra* note 60, *with Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970).

[62]Compare *John Wiley & Sons* v. *Livingston*, *supra* note 60, with *Howard Johnson Co.* v. *Detroit Joint Board*, *supra* note 60.

anything new. Indeed, I saw the same language I had seen many times before, but this time the occasion caused me to see something else. I saw these decisions more vividly as an integrated whole with interrelated parts. I saw them not just as three important cases among a series of Section 301 cases, and not just as rules defining the respective roles of courts and arbitrators in relation to disputes arising under collective agreements. I saw them—as if for the first time—as a single document defining the nature of the collective agreement and the role of the arbitrator in relation to the collective bargaining process.

The legal entity which emerges from this definition is not identical to any description supplied by any of the eminent legal scholars who have written on the subject,[63] although there are strong resemblances to certain prominent features in some of their theoretical models. The Court's definition commands our attention. Aside from the persuasive fact that the Court's definition represents the law, it also represents an approach to the collective bargaining process that has worked remarkably well during the past 20 years and will likely continue to do so in the foreseeable future. Notwithstanding that this audience is quite familiar with the *Trilogy* opinions, I want to review them at this time in order to emphasize the unity of their doctrine and to demonstrate that certain errors in several recent court decisions are attributable to the failure of some courts to apply the doctrine as a whole. This is particularly true of the Courts of Appeals for the Fourth and Sixth Circuits.[64]

Justice Douglas presented the opinions in an order that roughly coincided with the frequency with which the main problem areas in judicial enforcement of grievance arbitration tended to arise.

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[63]*E.g.*, Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Aaron, *On First Looking into the Lincoln Mills Decision*, *supra* note 24; Summers, *Collective Agreements and the Law of Contracts*, 58 Yale L.J. 525 (1969); Feller, *A General Theory of the Collective Bargaining Agreement* 61 Calif. L. Rev. 663 (1973); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, *supra* note 5; and Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas Jones (Washington: BNA Books, 1967), 1 (also 34 U. Chi. L. Rev. 545 (1967)).

[64]*See* notes 100–103 and 207–226 *infra* and accompanying text.

IV. The *Trilogy* Revisited

A. American Manufacturing

The first case, *American Manufacturing*,[65] concerned the problem of judicial intrusion into the merits of a dispute prior to an arbitral decision. The grievance involved the discharge of an employee who had brought a worker's compensation action against his company. In the ensuing settlement of the case, his physician expressed the opinion that the injury had left the employee permanently partially disabled. When the union sought his reinstatement in a grievance, the company relied on the physician's statement and contended that the employee was unable to work. It refused reinstatement and refused to arbitrate. The district court held that the employee was estopped because of the settlement of the worker's compensation claim. The court of appeals affirmed,[66] but for different reasons, holding that the grievance was frivolous, patently baseless, and therefore not subject to arbitration. The Supreme Court reversed and ordered arbitration. In doing so, it expressly rejected application of New York's *Cutler-Hammer*[67] doctrine with which some courts were denying arbitrability "[i]f the meaning of the provision of the contract sought to be arbitrated" was deemed by the Court to be "beyond dispute."[68]

In this first of the *Trilogy* decisions, Justice Douglas began the process of describing the nature of the collective agreement and how it differed from ordinary commercial contracts. He noted the "crippling effect" of the lower court's "preoccupation with ordinary contract law."[69] He said that "special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[70] Viewing the collective agreement essentially as Dean Shulman had described it in his Holmes lecture, about which the *Warrior & Gulf*[71] opinion would be even more specific, he emphasized the manner in which the arbitrator's role was integrated into the bargaining process:

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[65] *Steelworkers* v. *American Mfg. Co.*, *supra* note 1.
[66] 264 F.2d 624, 43 LRRM 2757 (6th Cir. 1959).
[67] 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).
[68] *Id.*, 271 App. Div. at 918.
[69] 363 U.S. at 567.
[70] 363 U.S. at 566–67.
[71] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 2.

"Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[72]

That language was alluded to and repeated in part in the *Enterprise Wheel*[73] decision, but its initial statement in *American Manufacturing* is also helpful in explaining what the Court meant in *Enterprise* about the limits on a court's reviewing authority when an arbitrator fails to apply "correct principles of law to the interpretation of the collective bargaining agreement."[74] I shall return to this point when I examine some recent decisions setting aside arbitration awards where the courts in question could not bring themselves to countenance bad judgment by an arbitrator. As we shall see, the courts in those decisions failed to understand that the Supreme Court intended that the arbitrator would have the right to be wrong, for he was selected and agreed upon by the parties as the person who would settle disputes over issues which had also been agreed upon as proper subjects for submission to arbitration.

An arbitrator under a collective agreement was characterized more recently, in Mr. Justice Powell's opinion in *Alexander* v. *Gardner Denver Co.*,[75] as the "proctor"[76] of the bargain. The phrase is apt, for as the Court described him in Dean Shulman's words: "He is . . . part of a system of industrial self-government created by and confined to the parties."[77]

The problem posed by the specific issue in *American Manufacturing* has ceased to be a problem. The Court's opinion has served as a clear "keep off" sign directed to the lower courts regarding arbitrable disputes prior to arbitration. The rule which it announced, which was expounded further in the second *Trilogy* case, was that:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.

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[72] 363 U.S. at 568.
[73] *Steelworkers* v. *Enterprise Wheel and Car Corp.*, *supra* note 3.
[74] *Id.*, at 598.
[75] 415 U.S. 36, 7 FEP Cases 81 (1974).
[76] *Id.*, at 53.
[77] *Id.*, n. 16, quoting Shulman, *supra* note 17 at 1016.

"The courts . . . have no business weighing the merits of the grievance. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[78]

B. Warrior & Gulf

The *Warrior & Gulf*[79] case was chosen as the vehicle for the Court's principal statement on the nature of the collective agreement. In connection with the immediate issue of substantive arbitrability, the statement explained why a collective agreement should be construed differently from an ordinary contract. But the statement also provided the broad philosophical underpinnings for the relative roles of court and arbitrator which Justice Douglas was seeking to define.

The grievance in issue concerned contracting-out of maintenance work. Although the collective agreement contained no provisions directly relating to subcontracting, it did contain the usual recognition clause. There was also a clause stating that issues which "were strictly a function of management shall not be subject to arbitration."[80] Relying on the latter provision, the employer refused to arbitrate. The Supreme Court held the grievance arbitrable.

Whether the parties have agreed to arbitrate a particular dispute is a threshold contract question the determination of which provides the basis for the arbitrator's jurisdiction. This question of *substantive arbitrability*[81] is thus properly to be determined by the court, not in the final instance by the arbitrator.[82] In order to give full effect to the congressional preference for arbitration as the favored means for the settlement of disputes under collective agreements,[83] the Court decreed, as a rule of contract construction, a presumption in favor of arbitrability in a collective agreement which contains an arbitration clause. Such a rule was appropriate because judges, unlike arbitrators,[84] were not expected to delve into the bargaining background or other unwritten factors which might properly influence the interpretation of

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[78]363 U.S. at 567–58.
[79]*Supra* note 71.
[80]*Id.*, at 576.
[81]In a later case, the Supreme Court ruled that the determination of *procedural arbitrability* was properly the function of the arbitrator. *John Wiley & Sons* v. *Livingston*, *supra* note 60. *See* note 176 *infra*.
[82]363 U.S. at 582. *See also John Wiley & Sons*, *supra* note 60.
[83]29 U.S.C. § 173(d) (1970).
[84]*See* notes 69–78 *supra* and accompanying text.

collective bargaining provisions. Furthermore, the Court recognized that whereas arbitration "[i]n the commercial case . . . is the substitute for litigation," under a collective agreement it is "the substitute for industrial strife."[85] It therefore concluded that because of the difference in function, "the hostility evinced by courts toward arbitration of commercial agreements has no place here."[86] The presumption of arbitrability was framed as follows:

> "[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
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> . . .
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> "In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."[87]

In the instant *Warrior & Gulf* case, the Supreme Court relied on the existence of a broad grievance and arbitration provision relating to "differences . . . between the Company and the Union [and] any local trouble of any kind"[88] to conclude that the subcontracting grievance was arbitrable.

The *Warrior & Gulf* holding on arbitrability has not created any significant problems in its application. A recent First Circuit decision, *Mobil Oil Corp.* v. *Local 8–766, OCWA,*[89] is illustrative of strong judicial awareness of the policy favoring substantive arbitrability. The issue in that case also concerned subcontracting. The arbitration clause limited arbitration to the "express terms" of the agreement. There was no provision specifically dealing with subcontracting, although the agreement contained a recognition clause and provisions for seniority, wages, and classifications. The arbitrator found the dispute arbitrable and that the employer had violated the agreement by unilaterally contracting out certain deliveries from one of its plants. The lower court enforced the award without making an independent determination of arbitrability. Although the court of appeals affirmed, it declared the district court in error for failing to make an independent determination of arbitrability; however, remand

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[85]363 U.S. at 578.
[86]*Ibid.*
[87]*Id.*, at 582–83, 584–85.
[88]*Id.*, at 576.
[89]600 F.2d 322, 101 LRRM 2721 (1st Cir. 1979). *See also, e.g., Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n,* 532 F.2d 615 (8th Cir. 1976).

was not required for the issue was one of law and the record was complete. The court of appeals also rejected the employer's proffer of extrinsic evidence of bargaining history, which was offered to establish an intent to exclude subcontracting from arbitration. Although a split among the circuits on such use of bargaining history to determine substantive arbitrability was acknowledged, the court held such evidence irrelevant under *Warrior & Gulf* standards, noting that the Supreme Court had reaffirmed those standards in its 1977 ruling in *Nolde Brothers* v. *Bakery Workers,*[90] where arbitrability of a grievance that had arisen under a collective agreement was upheld even though the agreement itself had expired.

Warrior & Gulf, however, was more than a case about arbitrability. It was also the case in which Harry Shulman's concept of the collective agreement was implanted as the underlying rationale of the newly fashioned law of the collective agreement and arbitration. Although the judiciary was accorded its proper role of determining whether there was an agreement to arbitrate, where there was such an agreement the arbitrator's role was enhanced and the court's role was diminished. The reason for the new apportionment of responsibility was the Court's acceptance of Shulman's view of the collective agreement—that it "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[91]

Justice Douglas saw in the collective agreement "a system of industrial self-government"[92] with the grievance procedure at the very heart of the system. Arbitration was viewed as "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[93]

Using the words of Dean Shulman, the Court described the written collective agreement to indicate the diverse compilation of provisions which it typically contains: "Some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in

[90] *Supra* note 60.
[91] 363 U.S. at 578.
[92] *Id.,* at 580.
[93] *Id.,* at 581.

their application; and some do little more than leave problems to future consideration with an expression of hope and good faith."[94]

The Court was thus recognizing that most arbitral awards will call for fairly traditional contract interpretation, not unlike that which a court engages in when it construes a commercial contract. But the last type of provision described, where problems are left for "hope and good faith" consideration, will require special competence and different expectations from the decision-maker. The opinion specified that "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement."[95] Accordingly, the Court stressed that the arbitrator's role in the process was creative as well as interpretive, for

> "... [a]rbitration is a means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and conduct are given to the collective agreement."[96]

The arbitrator was indeed the "proctor" of the agreement—a role not unlike "the parties' officially designated 'reader' of the contract,"[97] as the arbitrator was described by Dean St. Antoine.

The Court in *Warrior* was thus explicating what it meant by the requirement, stated later in *Enterprise Wheel,* that the arbitrator's award must draw its "essence"[98] from the agreement. It said: "The labor arbitrator's source of law is not confined to the express provisions of the contract as the industrial common law —the practices of the industry and the shop—is equally a part of the collective bargaining agreement, although not expressed in it."[99] The Court then illustrated the kind of judgment which the parties expected from their arbitrator—their "proctor" or "reader." It was an illustration which the Sixth Circuit should have noted, for example, in its 1979 decision in *Detroit Coil* v. *Machinists.*[100] The pertinent statement in *Warrior & Gulf* was that:

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[94] *Id.,* at 580, quoting Shulman, *supra* note 17 at 1005.
[95] *Ibid.*
[96] *Id.,* at 581.
[97] St. Antoine, *supra* note 5 at 1140.
[98] 363 U.S. at 597.
[99] 363 U.S. at 581–82.
[100] 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979).

> "The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished."[101]

In the *Detroit Coil* case, the Sixth Circuit provided a classic illustration of a court narrowly reading the phrase from *Enterprise Wheel* about an arbitrator's "dispensing his own brand of industrial justice" (which I shall discuss further when I review the last *Trilogy* decision) and giving it a meaning different from what the Supreme Court was stressing in the *Trilogy* as a whole, particularly in its *Warrior & Gulf* description of the factors on which an arbitrator's judgment could be based.

The contract in *Detroit Coil* contained a provision that unless the local union notified the company "within eight (8) working days from the date" when the union made the decision to arbitrate, "the grievance or grievances shall be considered settled."[102] The union made its decision to arbitrate at a meeting on April 6, 1976, and notified the company by letter dated April 15, which the company did not receive until April 30. The company responded that it considered the grievance settled, although the union persisted in seeking arbitration, to which the company would not agree. However, the parties did agree to submit the arbitration issue to arbitration.

The arbitrator ruled that despite the union's failure to meet the literal notification requirements in the contract, the case should be heard on its merits because of several factors: (1) The letter containing the notification was dated within the eight-day period. (2) No evidence was submitted to indicate that the union actually considered the grievance settled. (3) The parties had not in the past used the excuse of time-limits to deny a grievance. (4) Union testimony indicated it had not insisted on a company response within a 48-hour requirement specified in the contractual grievance procedure. (5) The union had waived the time requirements at Step 3 in order to give the owner of the company an opportunity to provide his input in the company's response. And, finally, (6) the arbitrator took note of the

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[101]363 U.S. at 582.
[102]594 F.2d at 577.

good relations between the union and the company, indicating that a denial of arbitrability would result in a deterioration of that relationship.

The Sixth Circuit disregarded or considered irrelevant the first five reasons, holding that there was no evidence of waiver of this particular requirement in the past. As to the factor relating to potential deterioration of good relations, the court, without reference to the morale factor mentioned in *Warrior* as a proper basis for arbitral consideration, concluded that such reliance amounted to the arbitrator's "dispensing his own brand of industrial justice,"[103] and the award was vacated.

A final word about *Warrior & Gulf:* In concluding his description of the arbitrator's pivotal role under the collective agreement, Justice Douglas compared arbitrators and judges, using language which has been characterized by such phrases as "extravagant"[104] or "wonderful nonsense."[105] His extravagant praise for arbitrators was a source of some consternation in the judicial community and a source of embarrassment or amusement in the arbitration community. Although I have shared the feeling of amusement, I am not sure that any of these reactions was proper. Justice Douglas prefaced his praise by observing that: "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."[106]

He was thus elaborating on the unique nature of the decisional expectations which collective bargaining parties place on the arbitrator whom they have personally chosen as their proctor. Here again he was giving broad meaning to the limitation in *Enterprise* that the award must draw its "essence"[107] from the agreement, for the practice of drawing upon experienced personal judgment and industrial common law to fill in the gaps in an agreement was obviously not to be equated with the impro-

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[103]*Id.*, at 581, quoting 363 U.S. at 597.

[104]Feller, *supra* note 4 at 111; Christensen, *Judicial Review: As Arbitrators See It*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1972), at 100.

[105]Aaron, *supra* note 24 at 44.

[106]363 U.S. at 582.

[107]363 U.S. at 597.

priety of an arbitrator's dispensing "his own brand of industrial justice."[108]

Justice Douglas stressed that those functions which the arbitrator was required to perform in order to serve the "specialized needs" of the collective bargaining process were foreign to what judges do in construing "ordinary contract law."[109] He therefore concluded that: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[110] He was not saying that arbitrators are more intelligent or generally better informed than judges. He was only reporting their relative experience and competence attributable to the respective conditions under which they operate. In the first place, unlike a judge, an arbitrator is personally selected and agreed upon by the disputing parties. The arbitrator's background and experience concerning industrial relations are thus initially considered by the parties to be suitable for the dispute in question. Although such experience and competence generally do exist, it is equally important that they be so perceived and screened by the parties. Second, the arbitration hearing is usually conducted close to and often even within the physical confines of the location of the dispute. Hearings are commonly held in factory conference rooms or in nearby motels, not in remote courthouses. Witnesses at the hearings are called from and return directly to their jobs in the plant. Thus, even from a physical standpoint the arbitration hearing and the presence of the arbitrator tend to be visible fixtures within the collective bargaining process. Third, the ablest judge cannot be similarly informed because the rigid evidentiary process upon which judges must rely would often be insufficient to meet the specialized needs of the parties. This is not to say that a judge could not fill the arbitrator's role. Rather, judges in the existing judicial system simply do not fit that role, nor should they be expected to fit it considering the nature of the collective agreement. Of course, as individuals, judges are usually very competent and many would probably make excellent arbitrators. In fact, in a few jurisdictions there are some highly qualified judges who moonlight as highly qualified arbitrators. Some of

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[108] *Ibid.*
[109] 363 U.S. at 567.
[110] 363 U.S. at 582.

them are members of this Academy. But decision-making by a judge is significantly different from that by an arbitrator—a difference that Justice Douglas understood and stressed because of its bearing on the relationship between judges and arbitrators that the *Trilogy* was intended to define. Since the *Trilogy,* the Supreme Court has had no cause to dilute Justice Douglas's description of the relative functions and levels of information available to arbitrators and judges; indeed, in its 1977 *Nolde Brothers*[111] decision, the Court repeated and approved exactly the same description.

C. Enterprise Wheel

The last of the *Trilogy* cases, *Steelworkers* v. *Enterprise Wheel and Car Corp.*,[112] is the one which has been most involved in subsequent litigation. The principles of *American Manufacturing* and *Warrior & Gulf* were readily accepted by the lower courts, but the *Enterprise* decision, which relates to enforcement and review of awards after their rendition, is occasionally the subject of judicial action. There are two primary reasons for such litigation. In the first place, the Supreme Court intended some limited review of arbitration awards; therefore, many cases of judicial review are simply what the *Enterprise* decision required and anticipated. In the second place, the language in *Enterprise* defining the scope of review has seemed sufficiently ambiguous to allow some courts to set aside arbitration awards with which they disagreed by holding that such awards did not draw their "essence from the agreement" or that the arbitrator was "dispensing his own brand of industrial justice."[113] A number of those decisions, especially several recently issued by the Fourth and Sixth Circuits, have actually broadened the scope of review far beyond the *Trilogy* standard. But the reviewing standard of *Enterprise* is not as ambiguous as some commentators[114] have asserted. Most courts have understood its meaning and most—with some notable exceptions—have dutifully enforced awards, notwithstanding that they may have disagreed with the arbitrator's fact-finding, reasoning, or conclusions.[115]

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[111] *Supra* note 60.
[112] 363 U.S. 593 (1960).
[113] *Id.*, at 597.
[114] *E.g.*, Aaron, *supra* note 24 at 44, and St. Antoine, *supra* note 5.
[115] See discussion *infra* at notes 135–226 and accompanying text.

Before examining specific cases, however, I want to review the familiar facts of *Enterprise* and note exactly what the Court said about those facts. The grievance at issue was the discharge of several employees who had left their jobs in protest of the discharge of a fellow employee. The arbitrator found that although the work stoppage was improper, discharge was not justified; accordingly, he modified the discipline to a ten-day suspension. The Supreme Court approved the award, stating that "the courts have no business overruling [arbitrators] because their interpretation of the contract is different from his."[116] The Court's definition of the collective agreement and the role of arbitration thereunder, about which it had elaborated in *American Manufacturing* and *Warrior & Gulf,* provides the touchstone for judicial review of an arbitrator's award. The specific phrases in *Enterprise* defining the limitations of an award, to which some courts have myopically supplied their own more restrictive definitions, were the following:

> "[T]he arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award."[117]

In adopting that standard, the Court was recognizing that an award must relate to the agreement—for that was what the arbitrator was selected to construe. But the word "essence" is not a word of precision, especially when read with the Court's numerous references to the multiple sources to which an arbitrator might look in order to determine the proper meaning of the agreement with regard to the issue in dispute. In the very paragraph in which the standard appears, the Court said that the arbitrator was "to bring his *informed judgment* to bear in order to reach a *fair* solution of a problem."[118] Language deemed ambiguous by an arbitrator and resolved in a way intended to achieve fairness, even though a court might read such language to provide for a different result, would thus not be a manifestation of the kind of infidelity to which the foregoing paragraph alluded.

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[116]363 U.S. at 599.
[117]*Id.*, at 597.
[118]*Ibid.* (emphasis added).

The efficacy of this "fair solution" approach was deemed "especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."[119]

It is significant that Justice Douglas avoided the adoption of conventional standards of judicial review.[120] Such standards would certainly have been inappropriate considering the nature of the collective agreement which the Court had defined in *Warrior & Gulf*. He thus did not use the phrases "gross error" or "gross mistake," terms which had traditional common law meanings.[121] Nor did he use such phrases as "without foundation in reason or fact" or indicate that an award must in some "rational way be derived from the agreement."[122] The concept of reason or rationality is something about which an arbitrator and a court might too easily differ because of their dissimilar frames of reference. Dean St. Antoine, however, would add such a "rationality" requirement because he believes "the parties presumably took it for granted that [their arbitrator] would not be insane and his decisions would not be totally irrational."[123] I would not be worried about courts setting aside a "totally irrational" award; I suspect there are not many such awards. It is the award which might seem to a court to be *partially* irrational that would give me pause. Better to rely on the "essence" requirement and look to the entire *Trilogy* to determine whether that standard has been met. For like reasons, a similar gloss on *Enterprise* suggested by Professor Bernard Meltzer[124] would seem to be inappropriate. He suggests that an award should be enforced "unless it clearly lacked a rational basis in the agreement read in the light of the common law of the plant where appropriate."[125] He asserts "that such limited judicial supervision would strengthen the institution of arbitration."[126] I fail to see how that conclusion would follow. Arbitration would certainly become more legalistic, more technical, and it would tend to lean more heavily on traditional judicial-type contract con-

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[119]*Ibid.*

[120]For a review of such standards, *see* Jones, *supra* note 32.

[121]6 C.J.S. Arbitration § 154.

[122]*Safeway Stores* v. *Bakery Workers Local 111*, 390 F.2d 79, 82, 67 LRRM 2646 (5th Cir. 1968), and *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969). *See* St. Antoine, *supra* note 5 at 1148.

[123]*Id.*, at 1149. See *infra* notes 135–40, 151–52, 166–70.

[124]Meltzer, *supra* note 63.

[125]*Id.*, at 13.

[126]*Id.*, at 14.

struction. It would thus more nearly resemble statute-based labor arbitration in Canada.[127] More important, such a broadening of the scope of judicial review would be inconsistent with the arbitrator's proper role as described by the Court in the *Trilogy*, for it would seem to be at variance with the Court's effort to prohibit judicial second-guessing of the arbitrator as to the merits of the grievance.[128]

Thus, in his concluding rationale for the *Enterprise* standard, Justice Douglas expressly rejected a wide scope of judicial review. He pointedly refused to adopt an approach which would require an arbitrator to apply the "correct principle of law to the interpretation of the collective bargaining agreement," because:

> ". . . acceptance of this view would require courts . . . to review the merits of every construction of the contract . . . [making] meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[129]

The maintenance of high standards of arbitral competence was thus not intended to be dependent on close scrutiny by judges. The integrity and competence of the decision-makers in this voluntary system would ultimately be guaranteed, not by judicial review but by the parties themselves through an informal marketplace screening: the process of selecting and rejecting arbitrators. Those persons who do not meet the rigorous requirements of a demanding constituency will not become—or will not

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[127] *E.g.*, *Outboard Marine Corp.* v. *Steelworkers Local 5009*, CCH Canadian Lab. L. Rep. ¶14,462 (1976); *Canadian Steelworkers* v. *Atlas Steel Corp.*, CCH Canadian Lab. L. Rep. ¶14,425 (1976); *Steelworkers Local 1005* v. *Steel Company of Canada, Ltd.*, CCH Canadian Lab. L. Rep. ¶14,257 (1976); *Toronto Civic. Employees Local 43* v. *Municipality of Metropolitan Toronto*, CCH Canadian Lab. L. Rep. ¶14,203 (1976); *Hospital Joyce Memorial* v. *Golinas*, CCH Canadian Lab. L. Rep. ¶15,367 (1975). *See generally* Canadian Industrial Relations, the Report of Task Force on Labour Relations (Woods, Chairman, 1968); Weiler, Reconcilable Differences: New Directions in Canadian Labour Arbitration, at 94–97 (1980); D. Brown and D. Beatty, Canadian Labour Arbitration, 22–35 (1977); Morris, *An Outsider's Affectionate View of Labor Trends in Canada—A Comparison of Development on Both Sides of the Border*, in The Direction of Labour Policy in Canada (Industrial Relations Centre, 1977), 82, 91–94.

[128] A review test suggested by another commentator is that of arbitral "honesty," "honest construction," "honest intellect," "honest arbitrator," and "honest decision" —which I would find too subjective notwithstanding the nonsubjective intent of its author. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 297–98 (1980).

[129] 363 U.S. at 598–99.

remain—arbitrators. But as we all know too well, even the most competent and experienced arbitrator can and on occasion does make a serious mistake—or at least what one party perceives to be a serious mistake. Except for the limited situation where the arbitrator wholly strays from the "essence" of the agreement,[130] the Court intended that correction of mistakes would come from the parties' own appellate process, that is, from subsequent collective bargaining. Only the exceptional situation—the extreme error which could not meet the "essence" test—was reserved for judicial review. This was the real message of *Enterprise.*

A collateral benefit of the Court's sparse approach to judicial review was the avoidance of the phenomenon which Justice Frankfurter feared would occur if Section 301 were interpreted as a grant of federal substantive law: that it "would bring to the federal courts an extensive range of litigation . . . [and] open the doors of the federal courts to a potential flood of grievances. . . ."[131] It did not because an important by-product of the *Trilogy,* with its presumptions favoring the arbitral process but disfavoring judicial intervention in that process, was to protect the courts from excessive and congestive involvement in the settlement of grievances arising under collective agreements.

The *Enterprise* standard of judicial review was but the logical fulfillment of the *Trilogy*'s unitary concept of the collective agreement and the relation of arbitration to that agreement. And because the Supreme Court described that concept by means of interdependent statements in all three of the decisions, *Enterprise Wheel* was not meant to be read in isolation.

V. *Enterprise Wheel*—Twenty Years Later

A. Judicial Review of the Merits of an Award: The Prevailing View

A survey of the circuits covering cases which fall within the scope of this paper, that is, those which involved only the interpretations and applications of the collective agreement (not cases involving the impact of external law), reveals that in most

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[130]An example wherein an arbitrator dispensed his "own brand of industrial justice" and issued an order which did not draw its "essence" from the agreement can be found in *City Elec., Inc.* v. *Local 77, IBEW,* 517 F.2d 616, 89 LRRM 2535 (9th Cir. 1975), discussed in note 189 *infra.*

[131]*Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp., supra* note 54.

of the courts the *Enterprise* standard is alive and well. In several courts, however, the scope of judicial review has been stretched far beyond the limits countenanced by the *Trilogy* standard. The Fourth and Sixth Circuits,[132] in particular, have demonstrated a judicial reluctance to give full effect to the Supreme Court's "hands-off" review policy. While no circuit court admits to a revisionary policy—due allegiance is always declared to the general requirements of the *Trilogy*—the fact remains that several key decisions in the Fourth and Sixth Circuits cannot be reconciled with the unitary *Trilogy* concept described hereinabove. It is instructive to review what has happened in all the circuits, for the overwhelming judicial approach in the other nine circuits has been to leave to the arbitrators, who were chosen by the parties, the basic task of construing the collective agreement. The survey that follows reveals that the Fourth and Sixth Circuits are indeed revisionary in their approach.

This survey will examine only important and recent decisions of the federal circuit courts of appeals. Opinions of the federal district courts will not be examined, for those courts look to their immediate appellate courts for guidance and review. And while state courts also have jurisdiction to enforce Section 301 law,[133] the law which they apply must be the law fashioned by the federal courts.[134] Although some state court decisions may fail to measure up to the rigid *Enterprise* standard, state court decisions will not be included in this survey. The general state of the law under *Enterprise* can best be judged by looking at federal appellate cases. Except for the two maverick circuits, which I shall save for last, the circuits will be reviewed seriatim.

First Circuit: The standard in the First Circuit was expressed in *Bettencourt* v. *Boston Edison Co.*,[135] where the court relied on a phrase first articulated by the Fifth Circuit in a Railway Labor Act[136] case, *Railway Trainmen* v. *Central of Georgia Ry. Co.*[137] As

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[132]*See* notes 208–227 *infra* and accompanying text.

[133]*Smith* v. *Evening News*, *supra* note 49; *Teamsters Local 174* v. *Lucas Flour*, *supra* note 48.

[134]*Teamsters Local 174* v. *Lucas Flour*, *supra* note 48; *Textile Workers* v. *Lincoln Mills*, *supra* note 15.

[135]*Edward R. Bettencourt* v. *Boston Edison Co.*, 560 F.2d 1045, 96 LRRM 2208 (1st Cir. 1977).

[136]45 U.S.C. §§ 151–88.

[137]*Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 415 F.2d 403, 71 LRRM 3042 (5th Cir. 1969). *See* notes 166–70 *infra* and accompanying text.

applied, the statement neither adds to nor subtracts from the broad and basic *Enterprise* approach. According to the First Circuit concept, a party seeking to overturn an arbitration award under a collective agreement

> ". . . has to show far more than that the case might have come out the other way, or that there were gaps in the arbitrator's reasoning. At a minimum, he must establish that the award is 'unfounded in reason and fact,'[138] is based on reasoning 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling,'[139] or is mistakenly based on a crucial assumption which is 'concededly a non-fact. . . .' "[140]

In *Westinghouse Electric* v. *S.I.U. de Puerto Rico,*[141] the parties had renegotiated their agreement without modifying the language of a clause which had been construed in a previous arbitration. In a subsequent arbitration, the arbitrator refused to follow the earlier interpretation, and the company contended that he was thus modifying the terms of the contract. The First Circuit explained that while it might have disagreed with the arbitrator based on common law principles of construction, "arbitrators are not bound to follow judicial rules of construction and interpretation."[142]

Second Circuit: The basic approach of the Second Circuit is contained in Judge Kaufman's opinion in *Humble Oil & Refining Co.* v. *Teamsters Local 866,*[143] rather than in the more widely known *Torrington* decision,[144] which it distinguished. In *Torrington,* the court denied enforcement of an arbitration award which had found a prior practice between the parties that had allowed employees paid time off for voting on election day to be an implied provision in the collective agreement. In *Humble Oil,* Judge Kaufman stressed that this "unilateral" practice in *Tor-*

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[138] *Ibid.*

[139] *Citing Safeway Stores* v. *Bakery Workers Local 111, supra* note 122. *See* notes.

[140] *Citing Electronics Corp. of America* v. *International Union of Electrical Workers,* 492 F.2d 1255, 85 LRRM 2534 (1st Cir. 1974). *Supra* note 135 at 1050. *See also Union de Tronquistas de Puerto Rico, Local 901* v. *Flagship Hotel Corp.,* 554 F.2d 8, 95 LRRM 2334 (1st Cir. 1977); *Miller* v. *Spector Freight Systems, Inc.,* 366 F.2d 92, 63 LRRM 2222 (1st Cir. 1966).

[141] *Westinghouse Elevators of Puerto Rico, Inc.* v. *S.I.U. de Puerto Rico,* 583 F.2d 1184, 99 LRRM 2651 (1st Cir. 1978).

[142] *Id.,* at 1187.

[143] 447 F.2d 229, 78 LRRM 2123 (2d Cir. 1971).

[144] *Torrington Co.* v. *Metal Prod. Workers Union,* 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966). The *Torrington* decision has attracted more criticism than precedent. *E.g.,* Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration,* 46 Tex. L. Rev. 865 (1968); Aaron, *Judicial Intervention in Labor Arbitration,* 20 Stan. L. Rev. 41 (1967); Meltzer, *supra* note 63. *See also* notes 159–60, 191 *infra* and accompanying text.

rington had been terminated two years before the arbitrated dispute arose and the award was based on no specific language in the agreement. In the *Humble Oil* case, however, the arbitration board was "confronted with an opaque but 'express provision' in the contract [and] sensibly sought clarification in totally relevant evidence beyond the language of the contract."[144a] The court's opinion said that in order to discover the meaning of a provision,

> ". . . the Board was required to discover the intent of the parties, and to do this it looked to evidence and not merely the cold and cryptic words on the face of the agreement . . . . If the Board was barred from resorting to bargaining history [etc.] the parties would be remitted to securing arbitration only when there was a violation of a provision so plain and unambiguous as to require no collateral evidence of intent . . . . To emasculate the arbitration clause, absent a more clear and definite intent that the parties intended it to have such a wooden effect and to be construed so antiseptically, would be contrary to . . . the well-recognized presumption . . . favoring private settlement of labor disputes."[114b]

To discover the intent of the parties, the board had looked to bargaining history and to rights established under similar language in past contracts, not merely to the "cryptic" and "opaque" language of the contract being construed, and the circuit court affirmed the enforcement of the award.

In *Bell Aerospace Co.* v. *Local 516, U.A.W.,*[145] however, Judge Hays cautioned that the "[c]ourts will not enforce an award which is incomplete, ambiguous, or contradictory."[146] The circuit court thus refused to enforce an award which was "contradictory on its face," and remanded the matter for resubmission to arbitration. Judge Hays commented: "The purpose of arbitration is to resolve disputes, not to create new ones. An award which does not fulfill this purpose is unacceptable."[147] *Bell Aerospace* was narrowly confined to its facts in the Second Circuit's *Kallen* v. *District 1199*[148] decision, where the court rejected a rule which would require vacation of an award as "too vague and incomplete to merit enforcement"[149] and stressed that the

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[144a] *Supra* note 143 at 233.
[144b] *Id.,* at 232.
[145] *Bell Aerospace Co., Div. of Textron, Inc.* v. *Local 516 UAW,* 500 F.2d 921, 923, 86 LRRM 3240 (2d Cir. 1974).
[146] *Id.,* at 923.
[147] *Ibid.*
[148] 574 F.2d 723, 98 LRRM 2232 (2d Cir. 1978).
[149] *Id.,* at 726.

award in *Bell Aerospace* had been not only "ambiguous," but also "contradictory on its face."[150]

Third Circuit: The leading case in the Third Circuit is *Ludwig Honold Mfg. Co.* v. *Fletcher,*[151] where the court faithfully followed the *Enterprise* standard, but nevertheless felt compelled to frame a definition of what that standard meant. Recognizing the need for judicial restraint, the court stated:

> "[W]e hold that a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award."[152]

Most of that statement, particularly the first half, is innocuous enough; however, the reference to "principles of contract construction" would seem to add nothing except the need for future definition, for the principles of contract construction which an arbitrator might legitimately employ can be different from traditional principles, and that is what the *Trilogy* was all about.

Thus far, the Third Circuit has applied its definition consistent with the *Trilogy*'s unitary concept of the arbitrator's authority. However, the presence of the phrase "principles of contract construction" seems to have tempted at least two lower courts to substitute their contractual principles for those upon which arbitrators may properly rely. In *Acme Markets* v. *Bakery and Confectionary Workers,*[153] the arbitrator had found certain store closings to be "strategic" rather than "economic," and therefore he deemed them "lockouts" under the collective agreement, a construction which the district court said undermined the parties' expressed intent as to the meaning of "lockout." The circuit court reversed, finding the arbitrator's award not unreasonable, not irrational, and drawing its essence from the agreement. In *Johnson Bronze Co.* v. *U.A.W.,*[154] the circuit court reversed a district court for exceeding the permissible scope of review of an arbitration award. The arbitrator had used a "reasonableness"

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[150] *Ibid. See also Wire Service Guild Local 222* v. *United Press Int'l,* ___F.2d___, 104 LRRM 2955 (2d Cir. 1980).
[151] *Supra* note 122.
[152] 405 F.2d at 1128
[153] 613 F.2d 485, 103 LRRM 2394 (3d Cir. 1980).
[154] 621 F.2d 81, 104 LRRM 2378 (3d Cir. 1980).

requirement as a limitation on management's authority under a contractual provision, which the circuit court upheld as "not totally unsupported by principles of contract construction."[155]

Fifth Circuit: The Fifth Circuit has established a fine record of adherence to the basic principles of *Enterprise.*[156] The pattern was fixed early in a series of opinions written by Judge Brown.[157] In *Dallas Typographical Union* v. *Belo,*[158] he criticized the Second Circuit's *Torrington* decision,[159] saying that "it has to be very carefully confined lest, under the guise of the arbitrator not having 'authority' to arrive at his ill-founded conclusion of law or fact, or both, the reviewing court takes over the arbitrator's function."[160] Judge Brown's opinion in *Safeway* v. *Bakery Workers*[161] spelled out the Fifth Circuit's general attitude about judicial restraint in applying the *Enterprise* standard of review:

> "On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' . . . But when it reasonably satisfies those requirements we think it is not open to the court to assay the legal correctness of the reasoning pursued. Arbitrators, as do Judges, can err. And the policy of the law . . . committing awesome questions of great intricacy and difficulty to lay persons who need not be and frequently are not, even lawyers, [has] to reckon with the likelihood that the chance—and gravity—of error will be greater, not less, than the traditional judicial process."[162]

Judge Brown stressed that inasmuch as the *Trilogy*'s admonitions were addressed primarily to judges, judges "should heed

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[155]*Id.*, at LRRM 2380, *citing* Restatement of Contracts § 236 (1932).

[156]The cases following demonstrate that record. However, in a case in a related area —judicial review of arbitral remedies where NLRB jurisdiction may be involved—the Fifth Circuit has departed widely from the *Enterprise* approach. Although this peripheral area is important to the operation of mature collective bargaining and the enforcement of collective agreements, the area does not fall within the scope of this paper. *(See* text preceding note 132 *supra.)* The opinions in *General Warehousemen, Teamsters Local 767* v. *Standard Brands, Inc.,* 579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1978) should be noted, however, as a caveat to the accolades which the Fifth Circuit has earned in the area of "pure" *Enterprise* cases. See *Report of the Committee on Law and Legislation,* App. C in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980), at 257, 270; Kaden, *supra* note 126 at 287–88.

[157]*Int'l Ass'n of Machinists* v. *Hayes Corp.,* 296 F.2d 238, 49 LRRM 2210 (5th Cir. 1961); *A.H. Belo Corp.* v. *Dallas Typographical Union,* 372 F.2d 577, 64 LRRM 2491 (5th Cir. 1967); *Safeway Stores* v. *Bakery & Confectionery Workers Local 111,* 390 F.2d 79, 67 LRRM 2646 (5th Cir. 1968); *Gulf States Telephone Co.* v. *Local 1692, IBEW,* 416 F.2d 198, 72 LRRM 2026 (5th Cir. 1969).

[158]*Supra* note 157.

[159]*Supra* note 144.

[160]372 F.2d at 583.

[161]*Supra* note 157.

[162]390 F.2d at 82.

them by resisting the temptation to 'reason out' a la judges the arbiter's award to see if it passes muster."[163] He lectured employers on the reason behind the rule:

> "If such a result is unpalatable to an employer or his law-trained counsel who feels he had a hands-down certainty in a law court, it must be remembered that just such a likelihood is the by-product of a consensually adopted contract arrangement—a mechanism that can hold for, as well as against, the employer even to the point of outlawing labor's precious right to strike."[164]

He concluded with: "The arbiter was chosen to be the Judge. The Judge has spoken. There it ends."[165]

Another Fifth Circuit decision, *Railroad Trainmen* v. *Central of Georgia Ry.*,[166] contributed additional definitional language regarding the scope of judicial review, although the court was there construing the standard applicable to nonvoluntary arbitration under the amended Railway Labor Act.[167] Based on a phrase in a congressional report on the 1966 Railway Labor Act Amendments, Judge Wisdom blended RLA requirements with those under 301 of the LMRA (i.e., the *Enterprise* standard) and declared that "an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction of the arbitrating body."[168] Other courts, particularly the First Circuit,[169] have picked up the language of the *Central of Georgia* case without recognizing the distinction between consensual arbitration under the *Trilogy* standard and the congressional standard which the Fifth Circuit was expounding for compulsory grievance arbitration under the RLA. Here was part of the genesis of the "rationality" concept which several courts have equated with the *Enterprise* standard and which Dean St. Antoine would add to that standard.[170]

In a 1974 Fifth Circuit decision, *Machinists* v. *Modern Air Transport*,[171] a case which might have arisen under the Railway Labor Act, although the opinion does not so state, Judge Lee quoted the "foundation in reason or fact" test, but applied a pure *Enter-*

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[163] *Id.*, at 83.
[164] *Ibid.*
[165] *Id.*, at 84.
[166] 415 F.2d 403, 71 LRRM 3042 (5th Cir. 1969).
[167] 45 U.S.C. §§ 151–88.
[168] 415 F.2d at 411.
[169] *See* notes 136–40 *supra* and accompanying text.
[170] The other part seems traceable to the "rational" reference in the Third Circuit's *Ludwig Hanold* decision, *supra* note 152.
[171] 495 F.2d 1241 (5th Cir. 1974).

prise standard to reverse a district court's vacation of an arbitrator's award. In *Bakery Workers* v. *Cotton Baking Co.*,[172] the court emphasized the arbitrator's broad authority to fashion remedies and approved an award of monetary damage to the union notwithstanding the district court's determination that such an award was punitive rather than remedial, noting that "[i]n view of the variety and novelty of many labor management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility."[173]

In *Boise Cascade Corp.* v. *United Steelworkers*,[174] the Fifth Circuit repeated the "without foundation in reason or fact" paraphrasing of *Enterprise* standards, but, in the spirit of *Enterprise*, ruled that the "no additions or alterations" clause in a collective agreement must not be read as precluding an arbitrator from considering extrinsic evidence to explain an agreement that may rationally be considered ambiguous.[175]

In its most recent decisions, the Fifth Circuit continues to display a perceptive understanding of the respective roles of court and arbitrator in the interpretation of collective agreements that are not affected by external law.[176]

Seventh Circuit: The Seventh Circuit, in its review policy,[177] has faithfully followed *Enterprise*, though some recent decisions have added excess-baggage language about "principles of contract construction and the law of the shop," which the Third Circuit composed in the *Ludwig Honold* case.[178] In *Amoco Oil Co.* v. *O.C.A.W. Local 7-1*,[179] the circuit court upheld an arbitration award which reinstated a discharged employee, but without back

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[172]514 F.2d 1235 (5th Cir. 1975).

[173]*Id.*, at 1237.

[174]588 F.2d 127, 100 LRRM 2481 (5th Cir. 1979).

[175]*Id.*, at 130.

[176]*Alabama Power Co.* v. *Local 391, IBEW*, 612 F.2d 960, 103 LRRM 2691 (5th Cir. 1980), where the circuit court applied *Enterprise* standards to an arbitrator's finding of procedural arbitrability under the authority of *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557, 55 LRRM 2769 (1964); *see* note 81 *supra*. *See also Johns-Manville Sales Corp.* v. *Local 1609, Int'l Ass'n of Machinists*, 621 F.2d 756, 104 LRRM 2985 (5th Cir. 1980), upholding an arbitrator's award denying a manufacturer of asbestos products the right to promulgate a unilateral rule prohibiting all smoking on company property; it was held that the award, itself the result of public policy favoring arbitration of labor disputes, did not offend the national policy against smoking in asbestos plants.

[177]*See Smith Steel Workers* v. *A.O. Smith Corp.*, 626 F.2d 596, 105 LRRM 2044 (7th Cir. 1980); *Amoco Oil Co.* v. *OCAW Local 7-1*, 548 F.2d 1288, 94 LRRM 2518 (7th Cir. 1977); *Int'l Ass'n of Machinists Dist. 8* v. *Campbell Soup Co.*, 406 F.2d 1223, 70 LRRM 2569 (7th Cir. 1969); *Local 7-644 OCAW* v. *Mobil Oil Co.*, 350 F.2d 708, 59 LRRM 2938 (7th Cir. 1965).

[178]*See Ludwig Honold* v. *Fletcher*, supra note 151 and text accompanying notes 151–155.

[179]*Supra* note 177.

pay, where the level of proof of the grievant's wrongdoing presented by the employer was deemed insufficient to support the discharge. The court refused to substitute its judgment "for that of the consensually appointed arbitrator. . . ."[180] In that case, as in the recent *A.O. Smith* case,[181] the court adopted the *Ludwig Honold* formula as its own, but interpreted the arbitrator's decision fully in accord with the broad policy approach of the *Trilogy's* unitary concept.

Eighth Circuit: The Eighth Circuit's approach to judicial review of arbitrators' awards has carefully tracked the *Enterprise* direction. For example, in a 1974 decision, *U.A.W.* v. *White Motor Corp.*,[182] the court noted that: "In interpreting a collective bargaining agreement it is often necessary [for the arbitrator] to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties."[183] This court has recognized the unitary concept of the *Trilogy* decisions by stressing the unique characteristics of the labor contract and the arbitrator's source of law as expounded in *Warrior & Gulf,* rather than narrowly applying a few phrases in *Enterprise,* as some other courts have done.[184]

In its recent *Coca Cola Bottling* decision,[185] the Eighth Circuit provided an excellent example of the manner in which the developing common law of "just cause" discharges provides a basis, under the *Enterprise* standard, for upholding an arbitrator's decision in that area. The grievant had been discharged for dishonesty under a typical "just cause" discharge clause, but he had not been afforded an opportunity to present his side of the story prior to termination. The arbitrator's award stated that the weight of the evidence indicated that the grievant had been dishonest in that he had told his clerk-checker that he was short a case of soft drink, instead of truthfully telling him that he had broken the case. The arbitrator thus concluded that the termination was for just cause, but he added: "*provided* due process was followed in handling the discharge." Accordingly, because of

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[180]548 F.2d at 1296.
[181]*Supra* note 177.
[182]505 F.2d 1193, 87 LRRM 2707 (8th Cir. 1974).
[183]*Id.*, at 1197.
[184]See notes 98–101 *supra* and accompanying text.
[185]*Teamsters Local 878* v. *Coca Cola Bottling Co.*, 613 F.2d 716, 103 LRRM 2380 (8th Cir. 1979).

the employer's failure to provide the grievant with an opportunity to present his side of the case, he held that there was a lack of procedural fairness which caused the dismissal to fall short of the "just cause" standard. The circuit court rejected the employer's contention that the arbitrator's imposition of a due process standard was an attempt to "inflict his own brand of industrial justice onto the parties,"[186] in violation of the *Enterprise* prohibition. The court disagreed, noting that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases."[187] The opinion noted that while the court's "interpretation of 'just cause' may differ from that of the arbitrator . . . such disagreement is irrelevant," for it was not the court's function to review the merits.[188]

Ninth Circuit: The Ninth Circuit's approach to the application of *Trilogy* standards for judicial review of arbitration awards is also within the mainstream.[189] In its 1969 *Holly Sugar* decision,[190] the court criticized the Second Circuit's *Torrington* decision,[191] agreeing with Judge Feinberg's dissenting opinion, that "[w]hether the arbitrator's conclusion was correct is irrelevant because the parties agreed to abide by it, right or wrong."[192] The Ninth Circuit has also agreed with Judge Brown of the Fifth Circuit in the admonition that courts must resist "the temptation to 'reason out' a la judges the arbitrator's award to see if it passes muster."[193]

In *Riverboat Casino* v. *Local Joint Exec. Bd. of Las Vegas,*[194] the Ninth Circuit rejected the employer's argument that the arbitra-

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[186]613 F.2d at 719.

[187]*Ibid.*

[188]*Id.*, at 720.

[189]This court also provides a good example of a proper application of the *Enterprise* requirement that the award must draw its "essence" from the agreement and not be a product of the arbitrator's "own brand of industrial justice." See *City Elec., Inc.* v. *Local 77, IBEW,* 517 F.2d 616, 89 LRRM 2535 (9th Cir. 1975), where the court set aside a portion of an arbitration award which directed the parties to negotiate a travel allowance rate. The court stated: "It is not the function of an arbitrator, under this agreement or traditionally, to decide in what respects the contract in question should be modified in order to bring it into line with agreement of other employers. Contract modifications are not traditionally matters for arbitration." 517 F.2d at 619.

[190]*Holly Sugar Corp.* v. *Distillery & Allied Workers Int'l Union,* 412 F.2d 899, 71 LRRM 2841 (9th Cir. 1969). *See also Newspaper Guild* v. *Tribune Pub. Co.,* 407 F.2d 1327, 70 LRRM 3189 (9th Cir. 1969); *Anaconda Co.* v. *Great Falls Mill & Smeltermen's Union No. 6, Int'l Union of Mine, Mill & Smelter Workers,* 402 F.2d 749, 69 LRRM 2597 (9th Cir. 1968).

[191]412 F.2d 905, quoting from *Torrington Co.* v. *Metal Products Workers Union,* 362 F.2d 677, 683, 62 LRRM 2495 (2d Cir. 1966). See notes 144, 159–60 *supra.*

[192]412 F.2d at 905.

[193]412 F.2d 903, quoting from *Safeway Stores, supra* notes 161 and 163.

[194]578 F.2d 250, 99 LRRM 2374 (9th Cir. 1978).

tor exceeded his authority by failing to defer to a prior arbitration award that had interpreted the "good cause" provision of the same agreement. It said:

> "Absent a provision in the contract to the contrary, the arbitrator could reasonably conclude that strict adherence to the doctrine of stare decisis would impair the flexibility of the arbitral process contemplated by the parties. But even if the arbitrator were correct in this assessment of the parties' intent and erred in not following the prior arbitral award, we would not for that reason vacate the award."[195]

In its recent *San Diego Marine Construction Co.* decision,[196] that court noted that "[w]hen two plausible interpretations of a clause in a collective bargaining agreement exist, an arbitrator's choice of one or the other ought to be honored," and accordingly confirmed the enforcement of the award under the *Enterprise* standard.

Tenth Circuit: The case law regarding enforcement of the *Enterprise* standard in the Tenth Circuit is troubling. While *Enterprise* may be alive in that circuit, it has not always been well. Although the Tenth Circuit Court of Appeals has not indulged in second-guessing of arbitrators' findings and conclusions as extensively as have the Fourth and Sixth Circuits, it has nevertheless declined in several cases to enforce arbitration awards which appeared to be incorrect in their interpretation of the parties' contract. Five cases decided from 1975 through 1980 demonstrate that while there has been a general acceptance of *Enterprise* in easy cases, in the hard cases the court has been reluctant to recognize the arbitrator's right to be wrong.

The 1975 *Sav-on Groceries* case,[197] in one sense, was not an *Enterprise* case at all, but rather was based on a *Warrior & Gulf* issue. The court held that since the parties had agreed to a limited submission (whether the company had exercised fairness in not selecting a particular employee in a seniority dispute), the arbitrator exceeded his authority in awarding back pay to the successful grievant.

In *Campo Machinery Co.*,[198] the court enforced an award in

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[195] *Id.*, at 251.

[196] *Int'l Ass'n of Machinists, Dist. Lodge 50* v. *San Diego Marine Const. Corp.*, 620 F.2d 736, 104 LRRM 2613 (9th Cir. 1980).

[197] *Retail Store Employees Local 782* v. *Sav-On Groceries*, 508 F.2d 500, 88 LRRM 3205 (10th Cir. 1975).

[198] *Campo Machining Co., Inc.* v. *Local Lodge 1926, Int'l Ass'n of Machinists*, 536 F.2d 330, 92 LRRM 2513 (10th Cir. 1976).

which the arbitrator had found that the employee had breached the shop rule in question, but also found that there was not sufficient cause for discharge. Therefore, he reduced the penalty to one month's suspension and awarded partial back pay. The court deferred to the arbitrator's interpretation of the agreement regarding the effect to be given a breach of company rules.

In the *Mistletoe Express* case,[199] however, the court refused enforcement of an award which it held contravened an express provision in the agreement. The arbitrator had reduced a discharge penalty where the contract provided that employees "may be discharged for just cause," with certain causes specified. When one of those causes occurred, according to the court, the arbitrator had no choice but to sustain the discharge. In view of the specificity of the language in the contract, the court was deciding a "hard" case by relying on traditional rules of contract interpretation.

In *Fabricut, Inc.* v. *Tulsa General Drivers,*[200] the court refrained from reviewing the award on the merits and upheld the right of the arbitrator to fashion a "reasonable penalty"[201] in the absence of a penalty specified in the contract, finding that the award, unlike the award in *Mistletoe,* had "rational support."[202]

In *Operating Engineers, Local 670* v. *Kerr-McGee Ref. Co.,*[203] the court affirmed the vacation of an award where the arbitrator had set aside a discharge because of the employer's failure to submit sufficient evidence on one of the stated grounds for discharge (excessive absenteeism), although the other ground (false statements to obtain sick-leave benefits) had been proved. The collective agreement provided: "Any . . . false statements made to obtain benefits [for sick leave] will be cause for discharge." The Tenth Circuit held that it was clear that in requiring that all charges levied against the employee be proved in order to sustain the discharge, the arbitrator ignored the express terms of the agreement and thereby "violated the essense of the agreement."[204]

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[199] *Mistletoe Express Serv.* v. *Motor Expressmen's Union,* 566 F.2d 692, 96 LRRM 3320 (10th Cir. 1977).

[200] *Fabricut, Inc.* v. *Tulsa Gen. Drivers Local 523,* 597 F.2d 227, 101 LRRM 2148 (10th Cir. 1979).

[201] *Id.,* at 229.

[202] *Id.,* at 230.

[203] *Int'l Union of Operating Engineers* v. *Kerr-McGee Ref. Corp.,* 618 F.2d 657, 103 LRRM 2988 (10th Cir. 1980).

[204] *Id.,* at 660.

District of Columbia Circuit: In view of the venue limitations within the District of Columbia, it is not surprising that very few Section 301 cases have arisen in that circuit. The only judicial review case to be noted is *Washington-Baltimore Newspaper Guild, Local 35* v. *The Washington Post Co.*[205] The court enforced an award where certain evidence had been evaluated and rejected by the arbitrator; the court stated that:

> "[E]ven if we felt that the [arbitrator] had committed an error of law in excluding this line of proof, we would not vacate this award and order another arbitration. The better view is that an award will not be vacated even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it 'compels the violation of law or conduct contrary to accepted public policy.' "[206]

B. The View From the Sixth and Fourth Circuits

Sixth Circuit: We have already noted in the *Detroit Coil*[207] case a leading example of the Sixth Circuit's failure to heed the Supreme Court's admonition in the *Trilogy* that courts should not substitute their judgment for that of the arbitrator on the merits of an award. *Detroit Coil* is not an isolated case. Rather, it is but one in a series of decisions, beginning at least with *Timken Co.* v. *Local 1123, Steelworkers Union*[208] in 1973, through which that circuit has chosen to redefine the meaning of *Enterprise,* ignoring the integrated aspects of the three *Trilogy* cases viewed as a whole. If the trend continues, the courts in that circuit, if not also in other circuits, may eventually be inundated with arbitration review cases; thus, for large numbers of grievances, arbitration will not be the final and binding determination that the Supreme Court said it was intended to be. Instead, the arbitration hearing will once again become the first step on the way to the courthouse.

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[205] *Washington-Baltimore Newspaper Guild Local 35* v. *The Washington Post Co.,* 442 F.2d 1234, 76 LRRM 2274 (D.C. Cir. 1971). This affirmative policy seems to be well entrenched in the circuit. *See* the recent district court opinion in *Metromedia* v. *Stage Employees Local 819,* ___F.Supp___, 105 LRRM 2908 (D.C. D.C. 1980).

[206] 442 F.2d at 1239, *citing Gulf States Tel. Co.* v. *Local 1692, IBEW,* 416 F.2d 198, 201, 72 LRRM 2026 (5th Cir. 1969).

[207] *Detroit Coil Co.* v. *Int'l Ass'n of Machinists,* 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979). *See* notes 100–103 *supra* and accompanying text.

[208] 482 F.2d 1012, 83 LRRM 2814 (6th Cir. 1973). Other cases prior to *Timken* which represented a strict construction approach to judicial review of arbitrators' awards included: *Local 342, UAW* v. *TRW, Inc.,* 402 F.2d 727, 69 LRRM 2524 (6th Cir. 1968), *cert. denied,* 395 U.S. 910, 71 LRRM 2253 (1969); *Amanda Bent Bolt Co.* v. *UAW Local 1549,* 451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971).

Although I shall list various offending Sixth Circuit decisions, it would serve no purpose to outline the facts of all of them. It will be instructive, however, to examine at least one case in detail to illustrate the general manner in which that court has been reviewing arbitration cases. Since *Timken*[209] was one of the earliest in the series, it will serve as the model for our examination.

The grievance in *Timken* concerned a determination of whether the grievant had voluntarily terminated his employment pursuant to a "voluntary quit" clause in the collective agreement or whether he was discharged. The discharge clause required the company to comply with certain procedural requirements, including notification of the reason for discharge presented in the presence of the union representative. The company contended that the discharge requirements did not have to be met because the employee was terminated pursuant to the "voluntary quit" provision, which provided that: "An employee's length of service shall be broken and credit for all previous service lost by . . . voluntary quitting the service of the Company (an unauthorized absence of seven (7) consecutive scheduled work days shall be considered a voluntary quit). . . ."[210]

The grievant had been unable to report for work for an extended period because he was in jail, having been sentenced to 117 days following a guilty plea to two traffic offenses. But on the next scheduled work day after he began serving his sentence, his wife informed the company that her husband would be unavailable for work, and she later advised of the reason. After 29 days of confinement, the grievant was released from jail, whereupon the company sent him a separation notice based on his "unexcused absence in excess of seven days."[211] The record in the ensuing arbitration hearing indicated that although the company had consistently denied authorized absences to employees in jail, it had nevertheless maintained a liberal authorization policy for employees absent due to illness or injury. According to the arbitrator, this inconsistency was deemed sufficient to invalidate the lack of authorization in the grievant's case; he therefore construed the "voluntary quit" provision as unappli-

[209] *Ibid.*
[210] *Id.*, at 1013.
[211] *Ibid.*

cable in cases, such as this, where the employee had no intention of quitting and had promptly notified the company of his predicament, which was the same interpretation the company had applied by waiver for absences due to illness or injury.

The district court vacated the award and the Sixth Circuit affirmed. After quoting extensively from *Enterprise,* the opinion concluded that the arbitrator exceeded his authority because "[t]he 'voluntary' quit provision specifically applies to unauthorized absences for seven (7) consecutive scheduled work days. Consequently there was no need to go outside the record and consider other definitions of the term 'quit.' "[212] Seemingly oblivious of what the Supreme Court had said about an arbitrator's permissible sources of information and authority to determine the meaning of collective bargaining provisions, and wholly overlooking what the Court had said about the nature of the collective agreement, the Sixth Circuit treated the issue as an ordinary contractual dispute, saying: "A collective bargaining agreement is after all a contract and the arbitrator is limited to the interpretation and application of that contract," and since this contract contained a definition of "unauthorized," the arbitrator "clearly exceeds his own authority by seeking conflicting definitions outside the record."[213] The court considered the language of the agreement unambiguous, but to the arbitrator it was ambiguous. There is no way to reconcile the court's action with the *Trilogy* requirements.

Following its *Detroit Coil* decision, the court decided *Storer Broadcasting Co.* v. *A.F.T.R.A.*[214] where it found "absolutely no evidentiary support" for the arbitrator's determination. Apparently the record was not all that clear, however, for in addition to the arbitrator's deeming the evidence sufficient, the dissenting judge noted that although the evidence was "[a]dmittedly . . . of marginal weight, it is not totally specious," and he further noted that the award was also supported by logic and analogy to specific provisions contained in a previous agreement. The majority of the court had indeed substituted its interpretations of facts and contractual language for that of the arbitrator chosen by the parties.

The *Storer* case provided the court with an opportunity to

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[212] *Id.*, at 1014–15.
[213] *Id.*, at 1015.
[214] 600 F.2d 45, 101 LRRM 2497 (6th Cir. 1979).

codify its revision of the *Enterprise* standard. Citing its 1979 *Detroit Coil* decision,[215] it announced two exceptions to the *Trilogy* prohibition regarding judicial review of the merits of an arbitration award:

> "First, 'the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. . . .' Second, 'although a court is precluded from overturning an award for errors in the determination of factual issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated." ' "[216]

These new rules, as might have been expected, are leading to the overturning of arbitrators' awards, especially on the basis of "plain" meaning in the contract—at least what a court, district or circuit, in disagreement with the arbitrator, deems to be plain meaning. For example, in the recent decision in *Firemen & Oilers, Local 935-B* v. *Nestle Co.*,[217] the Sixth Circuit reversed a district court that had enforced an arbitrator's award which reinstated a discharged employee without back pay. The circuit court ordered the entire award vacated, thereby confirming the discharge. This result was achieved by the circuit court's disagreeing with the arbitrator as to the meaning of the words "shall" and "insubordination." For the latter, the court relied upon the authority of Black's Law Dictionary.[218]

The real question in all of these revisionist cases[219] is not whether the court's interpretations of the contract and/or facts are correct or better than that of the arbitrator. The real question is: Who shall decide?

Fourth Circuit: The Fourth Circuit's record of deviation from the *Trilogy* standard of judicial review is not as structured as that of the Sixth Circuit. Although there are only a few recent cases on which to base judgment,[220] these cases suggest a possible

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[215] *Supra* note 207.

[216] 600 F.2d at 47, *citing Detroit Coil, supra* note 207, and dictum in *N.F. & M. Corp.* v. *Steelworkers Union*, 524 F.2d 756, 760, 90 LRRM 2947 (3d Cir. 1975).

[217] ____F.2d____, 105 LRRM 2715 (6th Cir. 1980).

[218] Fifth edition, 105 LRRM at 2717.

[219] *See also General Drivers Local 89* v. *Hays and Nicoulin, Inc.*, 594 F.2d 1093, 100 LRRM 2998 (6th Cir. 1979), where the lower court was affirmed in its intrepretation of language in the collective agreement which differed from that of the arbitrator.

[220] *See Baltimore Reg. Joint Bd.* v. *Webster Clothes, Inc.*, 596 F.2d 95, 100 LRRM 3225 (4th Cir. 1979); *Westinghouse Elec. Corp.* v. *IBEW*, 561 F.2d 521, 96 LRRM 2084 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036, 97 LRRM 2341 (1978). *But see Crigger* v. *Allied Chem.*

recurrence of the negative attitude toward labor arbitration which was evident in the court's 1961 *American Thread*[221] decision. If that is so, it would seem that the Fourth Circuit has chosen to confine arbitral discretion more strictly than the *Trilogy* mandate contemplated. This has happened particularly with regard to the fashioning of remedies, notwithstanding that the Supreme Court in *Enterprise* expressly approved the application of a flexible "fair solution" approach by arbitrators in their ordering of appropriate remedies.

In *Westinghouse Electric Corp.* v. *IBEW,*[222] the circuit affirmed the vacating of an arbitrator's award of vacation pay, holding that because the record did not support a finding of actual damages, the award was "punitive." The court thus decided that only monetary loss was compensable, not loss based on inconvenience, a factor which another arbitrator had rejected in an arbitration decision which the circuit court cited.

In *Baltimore Regional Joint Bd. Amal. Clothing Workers* v. *Webster Clothes, Inc.,*[223] the circuit court again affirmed vacation of an award based on its holding that the remedy in question was punitive rather than compensatory. It disagreed with the arbitrator's evaluation of the evidence, finding instead that there was no "rationally probative evidence . . . of any sort traditionally justifying an award of compensatory damages."[224] The issue involved a breach of contract based on a plant shutdown and the

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Corp., 500 F.2d 1219, 86 LRRM 3162 (4th Cir. 1974). *Cf. Monongahela Power Co.* v. *Local 2332, IBEW,* 566 F.2d 1196, 91 LRRM 2583 (4th Cir. 1976).

[221]*Textile Workers Union* v. *American Thread Co.*, 291 F.2d 894, 48 LRRM 2534 (4th Cir. 1961). The Fourth Circuit denied enforcement of an arbitration award which had reduced a discharge penalty to a disciplinary suspension and had ordered the grievant reinstated. The arbitrator had found that the grievant's offense (improperly handling a function on a carding machine) did not amount to just cause for discharge, though it was basis for imposition of a lesser penalty. Interpreting the contractual language differently from the arbitrator, the court held that the arbitrator had exceeded his authority when he "went outside the record," i.e., relied on another arbitration award at the same company, to arrive at his decision. But the arbitrator specifically found that the evidence was insufficient to constitute "just cause for discharge." As Chief Judge Sobel noted in his dissenting opinion, regarding the *Enterprise* standard: "Never has the Supreme Court prescribed a guide more clearly or with more positiveness. Yet, the court's decision in the present case does precisely what the Court has prohibited." 291 F.2d at 905. Not only did the arbitrator specifically find "no just cause for discharge," the other arbitration award on which he had relied was actually "brought out *at the hearing.*" 291 F.2d at 906. Not only is *American Thread* still followed in the Fourth Circuit, *e.g., Monongahela Power Co., supra* note 220 at 1199, it has also furnished authority for some of the Sixth Circuit decisions. *See Local 342, UAW, supra* note 208 at 731; *Detroit Coil, supra* note 207 at 579.

[222]*Supra* note 220.

[223]*Supra* note 220.

[224]596 F.2d at 98.

contracting out of bargaining unit work. The union responded with a strike which, as a result of emergency arbitration, the arbitrator order enjoined. The same arbitrator issued the award of damages, which he did not term punitive. However, the circuit court deemed it punitive and stated, based on its own interpretation of the agreement, that such "award of damages . . . does not draw its essence from the agreement, for the agreement's essence does not contemplate punitive but only compensatory awards."[225] The court did not order a remand to arbitration; therefore the union and the employees were left without a remedy for a substantial breach of contract.

I confess to some uncertainty in grouping the Fourth Circuit's record with that of the Sixth Circuit. But in view of the Fourth Circuit's early decision in *American Thread,*[226] to which that circuit still adheres, and the recent decisions noted above, this circuit seems revisionist in approach, at least with regard to arbitral remedial authority.

V. Conclusion

The American collective bargaining community has been served well by the legal rules and theories embodied in the *Steelworker Trilogy* decisions. For the most part, those doctrines are as viable today as they were 20 years ago. Unfortunately, a minority of circuit courts have not applied the full meaning of the decisions to cases involving enforcement of arbitration awards. Hopefully, however, those courts will see fit to return to the original *Trilogy* concepts which differentiate collective agreements and grievance arbitration from their counterparts in the commercial world.

This study of the *Trilogy* teaches that a grievance arbitration award arising solely under a collective agreement is entitled to greater deference than an ordinary contract for five principal reasons: (1) The arbitration is not a substitute for judicial determination, but a substitute for a strike or other industrial disruption. (2) The parties have voluntarily agreed to final and binding arbitration. (3) The parties have chosen and agreed upon the specific person who will serve as their arbitrator. (4) The parties and the industrial relations community, by operation of market-

[225] *Ibid.*
[226] *Supra* note 221.

place selection and rejection, maintain a high degree of control over the qualifications and identity of their arbitrators. (5) The parties, through further collective bargaining, retain the means to reverse whatever interpretation or order an arbitrator issues. Accordingly, what the Supreme Court said about the "essence of the agreement" and the arbitrator's "own brand of industrial justice" must be related to what the Court said elsewhere about the nature of the collective agreement, the arbitrator's authority, and the sources on which he may draw for his findings and interpretations.

Dean Shulman understood and explained why courts should stay out of arbitration, and except for the rare case where the arbitrator *wholly* ignores the agreement and decides the issue on a noncontractual basis—that is, by his own concept of "industrial justice"[227]—the Supreme Court agreed with that view and made it the law.

[227] *E.g., see* note 189 *supra.*

APPENDIX A

NATIONAL ACADEMY OF ARBITRATORS OFFICERS AND COMMITTEES, 1980–1981

I. *Officers*

Eva Robins, President
John Phillip Linn, Vice President
William P. Murphy, Vice President
Alexander B. Porter, Vice President
Arnold M. Zack, Vice President
Richard I. Bloch, Secretary-Treasurer
Edgar A. Jones, Jr., President-Elect

II. *Board of Governors*

Raymond L. Britton
Martin A. Cohen
Alfred C. Dybeck
David E. Feller
Walter J. Gershenfeld
James M. Harkless
Dallas L. Jones
Charles J. Morris
Francis X. Quinn
Charles M. Rehmus
Milton Rubin
Anthony V. Sinicropi
Clare B. McDermott (ex officio)

III. *Past Presidents*

Ralph T. Seward, 1947–49
William E. Simkin, 1950
David L. Cole, 1951
David A. Wolff, 1952
Edgar L. Warren, 1953
Saul Wallen, 1954
Aaron Horvitz, 1955
John Day Larkin, 1956

Paul N. Guthrie, 1957
Harry H. Platt, 1958
G. Allan Dash, Jr., 1959
Leo C. Brown, S.J., 1960
Gabriel N. Alexander, 1961
Benjamin Aaron, 1962
Sylvester Garrett, 1963
Peter M. Kelliher, 1964
Russell A. Smith, 1965
Robben W. Fleming, 1966
Bert L. Luskin, 1967
Charles C. Killingsworth, 1968
James C. Hill, 1969
Jean T. McKelvey, 1970
Lewis M. Gill, 1971
Gerald A. Barrett, 1972
Eli Rock, 1973
David P. Miller, 1974
Rolf Valtin, 1975
H. D. Woods, 1976
Arthur Stark, 1977
Richard Mittenthal, 1978
Clare B. McDermott, 1979

IV. *Appointments and Committee Rosters*

(a) *1981 Annual Meeting*

Arrangements Committee

Ted T. Tsukiyama, Chairman

Daniel G. Collins
Fred L. Denson
Joseph F. Gentile
Emily Maloney
James A. Morris
Paul Prasow
Thomas T. Roberts
Marshall Ross
Nicholas H. Zumas

Program Committee

Daniel G. Collins, Chairman

Howard D. Brown
Thomas G. S. Christensen
William Dorsey
Alex Elson
David Feller
Howard Gamser
Margery F. Gootnick
William Murphy
Alexander Porter
Ted T. Tsukiyama
William Weinberg
Arnold Zack

(b) *The Standing Committees*

Executive Committee

Eva Robins, President

Richard I. Bloch
Edgar A. Jones, Jr.
John Phillip Linn
Clare B. McDermott

Membership Committee

Mark L. Kahn, Chairman

Byron R. Abernethy
Arvid Anderson
Frances Bairstow
Dana E. Eischen
William J. Fallon
J. Joseph Loewenberg
Arthur A. Malinowski
John C. Shearer
James C. Vadakin
Marian Kincaid Warns

Committee on Professional Responsibility and Grievances

Howard A. Cole, Chairman

Benjamin Aaron
Gerald A. Barrett
John E. Dunsford
Thomas McDermott
Richard Mittenthal
Harry H. Platt
Eli Rock
Peter Seitz
Ralph T. Seward
Arthur Stark
John F. W. Weatherill
Dallas M. Young

Committee on Research and Education

Planning Section

Francis X. Quinn, S.J., Co-chairman
Milton Rubin, Co-chairman
Anthony V. Sinicropi (ex officio, as Chairman of Committee on the Development of Arbitrators)
Arnold M. Zack, Co-chairman

Section on Oral History

Francis X. Quinn, S.J., Chairman

William Eaton
Joseph Krislov

Section on Continuing Education

Arnold M. Zack, Chairman

Monroe Berkowitz
Rodney E. Dennis
Walter J. Gershenfeld
Donald P. Goodman
Joe H. Henderson
Emily Maloney
Robert B. Moberly
Carlton J. Snow

Ralph Roger Williams

Section on Research

Milton Rubin, Chairman

Morrison Handsaker
Jacob D. Hyman
M. David Keefe
Paul L. Kleinsorge
Arthur Lesser, Jr.
George Nicolau
Julius Rezler
Martin Wagner
Sol M. Yarowsky

Committee on Law and Legislation

Charles J. Morris, Chairman

David M. Beatty
Neil Bernstein
Charles B. Blackmar
George E. Bowles
Innis Christie
Nathan Cohen
Robert W. Foster
Paul D. Jackson
Richard L. Kanner
Harold B. Lande
Thomas P. Lewis
Samuel J. Nicholas, Jr.
Earl Palmer
Ivan C. Rutledge
David P. Twomey
James P. Whyte

Committee on Legal Affairs

John Kagel, Chairman

John F. Caraway
Nathan Green
David M. Helfeld
J. Ross Hunter, Jr.
George S. Ives
Harold D. Jones, Jr.
Jonathan S. Liebowitz
Richard L. Ross
Marshall J. Seidman
Carlton J. Snow

Committee on Overseas Correspondents

Jack Stieber, Chairman

Jonas Aarons
Donald A. Anderson
Gerald Cohen
William F. Dolson
L. D. May
Herbert V. Rollins

Committee on Public Employment Disputes Settlement

Paul Prasow, Chairman

John B. Abernathy
Reginald H. Alleyne
Arvid Anderson
Leon B. Applewhaite
Armon Barsamian
David R. Bloodsworth

Frederick H. Bullen
Irwin J. Dean, Jr.
John F. Drotning
Jonathan Dworkin
Milton T. Edelman
Philip Feldblum
Jerome G. Greene
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APPENDIX B

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION*

CHARLES J. MORRIS**

I. Introduction

This year marks the third year of distribution to Academy members of the *Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements* prepared by the Labor and Employment Law Section of the American Bar Association. It marks the second year of experimentation with new formats for the report of the Academy's Committee on Law and Legislation. Last year's report discussed nine decisions of the courts and the National Labor Relations Board that the committee deemed worthy of special comment. This year's report continues with the same approach. We have selected 16 cases from the courts and the Labor Board that we consider significant for the development of the law of labor arbitration.

This new format allows us to be selective, for we continue to rely upon the ABA Report for a comprehensive overview of general developments in arbitration law. Our selections in this report focus on significant decisions in two related areas: (1) cases within the common law line of Section 301[1] arbitration decisions, which stem from *Lincoln Mills*[2] and the *Steelworkers Trilogy*,[3] and (2) cases which continue to define the relationship between the NLRB and arbitration.

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*Members of the Committee on Law and Legislation are Nathan Cohen, Leonard H. Davidson, Gerry L. Fellman, Robert W. Foster, Nathan Green, Charles F. Ipavec, Morris J. Kaplan, Thomas P. Lewis, Samuel S. Perry, and Charles J. Morris, chairperson.

**Professor of Law, Southern Methodist University, Dallas, Tex.

[1]61 Stat. 156, 29 U.S.C. §185 (1976).

[2]*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 40 LRRM 2113 (1957).

[3]*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

The committee is still experimenting. The format followed in the preparation of the instant report drew heavily upon the participation of almost every member of the committee, for which the chairperson is indeed grateful. The report also benefited from the assistance of 11 law students from Southern Methodist University whose contribution is gratefully acknowledged.[4] Notwithstanding such wide participation, we do not believe that we have yet achieved a unified process that will provide a definitive model for the future work of this committee. We therefore recommend further experimentation, but along similar lines. We do urge that every member who agrees to serve on this committee understand that he or she will be expected to make an important contribution by way of thought, analysis, and writing. We hope that a tradition of active membership participation will become firmly established for the future of this committee.

II. The Developing Common Law of Labor Arbitration Under Section 301

A. Substantive Arbitrability

One of the key principles of the *Trilogy* doctrine is that the question of substantive arbitrability is a matter for judicial determination. Thus, whether the parties have agreed to arbitrate a particular dispute—which usually involves determination of whether the collective agreement requires arbitration of the grievance—is to be determined by the court. As to such judicial determination, there is no requirement of deference to the arbitrator's interpretation, for the arbitrator's authority depends wholly upon the parties' having submitted the dispute to arbitration. This principle avoids a binding bootstrap decision by the arbitrator as to the scope of his or her own jurisdiction. Two appellate decisions of the past year provide reinforcement and refinement to the role of the courts in determining arbitrability: *Mobil Oil Corp.* v. *Local 8-766, OCAW*[5] and *Piggly Wiggly Operators Whse., Inc.* v. *Piggly Wiggly Operators' Warehouse Indep. Truck Drivers, Local No. 1.*[6]

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[4]Bruce Berger, Patricia Brandt, Alan Busch, Dan Dargene, Patrick DeMuynck, Sanford Denison, Robert Godfrey, Peter Riley, Eric Ryan, Steven Taylor, and Mark Williams.

[5]*Mobil Oil Corp.* v. *Local 8-766, Oil, Chemical and Atomic Workers International Union*, 600 F.2d 322, 101 LRRM 2721 (1st Cir. 1979).

[6]*Piggly Wiggly Operators' Warehouse, Inc.* v. *Piggly Wiggly Operators' Warehouse Independent Truck Drivers, Local No. 1*, 611 F.2d 580, 103 LRRM 2646 (5th Cir. 1980).

While the Supreme Court has insisted that the question of substantive arbitrability be decided by the courts, it nevertheless limited the judicial role in determining arbitrability by requiring a presumption favoring arbitrability. As the Court specified in *Warrior & Gulf*,[7] a dispute is deemed arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." And "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."[8]

In the *Mobil* case, the Court of Appeals for the First Circuit applied both of the foregoing *Warrior & Gulf* requirements. Mobil had unilaterally decided to subcontract all delivery of fuel oil and gasoline from its Bangor plant, and as a result four truck drivers were terminated. Although there was no provision in the agreement specifically dealing with subcontracting, the agreement contained a recognition clause and provisions for seniority, wages, and classifications. The arbitration clause limited arbitration to the "express terms" of the agreement.

A grievance was filed and the matter proceeded to arbitration. The arbitrator found the dispute arbitrable and held the employer in violation of the agreement. When the employer refused to honor the award, the matter proceeded to federal district court, where the arbitrator's award was upheld on the merits.

On appeal to the First Circuit, the employer contended (1) the district court failed to make an independent determination of arbitrability, and (2) the arbitration clause was limited to disputes over "express provisions" and because there was no mention of subcontracting in the agreement, the dispute was not arbitrable. The union responded that the subcontracting violated the recognition clause and the seniority, wage, and classification provisions; accordingly, "express terms" of the agreement were in issue.

The circuit court agreed that the district court failed to make an independent determination of arbitrability and that such a determination was required. However, the court declined to remand the case, holding that the issue was a "question of law"

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[7]363 U.S. at 582–583.
[8]*Id.*, at 584.

and the factual record was complete. The court then addressed the issue of arbitrability. Basically agreeing with the union's contention that the dispute concerned "express provisions" of the agreement, it applied the familiar definition of arbitrability contained in *Warrior & Gulf:*

> "[A] dispute is arbitrable unless it can be said 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute' and unless there is an 'express provision excluding a particular grievance from arbitration.' "[9]

Since the arbitration clause did not expressly exclude subcontracting from arbitration, the dispute was deemed arbitrable.

Lastly, the court rejected an offer of extrinsic evidence of prior bargaining that the employer alleged would establish that subcontracting was excluded from arbitration. Although it noted a split among the circuits concerning the use of bargaining history to determine arbitrability, it held such history to be irrelevant, relying on *Warrior & Gulf* and its reaffirmation in *Nolde Bros.* v. *Local 358, Bakery Workers:*[10]

> ". . . The lower courts in Warrior & Gulf found compelling the fact that the union had been unable to insert a provision limiting subcontracting in its collective bargaining agreement. The Supreme Court, in reversing the finding of nonarbitrability, did not mention this prior bargaining history.
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> . . .
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> "Most recently, in *Nolde* . . . the Supreme Court reiterated the continued vitality of the Steelworkers Trilogy [and observed that] 'It is . . . noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration.' "[11]

Accordingly, the First Circuit determined that the arbitrator had substantive jurisdiction to render an award on the subcontracting issue, and the order of the district court was affirmed.

In the *Piggly Wiggly* case, the Fifth Circuit recognized that the agreement to arbitrate a dispute may be dependent on the ad hoc submission agreement as well as upon the arbitration clause in the collective bargaining agreement. The arbitration concerned a driver named Strickland who was discharged because he had been declared uninsurable by the employer's insurance carrier. The employer relied upon Section Z, Article 21, of the

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[9] *Id.*, at 582–583, 585.
[10] 430 U.S. 243, 94 LRRM 2753 (1977).
[11] *Id.*, at 254.

collective bargaining agreement, which read: "Any driver who becomes uninsurable by any of the Company's insurance carriers will be subject to immediate discharge." The union, however, questioned the validity of that clause. It responded to the discharge by filing the following grievance on behalf of Mr. Strickland:

> "Purported Section (z) of Article 21 of the contract is not a valid term of the contract. Second, my driving record is a direct and inevitable consequence of company policies and cannot be used to penalize me. Third, any violations prior to the effective date of this contract cannot be used to my disadvantage pursuant to an understanding and agreement between the parties to the contract. Further, I deny that I am uninsurable as alleged in the company's letter."

After preliminary steps had been exhausted, the parties selected an arbitrator and submitted the grievance to him without entering into a separate submission agreement. The Court of Appeals, in an opinion written by Judge Alvin Rubin, noted that "[a]t no time did the employer contend that the grievance or any part of it was not a proper subject for arbitration."[12]

After the evidentiary hearing, the arbitrator concluded that the discharge was improper, based on the determination that Article 21(Z) was not a part of the contract because the clause in question had never been submitted to the union and the union had not consented to it.

The employer countered that the contract was clear and that the arbitrator exceeded his authority by modifying or rewriting it contrary to a provision which stated that the arbitrator "shall have no authority to change, amend, add to, subtract from, modify or amend any of the terms or provisions of this Agreement." The employer thus viewed the issue as whether the arbitration award drew its essence from the agreement under *Enterprise Wheel* standards. However, the court viewed the issue as one of substantive arbitrability—a *Warrior & Gulf* question.

The court pointed out that the scope of an arbitrator's authority is not always controlled by the collective agreement alone, that before arbitration could proceed it is necessary for the parties to "supplement the agreement to arbitrate by defining

[12]611 F.2d at 582.

the issue . . . and by explicitly giving him authority to act."[13] Judge Rubin stated further:

> ". . . If the parties enter into a submission agreement this later contract is the substitution for legal pleadings; it joins the issue between the parties and empowers the arbitrator to decide it. . . . The arbitrator's jurisdiction is not limited to the issues that the parties could have been compelled to submit; the parties may agree on this method of resolving disputes that they were not compelled to submit to arbitration.
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> "The parties may act formally and enter into a written submission agreement or they may merely ask the arbitrator to decide the written grievance as it has been posed in their conciliation efforts. *When they do so, they have in effect empowered him to decide the issues stated in the grievance. The grievance itself becomes the submission agreement and defines the limits of the arbitrator's authority.* Arbitration is a matter of contract . . . but the initial contract to arbitrate may be modified by the submission agreement or grievance."[14]

Inasmuch as neither party had questioned the arbitrability of the dispute as stated in the grievance, the court held that the entire grievance, including the validity of Section Z, Article 21, was presented to the arbitrator without reservation. The court said that: "On whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority without regard to whether the parties had a prior legal obligation to submit the dispute."[15]

Although the employer did not contend that the court should inquire into the basis of the arbitrator's determination, the court noted that "the contract itself forbids [it] to do so, making this award final."[16] Judge Jones dissented on the ground that the terms of the contract were unambiguous, that the union had knowingly written them into the contract, and that they could not be written out of the contract by the arbitrator.[17]

The *Piggly Wiggly* decision stands as a warning to the parties that where there is no separate submission agreement and when one party disagrees with the statement of the issue contained in the grievance, it is incumbent on that party to put its objection before the arbitrator lest he waive his position and discover

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[13] *Id.*, at 583.
[14] *Id.*, at 584. Emphasis added.
[15] *Id.*, at 584.
[16] *Id.*, at 585.
[17] *Id.*, at 585.

when it is too late that he has broadened the scope of arbitrability under the agreement.

B. Scope of Judicial Review of Arbitration Awards

1. *Review of Contract Interpretation.* The extent of the authority which the *Enterprise Wheel* decision vested in the arbitrator to interpret provisions of an agreement submitted for determination was tested in two circuit decisions here cited.

In *Acme Markets* v. *Bakery & Confectionary Workers,*[18] the Court of Appeals for the Third Circuit upheld an arbitrator's award which concluded that certain store closings were strategic, "i.e., designed to gain some advantage or avoid some disadvantage in [current] contract negotiations" and therefore constituted "lockouts" within the meaning of the collective bargaining agreement. The closing in question was part of a multi-employer response to a whipsaw strike of another union. Setting aside a district court decision that had vacated the award, the court of appeals, relying on a prior unreported decision involving a related situation, held that:

> "[the arbitrator's determination] that the . . . shutdowns constituted illegal lockouts within the no strike-no lockout provision of the . . . contract was not unreasonable and drew its essence from the collective bargaining agreement. . . . The arbitrator's determination . . . is not irrational."[19]

In *Teamsters Local 878* v. *Coca Cola Bottling Co.,*[20] the Eighth Circuit rendered an important decision regarding an arbitrator's authority to construe a typical "just cause" for discharge clause. The grievant had been discharged for dishonesty under such a clause without having been afforded an opportunity to tell his side of the story prior to termination. The arbitrator stated in his award that the weight of the evidence indicated that the grievant had been dishonest in that he had told his clerk-checker that he was short a case of soft drink instead of telling him that he had broken the case. Accordingly, the arbitrator concluded "that the termination . . . was for just cause *provided* due process was followed in handling the discharge."[21] How-

[18] *Acme Markets* v. *Local 6, Bakery & Confectionary Workers International Union,* 613 F.2d 485, 103 LRRM 2394 (3d Cir. 1980).
[19] *Id.,* at 486–487.
[20] 613 F.2d 716, 103 LRRM 2380 (8th Cir. 1979).
[21] *Id.,* at 717.

ever, because of the employer's failure to give the grievant an opportunity to present his side of the case, there was a lack of procedural fairness which caused the dismissal to fall short of the just-cause standard.

The employer characterized the arbitrator's due-process requirement as "an unauthorized attempt to inflict his own brand of industrial justice onto the parties."[22] The court disagreed, noting that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases."[23] Judge Heany, writing for the majority, stated that while the court's "interpretation of 'just cause' may differ from that of the arbitrator, . . . such disagreement is irrelevant" for it was not the court's function to review the merits.[24] Judge Henley dissented.[25]

In *Operating Engineers Local 670* v. *Kerr-McGee Refining Co.*,[26] the Fourth Circuit affirmed the vacation of an arbitrator's award where the arbitrator had set aside a discharge because of the employer's failure to submit sufficient evidence on all of the stated grounds for discharge (excessive absenteeism), although the other ground (false statements to obtain sick leave benefits) had been proved. The collective agreement provided: "Any . . . false statements made to obtain benefits [for sick leave] will be cause for discharge."

The court of appeals held that it was clear that in requiring that all charges levied against the employee must be proved in order to sustain the discharge, the arbitrator ignored the express terms of the agreement and thereby "violated the essence of the agreement."[27]

While the district court in the *Kerr-McGee* case noted that it had the benefit of unambiguous contractual language against which to reverse the arbitrator's award, such was not the case in the Sixth Circuit decision in *General Drivers Local 89* v. *Hays and Nicoulin, Inc.*[28] In that per curiam opinion, the court of appeals and the lower court seem to have substituted their judgment for that of the arbitrator as to the interpretation of ambiguous terms of an agreement. The company had dismissed the grievant be-

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[22] *Id.*, at 719.
[23] *Ibid.*
[24] *Id.*, at 720.
[25] *Id.*, at 721.
[26] 618 F.2d 657, 103 LRRM 2988 (10th Cir. 1980).
[27] *Id.*, at 660.
[28] 594 F.2d 1093, 100 LRRM 2998 (6th Cir. 1979).

cause his bad health had rendered him unfit for his job. The arbitrator, however, concluded on the basis of expert testimony that the employee was not unfit. The arbitrator based his decision on a provision in the collective agreement which stated:

> "The *qualified* employee with the greater seniority and *ability* to perform the work remaining to be done shall be the last employee laid off . . . and the first to be recalled provided he has the ability to perform available work. *Ability shall be determined by the contractor in the first instance.*"[29]

The arbitrator determined on the basis of the emphasized portion of the foregoing that in later instances, such as grievance proceedings, the employer's determination of an employee's unfitness can be reviewed. The lower court, however, concluded that the proper contractual provision to apply was a managerial prerogative section which stated that: "The [Company] shall be the sole judge of the qualifications, capability, number, purpose and tenure of the employees." The court of appeals affirmed the lower court's summary-judgment determination that the latter clause indicated that the arbitrator could not contradict the company's determination that the employee was unfit. According to the court of appeals, the arbitrator viewed the company's action as a layoff without recall because of unfitness, whereas the appellate court said the record and the union's concession in oral argument indicated that the employee was discharged. Consequently, the arbitrator's construction of the contract was held not to draw its "essence from the collective bargaining agreement,"[30] citing *Enterprise Wheel.* But all the Sixth Circuit has done is to disagree with the arbitrator's interpretation of the contract. It certainly has not heeded the Supreme Court's admonition in *Enterprise* that it was not the function of the courts to apply "corrective principles of law to the interpretation of the collective bargaining agreement"[31] in order to determine whether the arbitrator's decision was based on the contract, for:

> ". . . The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's deci-

[29] *Id.,* at 1094.
[30] *Ibid.* Emphasis added.
[31] 363 U.S. at 598.

sion is final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[32]

2. *Review of Arbitrator's Findings of Facts.* Another Sixth Circuit decision involved the extent to which an arbitrator's findings of fact are subject to review under the *Enterprise* standard. Prior to 1973, the employer, in *Storer Broadcasting Co.* v. *AFTRA,*[33] had made voluntary contributions to a profit-sharing plan for the benefit of its employees. In 1973 it entered into a collective bargaining agreement with the union in which it was required to make contributions to the union's pension and welfare plan, and participation in the profit-sharing plan was discontinued. The 1973 collective agreement contained a provision stating that the union had "fully disclosed to its members the benefits being given up by its members in consideration for the Company's contribution to the AFTRA P & W fund and indicates that this arrangement is fully acceptable to the Union and its members."

In 1974, the trustee of the profit-sharing plan advised the employees covered by the collective agreement that they would receive the amounts that had "vested" in the profit-sharing plan up to that time. Seven out of the 20 employees involved, however, rejected checks for that amount and demanded to be paid the larger amounts which had been "credited" to their accounts in the plan. When this was refused, the union took the matter to arbitration.

The arbitrator construed the above contractual language to mean that the employer was bound to whatever reasonable interpretation the union had made and communicated to its members concerning their rights upon termination of their participation in the profit-sharing plan. He then made the factual finding that was the subject of the court action: that the union had represented to its members that they would receive the credited amount, not just the vested amount, and an award was entered in favor of the seven employees for the credited amount. The arbitrator's basis for this factual finding was that the union's version seemed

[32] *Id.*, at 598–599.

[33] *Storer Broadcasting Co.* v. *American Federation of Television and Radio Artists,* 600 F.2d 45, 101 LRRM 2495 (6th Cir. 1979).

"more logical" than the company's version, and the union must have told the employees they would receive the credited amount, otherwise the seven employees would not have objected to receiving only the vested amount. However, there was no direct evidence in the record to support this finding.

The Sixth Circuit reversed the district court's decision upholding the award. Citing its 1979 *Detroit Coil*[34] decision, it noted two important exceptions to the general rule established in the *Steelworkers Trilogy* that the courts are required to refrain from reviewing the merits of an arbitrator's award:

> "First, 'the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. . . .' Second, 'although a court is precluded from overturning an award for errors in the determination of factual issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated."' "[35]

The court found "absolutely no evidentiary support in the record before the arbitrator" for his factual finding. It noted that logic may be able to supplement evidence or help to draw inferences from evidence, but "it cannot substitute for evidence."[36]

The decision places another judicial gloss on the gloss which the court had cited as the second exception to the *Enterprise* standard. Here there was some evidence from which the arbitrator had drawn an inference. As the dissenting judge noted: "Admittedly, this evidence is of marginal weight; however, it is not totally specious. . . ."[37] The dissent further noted that the arbitrator was supplying "more than simple abstract logic,"[38] for his inference was supported by analogy to specific provisions contained in a previous plan which was discontinued by the 1973 collective bargaining agreement. It called for payment of "full credited amounts" to employees if the plan itself was dissolved or if a participating subsidiary of the company withdrew from the plan.

The *Storer* case is another in a line of recent Sixth Circuit

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[34]*Detroit Coil Co.* v. *International Association of Machinists,* 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979).
[35]Citing dictum in *N.F. and M. Corp.* v. *United States,* 524 F.2d 756, 760 (3d Cir. 1975).
[36]600 F.2d at 48.
[37]*Id.,* at 49.
[38]*Id.,* at 49.

decisions[39] that have chipped away at the basic premise of *Enterprise Wheel,* that ". . . [i]t is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[40]

C. Boys Markets[41] *Injunctions*

Steelworkers v. *Fort Pitt Steel Casting*[42] was a decision of the Third Circuit Court of Appeals upholding a *Boys Markets* status quo injunction against an action or threatened action involving a grievance subject to mandatory arbitration binding on both parties to a collective bargaining agreement. The union and the employer were parties to a three-year collective agreement, Section 9 of which prescribed a grievance procedure culminating in arbitration: "In the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an umpire. . . . The decision of the umpire shall be final." The grievance procedure applied to any employee complaint, and stated that it "may be utilized by the Company in processing Company grievances."

Section 19, paragraph 140, of the agreement provided:

> "The parties agree that in the event of a labor dispute at the end of termination of this Agreement, the Company will continue hospitalization and insurance benefits. At the end of said dispute, the Company will be reimbursed for payments made on behalf of the employees in payment methods mutually agreed on by the parties."

The parties having failed to reach a new agreement by expiration of the old agreement on March 2, 1978, the union struck. But negotiations continued and the company continued making premium payments for hospitalization and insurance benefits. The union denied it was obligated to reimburse the company, claiming the local union, not the national union, was solely responsible for guaranteeing repayment and that such repayment was to be achieved by deductions from employee wages

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[39]*E.g.,* Detroit Coil, *supra* note 34; *Hays and Nicoulin, supra* note 28; and *Timken Co.* v. *Local 1123, Steelworkers,* 482 F.2d 1012, 83 LRRM 2814 (6th Cir. 1973).

[40]363 U.S. at 599.

[41]*Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).

[42]598 F.2d 1273, 101 LRRM 2406 (3d Cir. 1979).

when the strike ended. Construing the union stance as a breach of paragraph 140, the company threatened to discontinue premium payments toward the benefits unless the union by June 1, 1978, guaranteed in writing to provide repayment.

The union rejected the company's demand and petitioned the state court for injunctive relief to restrain the company threat. An injunction was granted, but the company removed the action to the United States district court where injunctive relief was again granted. The district court's preliminary injunction barred the company from ceasing timely payments of the premiums to keep the benefits in effect. The district court later entered an amended order maintaining in effect the preliminary injunction, denying the company's motion to dissolve the same, and directing the union to proceed to an expeditious arbitration should the company file a grievance regarding the union's alleged breach of paragraph 140.

The company complied with the injunction and resumed negotiations with the union. The company made two separate proposals modifying paragraph 140, both of which would have terminated the company's obligation to continue payments past the thirtieth day of a work stoppage. The union rejected both proposals. Concluding that the parties had reached an impasse on paragraph 140, the company unilaterally implemented its last offer which, since 30 days had elapsed, resulted in immediate termination of premium payments. The district court, on motion by the union, adjudicated the company in civil contempt, holding that because of the unique nature of paragraph 140, "the Company ha[d] in effect bargained away its right to institute a unilateral change in this clause, following an impasse."[43] The court further held that the plaintiffs had established an immediate and irreparable need for equitable intervention, that the plaintiffs had no adequate remedy at law, that the dispute involved an arbitrable issue under the collective bargaining agreement between the parties, and the union "must participate in an expedited grievance arbitration proceeding, if and when initiated by the company concerning . . . the interpretation and effect of Section 19 of the agreement."[44]

The strike and negotiations between the parties continued, but without an agreement being reached. On November 29,

[43]452 F.Supp. 886, 887 (W.D.Pa. 1978).
[44]*Id.*, at 888.

1978, the company announced it was totally closing the plant, effective the following day. The district court denied the company's motion to vacate the injunction. It relied on *Nolde Bros. v. Local 358 Bakery Workers,*[45] holding that whether the obligations of the company under paragraph 140 were terminated upon shutdown of the plant was an arbitrable issue, and until that issue was resolved the company had no grounds to justify vacating the injunction.

The Court of Appeals for the Third Circuit affirmed the district court in its holding that it had authority to grant the preliminary injunction under the *Boys Markets* exception to the Norris-LaGuardia Act,[46] and it sustained the civil contempt order issued against the company. However, it remanded to the district court the question of permanent termination of company operations following the adjudication of contempt, holding that if the district court finds the company had permanently terminated all operations of the plant, then the injunction prohibiting the ceasing by the company of payments to maintain hospitalization and insurance must be dissolved.

In arriving at its decision, the appellate court considered three elements: (1) whether the underlying dispute is subject to mandatory arbitration; (2) whether the employer, rather than seeking arbitration of its grievance, is interfering with and frustrating the arbitral process which the parties had chosen; and (3) whether an injunction would be appropriate under ordinary principles of equity.

The court rejected the company's claims that arbitration was not mandatory. The company interpreted the grievance procedure under the agreement as providing for a permissive rather than mandatory obligation on the company to use the arbitration procedures and that it had the right to terminate the premium payments as an exercise of its management rights. The company's view, rejected by the circuit court, was that the union was required to initiate the grievance procedure on its claim that the company violated paragraph 140 by terminating the premium payments. Since the union did not do so, it was the company's view that it had not interfered with the arbitral process. The court held that the language of the grievance procedure employed permissive language in reference to both the union's

[45] *Supra* note 10.
[46] 47 Stat. 70 (1932), 29 U.S.C. §§101–115 (1964).

and the company's use of that procedure; therefore, the district court had not committed error in finding that arbitration was mandatory for the company.

The circuit court also agreed with the district court's determination that the payment of monies does not automatically preclude a finding of irreparable injury. It held that proper discretion was exercised and that the injunction was appropriate under equitable principles. It rejected the company's contention that under the implementation of its final offer, the employees were not irreparably injured since they would remain covered for 30 days after premium payments were terminated and would have the option to convert their individual policies thereafter. The court found that there was nothing in the record that suggested that the strike would end within 30 days and held that the absence of earnings during the strike promised a significant risk that the employees would not be in a position to pay for the benefits and would be irreparably injured with their loss.

In dealing with the company's contention that it was entitled to dissolution of the injunction on the basis of its right to implement its last offer after an impasse in collective bargaining, the court acknowledged that unilateral changes following an impasse did not violate the Labor Management Relations Act, but held that the provisions of paragraph 140 of Section 19 of the agreement did not lapse by its terms until the end of a labor dispute and that the company had already struck a bargain with the union on this issue and was therefore precluded by the agreement from altering the substance of that bargain without union approval. The circuit court also held that the district court was justified in entering a civil contempt order.

The rationale of the *Fort Pitt Steel Casting* decisions, at both the district and appeal court levels, reflects a deep commitment to the declared federal labor policy of protecting the integrity of the arbitral process under collective bargaining agreements.

III. Relationship Between the NLRB and Arbitration

A. The Spielberg Progeny

One of the areas of Board law capable of making the hearts of most arbitrators skip a beat is that of the *Spielberg* line of cases. The National Labor Relations Board has long held that it will

defer to an arbitration award where the following three requirements are satisfied: (1) the proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the National Labor Relations Act.[47]

Five important *Spielberg* cases are here reviewed: *Union Fork and Hoe Company,*[48] *Pacific Southwest Airlines, Inc.,*[49] *Cook Paint & Varnish Co.,*[50] *Suburban Motor Freight, Inc.,*[51] and *Servair, Inc.* v. *NLRB.*[52]

The arbitrator in *Fork and Hoe* found that union steward Robert Terry McKinney was discharged for just cause. On his way to so finding, the arbitrator set forth the following standard, by which he tested the alleged misconduct in the processing of a grievance:

> "The grievant, as a Union steward, is held to a higher degree of proper conduct within the plant, because the other employees look up to the steward, and should the steward treat management in a disrespectful manner, as was true in this situation, such disrespectful conduct, or insubordination, is much more visible when a Union steward becomes engaged in such conduct, because the eyes of the entire department are on the steward. It is hoped that the grievant finds employment elsewhere and should the grievant become an official in another bargaining unit, that the grievant will learn by this experience and thereby be a better Union official, and more carefully process a claim made by another employee in the bargaining unit. . . ."[53]

In reacting to the finding of the arbitrator as quoted above, the Board commented that the arbitrator "apparently failed to consider well-established Board law that a steward is protected by the Act when fulfilling his role in processing a grievance, just as any other employee is protected by the Act when presenting a grievance to an employer."[54]

Further, the Board described its own standard for measuring the conduct of stewards as follows:

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[47] *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).
[48] 241 NLRB No. 140, 101 LRRM 1014 (1979).
[49] 242 NLRB No. 151, 101 LRRM 1366 (1979).
[50] 246 NLRB No. 104, 102 LRRM 1680 (1979).
[51] 247 NLRB No. 2, 103 LRRM 1113 (1980).
[52] 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979).
[53] 101 LRRM at 1015.
[54] *Id.,* at 1015.

> "Thus, as was stated in *Clara Barton,*[55] a steward is protected by the Act 'even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.' The appropriate Board standard for measuring the conduct of an employee engaged in protected concerted activities was summarized in *Prescott Industrial Products Company,* as follows: 'The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected activities and that if employees exceed this line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.' "[56]

The Board held that because the arbitrator's standard of conduct for stewards while engaged in protected activities directly conflicts with "well-established Board precedent,"[57] his decision was clearly repugnant to the Act and deferral was refused. The Board reasoned that this policy of not deferring to arbitration awards where the punishment of overzealous stewards is at issue "insures that the grievance and arbitration machinery is used effectively in the manner in which it was intended."[58]

In *Pacific Southwest Airlines (PSA),* the complaint to the Board alleged that the employer had violated Section 8(a)(3) of the Act by discharging two employees, Ingalls and Sharpe, and had violated Section 8(a)(1) by refusing to permit a union steward to be present during a telephone interview with the two employees.

Ingalls and Sharpe were among the witnesses to an on-the-job drinking incident that ended in the discharge of two other employees. On August 23, 1977, the day before the scheduled arbitration hearing on the drinking incident discharges, the employer's attorney attempted to interview Ingalls and Sharpe to prepare for that hearing. After considerable discussion, including phone calls to the union office and approval from the union steward, Ingalls said he was instructed not to answer the questions. Then both Ingalls and Sharpe refused to answer questions and were suspended. On the following day PSA refused to per-

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[55] *Clara Barton Terrace Convalescent Center, a Division of National Health Enterprises-Delfern, Inc.,* 225 NLRB 1023, 1034, 92 LRRM 1621 (1976).
[56] 205 NLRB 51, 52, 83 LRRM 1500 (1973).
[57] 101 LRRM at 1015.
[58] *Id.,* at 1015, quoting *Barton,* at 1029.

mit a union steward to be present during telephone interviews when Ingalls and Sharpe were again asked if they would answer the questions; both employees persisted in their refusal to answer. Later, with a union steward present, a PSA official gave Ingalls and Sharpe each an opportunity to change his mind; when they still refused to respond, he discharged them.

The arbitrator found that PSA acted within its rights in attempting to interview Ingalls and Sharpe, that both should have submitted to the interview, but that because they "got caught in the middle of a struggle between two organizations,"[59] their discharge would be converted to suspensions.

The Board found that the arbitration award was not repugnant to the purposes and policies of the Act and fully met *Spielberg* standards for deferral, for the arbitrator's findings supported his conclusions and demonstrated that he considered and rejected the contentions of the General Counsel. Those findings included: (1) Ingalls and Sharpe were witnesses to the drinking incident. (2) A party to an arbitration, as an almost routine practice, interviews his witnesses to prepare for the hearing and to assess the evidence in light of a possible settlement. (3) PSA had the right to expect good-faith cooperation from Ingalls and Sharpe and did not seek disclosure of what they would testify to at the hearing or details of the union's position. (4) PSA did not go beyond legitimate inquiry into job-related conduct. (5) The interviews were not coercive. (6) PSA did not wrongfully intrude upon or interfere with the grievance procedure.

Concerning the 8(a)(1) issue, the Board observed that although PSA's refusal to permit the presence of a steward during the telephone interviews was improper, the violation was not material. PSA had allowed a steward to be present in the office interview of August 23 and at the discharge interview the following day, though not for the telephone interviews of August 24, and had allowed periodic opportunities to bolster union representation by telephone calls to the union. And during the telephone interviews, all Ingalls and Sharpe did was repeat their mistaken insistence on what they said was their right not to respond, which they again repeated at the discharge interview before being discharged.

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[59] 101 LRRM at 1367.

The Board, therefore, dismissed the complaint in its entirety, deferred to the arbitrator's award concerning Section 8(a)(1) and 8(a)(3) allegations, and concluded as follows:

> "In consideration of all the circumstances, we find that the arbitration award with respect to the *Weingarten*[60] issue is not clearly repugnant to the Act. In doing so, we do not condone Respondent's refusal of union representation, and we neither approve the arbitrator's nor reject the Administrative Law Judge's analysis of *Weingarten*.[61] Instead we find that the arbitration award does not do substantial violence to the *Weingarten* principles or to the purposes and policies of the Act and is therefore not clearly repugnant under the *Spielberg* standards."[62]

The *Cook Paint & Varnish Co.* case also involved interrogation concerning a pending grievance. In anticipation of a scheduled arbitration, the employer's counsel sought to question two employees concerning an incident for which a grieving employee had been discharged. When the two refused to cooperate, the employer threatened to discipline them. The Board found the employer's conduct in violation of Section 8(a)(1). The Board stated that whether an employer may compel its employees to submit to questioning depends on how the "delicate" balance is struck between the employer's need to maintain orderly conduct and the employees' right to make common cause with their fellow employees. "Delicate" or not, the Board indicated that the balance should be struck in favor of the employer when interrogation occurs in the "investigatory" stage of inquiry, i.e., the stage preliminary to the making of a disciplinary decision. But where a disciplinary decision has already been made, as in the instant case, the employer is engaging in "discovery," and the balance must be struck in favor of the employees' interest, for there is no general right to pretrial discovery in arbitration.[63]

The Board distinguished *PSA*, noting that in that case the arbitrator had sought to accommodate the conflicting interests and had struck the balance in favor of the employer. While the Board may not have decided the case the same way as the arbitrator, that did not necessarily mean that the arbitrator's result was "clearly repugnant to the policies" of the Act.

Quarreling with the generality of the principal opinion's ap-

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[60] *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975).
[61] The Administrative Law Judge found a violation of §8(a)(1).
[62] 101 LRRM at 1368.
[63] 102 LRRM at 1681.

proach and claiming that it did not apply a balancing test, Member Truesdale concurred. To prove his point, he contrasted the facts of the present case with those of *PSA.* In the present case, the employer was seeking to discover the union's position prior to arbitration. In *PSA,* the employer was interrogating certain employees to see if they could be called as company witnesses and to consider the possibility of settlement depending upon their answers. These were "legitimate" employer interests which could outweigh the employees' interests even though interrogation occurred prior to arbitration and after the disciplinary decision that was to be the subject of arbitration had already been made. In the present case, however, the employer was seeking to learn the union's case; this disclosed an illegitimate purpose of seeking to undermine the union's case.[64]

In *Suburban Motor Freight,* the Board overruled its 1974 decision in *Electronic Reproduction Service Corp.*[65] and thereby reestablished another requirement for deferral to arbitration under the *Spielberg* doctrine. In *Suburban,* a truck driver who had been discharged for alleged violations of work rules was reinstated, but with a warning, by a Local Joint Grievance Committee. The complaint before the Board included an allegation that the disciplinary action had been imposed for discriminatory and antiunion purposes, an issue that had not been presented to the joint committee in those terms. The Board refused to defer, stating that it would no longer honor the results of an arbitration proceeding under the *Spielberg* doctrine unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. It also ruled that the burden of proof, that the statutory issue of discrimination was litigated before the arbitrator, would be imposed on the party seeking deferral. The Board expressly overruled *Electronic Reproduction Service Corp.,* in which it had held that in the absence of unusual circumstances the Board would defer to arbitration awards dealing with discharge or discipline cases, even where there is no indication that the arbitrator had considered or had been presented with the unfair labor practice issue involved.

In a strong dissenting opinion, Member Penello argued that the Board was reverting to earlier doctrine which experience had shown resulted in a party's withholding evidence of dis-

[64] *Id.,* at 1681–82.
[65] 213 NLRB 758, 87 LRRM 1211 (1974).

crimination during arbitration in order to preserve a second opportunity to try his case in an unfair labor practice proceeding. This had a deleterious effect on arbitration, said the dissent, and for this reason the Board had correctly concluded in *Electronic Reproduction* that it

> ". . . should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg,* except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding."[66]

Meanwhile, in reviewing a *Spielberg*-type case from the Board, the Ninth Circuit indicated its agreement with the approach espoused by Member Penello. In the *Servair, Inc.* v. *NLRB* case, 19 employees who had struck to protest the allegedly discriminatory discharge of a union activist were themselves discharged. Their discharges were upheld in arbitration, but the Board refused to defer to the arbitrator's decision on the ground that the contractual issue of "just cause" was closely intertwined with a charge of a Section 8(a)(2) violation (unlawful employer support of a rival union) which could not be delegated to an arbitrator. The Board applied two criteria which *Baynard* v. *NLRB*[67] had added to the *Spielberg* doctrine, namely, (1) the arbitrator must clearly have decided the issue that is later presented to the NLRB, and (2) the issue must be one that is within the competence of an arbitrator to decide.

The Ninth Circuit reversed, holding the Board to the original *Spielberg* doctrine as the court interpreted it. According to the court, this meant that deferral should be exercised where a contractual issue, which may also be stated as a statutory violation, is submitted to arbitration. The court noted that nearly every alleged violation by management of a collective bargaining contract could also be framed as an unfair labor practice, and to give a losing party at arbitration a "second bite" in cases where this is so would tend to undermine the system of voluntary arbitration.[68]

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[66]*Id.*, at 1216.
[67]505 F.2d 342, 87 LRRM 2001 (D.C.Cir. 1974).
[68]Case withdrawn from publication, rehearing pending.

B. Arbitrability and NLRB Jurisdiction

In *Crescent City IAM Lodge 37* v. *Boland Marine & Mfg. Co., Inc.*,[69] the Fifth Circuit Court of Appeals held that the refusal of an NLRB regional director to issue a complaint was not a bar to arbitration of the same dispute under a collective bargaining agreement. The collective agreement contained a union-steward superseniority clause concerning overtime work assignments as well as layoff and recall. Klein, the grievant, was an outside machinist for the company for 28 years as well as an outside steward for the union for three and one-half years. The company transferred Klein to a position as inside machinist. The union, on Klein's behalf, filed a grievance, and an arbitration hearing was conducted. The arbitrator issued an award, but the union asserted that Klein's claim for overtime based on the steward's preference clause had not been disposed of. In a supplemental opinion, the arbitrator stated that the record provided insufficient evidence to rule on the overtime claim, but that the right to assert such claim "is preserved and is maintained without prejudice."[70]

Thereafter, the union again sought to arbitrate the preference overtime claim, but the company refused; whereupon the union filed an unfair labor practice charge under Section 8(a)(5) alleging the same facts which it originally sought to arbitrate. The NLRB regional director refused to issue a complaint, stating that the company's refusal to honor the steward-preference clause was lawful. The regional director based his determination on a Board decision holding that steward superseniority clauses are presumptively invalid on their face to layoff and recall, and also that the burden of rebutting that presumption is on the party asserting the clause's legality.[71]

The union filed suit in federal district court seeking an order to compel the company to arbitrate the issue.[72] The district judge granted the company's motion to dismiss on the grounds

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[69]591 F.2d 1184, 100 LRRM 3121 (5th Cir. 1979).

[70]*Id.*, at 1185.

[71]*Dairylea Cooperative, Inc.*, 219 NLRB 656, 89 LRRM 1737 (1974). The Board's rationale was that the granting of preferences to union stewards is justified only when it relates to recall or layoffs. In these instances the preference operates to facilitate the maintenance and administration of the collective bargaining agreement. Preferences regarding other aspects (overtime, choice of scheduling, etc.) of the agreement serve no such purpose.

[72]Jurisdiction was based on §301(a) of the Labor Management Relations Act, 29 U.S.C. §185 (1976).

that, according to the Board, the steward-preference clause was no longer enforceable. The union appealed, urging that the refusal by the NLRB to issue a complaint could not operate as a bar to arbitration.

The court of appeals reversed and remanded the case to the district court, with directions to compel arbitration of the grievance. First, the court distinguished the case from those in which an arbitrator's decision had been made and is found by the court to be in conflict with a Board's decision.[73] Next, citing the *Steelworkers Trilogy*, the court enunciated the appropriate guidelines to be applied in making a judicial determination of substantive arbitrability: (1) arbitration should be encouraged; (2) arbitrability depends on the collective bargaining agreement; (3) broad arbitration clauses manifest a real intention to utilize the process; and (4) exclusions must be clear and explicit. Stressing that the question of substantive contractual arbitrability is one for the courts, the court limited its role to deciding "whether the agreement on its face makes the claim asserted arbitrable." Accordingly, the court refused to project what the outcome of the arbitration of Klein's grievance might be and concluded that the broad arbitration clause in the agreement was dispositive.

In concluding that the petition for arbitration must be granted, the court also noted two Second Circuit decisions[74] which had rejected the argument that the refusal of the regional director to issue a complaint is a bar to arbitration. Those cases rejected the argument on three grounds: First, the failure to issue a complaint does not foreclose the possibility that the union may have rights and remedies under the collective bargaining agreement. Second, it is conceivable that the arbitrator could fashion a remedy under the contract that would not conflict with Board policy or the regional director's decision. Finally, the regional director's refusal to issue a complaint is not a binding determination of the dispute which precludes the union from arbitrating the issue. As a postscript, the court emphasized that its order merely compelled arbitration, as op-

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[73]It has generally been held that courts will not enforce an arbitration award that forces a party to the hearing to commit an unfair labor practice. *See Botany Indus. Inc.* v. *New York Joint Bd., Amalgamated Clothing Workers,* 375 F.Supp. 485, 86 LRRM 2046 (S.D.N.Y. 1974).

[74]*International Union of Electrical, Radio, and Machine Workers, AFL-CIO* v. *General Electric Co.,* 407 F.2d 253, 70 LRRM 2082 (2d Cir. 1968); *Luckenbach Overseas Corp.* v. *Curran,* 398 F.2d 403, 68 LRRM 3040 (2d Cir. 1968).

posed to placing "advance Court imprimatur on the award"; possible clashes between arbitral and Board determinations must await enforcement.[75]

The decision is consistent with prior case law addressing the question of whether the regional director's refusal to issue an unfair labor practice complaint operates as a bar to arbitration. The issue is deserving of analysis at two separate levels: (1) the legal effect of the NLRB's refusal to issue a complaint (i.e., res judicata or collateral estoppel), and (2) the conflict resulting from an arbitrator's ruling on the contract and the Board's interpretation of federal labor law.

It is well established that an NLRB refusal to issue a complaint has no res judicata or collateral estoppel effect.[76] Several reasons have been advanced for that proposition. First, "the Board uses different criteria in determining whether to issue a complaint from those which courts employ in adjudicating a controversy."[77] Second, any proceeding or decision by the regional director or General Counsel is administrative, and not adversarial.[78] Consequently, any application of res judicata or collateral estoppel would deny a party of his right to be heard.[79] Finally, the decision not to issue a complaint is not a final order (or final judgment on the merits) and thus can have no res judicata or collateral estoppel effect.[80]

The more significant aspect of the instant case is the conflict that may result between the Board (which interprets the federal statute) and the arbitrator (who interprets the collective bargaining agreement). If the court orders arbitration and the arbitrator enforces the steward-preference clause as it is written, then arguably the company is being compelled to commit an

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[75] *United States Gypsum Co.* v. *United Steelworkers of America,* 384 F.2d 38, 66 LRRM 2232 (5th Cir. 1968).

[76] *Pressette* v. *Int'l Talc Co., Inc.,* 527 F.2d 211, 215, 91 LRRM 2077 (2d Cir. 1975); *Smith* v. *Local 25, Sheet Metal Workers Int'l Assn.,* 500 F.2d 741, 747–748, 87 LRRM 2211 (5th Cir. 1974); *Peltzman* v. *Central Gulf Lines,* 497 F.2d 332, 334, 86 LRRM 2554 (2d Cir. 1974); *Aircraft & Engine Maintenance Employees, Local 290* v. *E.I. Schilling Co.,* 340 F.2d 286, 289, 58 LRRM 2169 (5th Cir. 1965), *cert. denied,* 382 U.S. 972, 61 LRRM 2147 (1966); *Local No. 1434, Int'l Brotherhood of Electrical Workers, AFL-CIO* v. *E.I. duPont Nemours & Co.,* 350 F.Supp 462, 465, 81 LRRM 2678 (E.D.Va. 1972).

[77] *Smith* v. *Local No. 25, supra* note 76, at 748. *See also Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967), where in a footnote the court stated, "[t]he public interest in effectuating the policies of the federal labor law, not the wrong done to the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."

[78] *Smith* v. *Local No. 25, supra* note 76, at 748; *IBEW* v. *duPont, supra* note 76, at 465.

[79] *Aircraft & Engine Maintenance Workers* v. *E.I. Schilling, supra* note 76, at 289.

[80] *Peltzman* v. *Central Gulf Lines, supra* note 76, at 334.

unfair labor practice.[81] If such an award were deemed to be in conflict with Board policy,[82] the company could file an unfair labor practice charge and obtain an NLRB ruling on the issue.

The Supreme Court must have contemplated this problem when in *Smith* v. *Evening News*[83] and *Carey* v. *Westinghouse Electric Corp.*[84] it held that the Board's unfair labor practice and representation disputes jurisdiction, respectively, do not preempt arbitral jurisdiction. Thus, the issue becomes whether the courts in Section 301 suits should effectuate Board policies by (a) denying petitions for arbitration where there is a Board-contract conflict, or (b) granting the petitions and then denying enforcement of any award that is clearly in conflict with Board policy. Alternatively, the courts might choose not to effectuate the Board's policies at all. Thus far they have not chosen this alternative.[85] Instead, they have chosen alternative (b) above, enforcing petitions for arbitration where there is potential conflict[86] and then denying enforcement of awards which either do not comport with NLRB policy or compel the commission of unfair labor practices.[87]

There are several persuasive reasons for the courts' choice: (1) Courts are not supposed to pass on the merits of grievances in their determination of arbitrability.[88] (2) The arbitrator may incorporate the federal statutes and Board policies into the in-

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[81]In light of the Board's determination in *Dairylea, supra* note 71, enforcement of the provision would result in violations of §§8(a)(2) and 8(a)(3) of the Labor Management Relations Act (supporting a labor organization, and discrimination in regard to terms or conditions of employment to encourage membership in a labor organization).

[82]See *Dairylea, supra* note 71.

[83]371 U.S. 195, 51 LRRM 2646 (1962).

[84]375 U.S. 261, 55 LRRM 2042 (1964).

[85]*Supra* note 73.

[86]However, several courts have held that if the grievant is seeking to compel arbitration under a contract provision which the NLRB has already found to violate the Labor Management Relations Act, or is seeking to have the arbitrator compel conduct which the Board has held will violate the Labor Act, the court in the §301 action should sustain a defense to arbitration. *See Oil Workers* v. *Cities Service Oil Co.*, 277 F.Supp. 665 (N.D.Okla. 1967); *Smith Steel Workers* v. *A.O. Smith Corp.*, 421 F.2d 1 (7th Cir. 1969). In each case, however, the Board's ruling dealt specifically with the parties at bar. The courts did not rely on mere precedent.

[87]*Carey* v. *Westinghouse Electric Corp., supra* note 84: "Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence." *Id.*, at 272, *and see* note 76 *supra* and accompanying text for decisions dealing with petitions for arbitration. See *Botany Indus., supra* note 73, where enforcement of an arbitral award was denied on the grounds that it compelled a violation of §8(e) of the Labor Management Relations Act. *See also Luckenbach Overseas Corp.* v. *Curran, supra* note 74 (conflicting award subject to review and correction in courts). *But see* discussion of *General Warehousemen, Teamsters Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1977) in the 1979 Report of this committee, pp. 265–267, 1979 NAA Proceedings.

[88]*See Steelworkers Trilogy, supra* note 3.

terpretation of the contract and no conflict will result.[89] (3) The arbitrator may fashion a remedy not inconsistent with Board policies.[90] (4) The Board might alter its policies during the time it takes to complete the arbitration and enforce the award. (5) In the event an award does issue which is inconsistent with the Board's policy, the matter could be determined by the Board in an unfair labor practice proceeding, and the Board's decision would take precedence over any conflicting arbitration award.[91]

C. Work-Assignment Disputes

UMW Local 1269 (Ritchey Trucking, Inc.)[92] involved a Section 10(k) work-assignment dispute between two locals of the UMW. A full panel of the NLRB, with one member dissenting, quashed the notice of hearing on the ground that the parties had agreed upon a method for voluntary adjustment of the dispute. The Board relied on the existence of a provision for arbitration in the collective bargaining agreement between an employers' association and the international body of the union which by its terms bound all affected employers and local unions, although it was conceded that the agreement did not provide capability for an employer to initiate arbitration or for all the affected parties to participate in the same arbitral proceeding. In so holding, the Board noted that "in deciding whether the Board lacks jurisdiction to proceed with an 8(b)(4)(D) complaint, we focus our inquiry on the existence, not the substance, of an agreed-upon method for the voluntary adjustment of the work dispute."[93]

In a strong dissenting opinion, Member Jenkins took the position that an arbitral decision based on a hearing at which only one of the competing unions and one of the members of the employers' association are heard "falls short of the statutorily specified 'agreed-upon method' of adjudicating disputes."[94]

It is clear from the legislative history that Section 10(k) was designed to provide, both to the public and to neutral employers, relief from the disruptive effects of jurisdictional work stoppages. The statutory provision was enacted to give to the Board primary authority to settle such disputes on the merits on the

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[89]*See* F. Elkouri and E.A. Elkouri, How Arbitration Works (2d ed. 1973) 328–338.
[90]*Supra* note 87.
[91]*See* notes 86 and 87, *supra.*
[92]241 NLRB No. 16, 100 LRRM 1496 (1979).
[93]*Id.*, at 1498.
[94]*Id.*, at 1498.

same basis as would an impartial arbitrator. But the Board is authorized to make a Section 10(k) determination on the merits only after first establishing that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties do not have an agreed-upon method for the voluntary settlement of the dispute. This latter determination reflects the policy of Congress in favor of voluntary dispute resolution.

Although the Board early on was reluctant to decide Section 10(k) disputes on the theory that such a course of action would clash with congressional policy in favor of voluntary dispute resolution, the Supreme Court held that the Board was indeed required to gear itself toward effectuating such dispute settlements. In *NLRB* v. *Radio Engineers Union (CBS),*[95] the Court stated that under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then to award such tasks in accordance with its decision."[96]

Following this mandate, the Board had consistently followed a pattern of considering the parties' agreed-upon method to be insufficient where the employer, as a necessary party, was excluded from the voluntary arbitration process. This stance was seriously challenged only once, by the District of Columbia Court of Appeals in *Plasterers Local 79* v. *NLRB.*[97] That appellate decision was reversed in *NLRB* v. *Plasterers Local 79,*[98] where the Supreme Court agreed with the Board that it was not required to defer its jurisdiction to a process of voluntary dispute settlement which does not include all the parties. In rejecting the D.C. court's argument that the unions were effectively the only real parties to the dispute, the Court noted that the Board since 1947 has accorded necessary party status to employers.

With reference to the policy considerations of *CBS, supra,* the Court noted:

> "Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table. . . . Section 10(k) contemplates only a voluntary agreement as a bar to a Board decision."[99]

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[95]364 U.S. 573, 47 LRRM 2332 (1961).
[96]*Id.,* at 586.
[97]449 F.2d 174, 74 LRRM 2575 (D.C. Cir. 1970).
[98]404 U.S. 116, 78 LRRM 2897 (1971).
[99]78 LRRM at 2903.

In three previous 10(k) determinations construing the same collective bargaining agreement between the Bituminous Coal Operators Association (BCOA) and the UMW, the Board had consistently found that the method of dispute settlement was sufficient to bind the employers' association members and voluntary signatories. See *United Mine Workers Local 1979 (Consolidated Coal Company),*[100] *United Mine Workers Local 1368 (Bethlehem Mines Corporation),*[101] and *United Mine Workers Local 1600.*[102] In *Consolidated Coal* and *Bethlehem Mines,* a panel of Murphy, Fanning, and Penello interpreted the arbitration clause in response to an employer contention that because the provision was for two-party dispute resolution, it could not suffice for an agreed-upon method relative to excluded parties:

> "However, the term 'employer,' as used in the agreement, refers to all coal operators who are signatories to the agreement and the term 'union' refers to all locals of the UMWA. . . . Thus we conclude that the only logical interpretation of the agreement allows the parties to participate in any arbitral proceeding directly affecting their interests."[103]

Thus, the Board's earlier acceptance of this method as sufficient for its deferral relied upon the assumption that all the parties would indeed have access to the arbitral process and would not be barred by a two-party procedure.

In *UMW Local 1600,* Member Murphy expressed some reservation with the Section 10(k) deferral practice of the Board. Footnote 6 noted:

> "While Member Murphy has heretofore adhered to the view that where an agreed-upon method exists the parties must resort to that procedure, she may deem it appropriate to reconsider her position in the event it appears from a series of cases that an existing method is ineffective or is not being used by the parties."[104]

Member Jenkins has consistently taken a strict scrutiny posture and would have the Board adhere to the mandate of the Supreme Court, as he sees it, of the Board's duty to protect the public and neutral employers from the disruption of jurisdictional disputes. To be consistent with that mandate, he would have the Board not defer to the "shadow" of an agreed-upon method which effectively excludes the employer from the arbi-

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[100] 227 NLRB 815, 94 LRRM 1689 (1977).
[101] 227 NLRB 819, 94 LRRM 1692 (1977).
[102] 230 NLRB 830, 95 LRRM 1405 (1977).
[103] 94 NLRB at 1692.
[104] 230 NLRB at n. 6.

tral process. See Jenkins's dissent in *Capitol Air Conditioning.*[105] In that same case Member Walther in dissent suggested that deferral be restricted to cases not only where there exists a method, but where the parties show an actual activation of the method that will resolve the dispute. Walther referred to frustration of congressional policy where the Board does not ensure that the dispute is actually resolved.

Based on its own precedents in considering whether an employer is considered a party to the private dispute-resolution process and the decision of the Supreme Court in *Plasterers Local 79,* the decision in *Ritchey Trucking* is surprising. The previous UMWA cases implied that if the contract did not allow for full participation of all affected parties, the Board would not defer. But when faced squarely with that question in *Ritchey,* the Board decided that the standard is simply the mere existence of an agreed-upon method of dispute resolution.

The Board distinguished *Plasterers Local 79* by noting that all the parties involved in that case were signatories to the agreement, but it ignored the rationale that the crucial question was whether the affected employer had an opportunity to participate in the arbitration proceedings. The Board noted further that the remaining employers can indeed be involved in the process by waiting until the union with which they have contracted decides to seek arbitration. In effect, the Board's decision places certain employers in the position of having to stand by until the disputing unions push the right buttons to bring the employers into the process.

The final decision reviewed in this report concerns the desirability of securing tripartite arbitration of jurisdictional disputes. Whether this end should be achieved at the expense of vacating the awards in two arbitration proceedings, each of which awarded the same work to a different union under different collective bargaining agreements, was the issue in *Louisiana-Pacific Corp.* v. *International Brotherhood of Electrical Workers, AFL-CIO, Local Union 2294.*[106] The court's answer to this narrow question was in the negative.

The company was a party to two collective agreements, with local unions of both the Association of Western Pulp and Paper Workers (Pulp Workers) and the International Brotherhood of

[105]224 NLRB 985 (1976).
[106]600 F.2d 219, 102 LRRM 2070 (9th Cir. 1979).

Electrical Workers (IBEW), each of which represented different employees of the company in separate bargaining units. The company assigned certain maintenance work on a generator to employees represented by IBEW. The Pulp Workers, believing that this was work which should have been assigned to them, filed a grievance, processed it to arbitration under their collective bargaining agreement, and obtained an award holding that the work should have been assigned to the Pulp Workers and directing the company to pay the Pulp Worker employees for the hours of work lost. The company filed suit to vacate the award and to secure an order compelling tripartite arbitration. On summary judgment, the court confirmed the award and denied the request for tripartite arbitration. The IBEW took no part in these proceedings, and the company neither requested not sought to compel tripartite arbitration until after the arbitrator's award in the Pulp Workers' grievance.

After that award had been confirmed by the court, however, the IBEW, feeling that its right to the assignment of similar work in the future was being jeopardized, filed a grievance under its collective agreement. After processing it to arbitration, it obtained an award declaring that the work had been properly assigned by the company to IBEW employees. The company again filed suit to vacate and to obtain tripartite arbitration of the dispute. On summary judgment, this award was also confirmed, and the request for tripartite arbitration was likewise denied. The company appealed from the decisions of the district court's refusing to vacate the two respective awards, and the two cases were consolidated on appeal before the Ninth Circuit.

Actions to review or vacate arbitration awards are normally governed by the test established in *Steelworkers* v. *Enterprise Wheel and Car Corp.*[107] Under this test, the award can be set aside only if it fails to "draw its essence" from the agreement. Here, the company made no claim that the two awards failed to draw their essence from the agreement, or that the arbitrators were guilty of fraud or bias,[108] or even that the two arbitrators made the incorrect decision under either of the two agreements. Instead, the company contended that the inconsistency of the two awards was sufficient grounds to vacate.

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[107] *Supra* note 3.
[108] *See* 9 U.S.C. §10.

To support this proposition, the company cited *Transportation-Communication Employees Union* v. *Union Pacific Railroad Company,*[109] in which a jurisdictional dispute had been referred to the National Railway Adjustment Board for resolution pursuant to the Railway Labor Act. One of the unions involved, however, refused to take part in the proceedings and the other parties made no effort to compel its participation. The lower federal courts refused to enforce the ensuing Board award because of the absence of an indispensable party and the Supreme Court affirmed, holding that it was the Board's duty under the Act to settle the dispute between all the parties in one proceeding; therefore, the court ordered that the dispute be remanded to the Board for tripartite arbitration. The Ninth Circuit, in *Louisiana-Pacific,* however, distinguished *Transportation Union* on the ground that under the Railway Labor Act the Adjustment Board had exclusive jurisdiction to hear and determine the dispute; whereas, in the instant case, where the Railway Labor Act has no application, the arbitrator's authority is derived not from statute but solely from the parties' own respective collective bargaining agreements.

The deciding consideration for the court in refusing to vacate the two awards and to order tripartite arbitration was the company's failure to secure either a contractual or judicial solution to the dispute prior to the arbitration of the first grievance. The court cited *Carey* v. *Westinghouse Electric Corp.,*[110] which held that the courts may order bilateral arbitration of jurisdictional disputes even though the dispute might later come under the jurisdiction of the Board in an unfair labor practice proceeding. The court in *Carey* noted that only one union would be involved in the arbitration and that an award might not settle the controversy. The court, however, went on to say: "Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it."[111]

In the Ninth Circuit's view, since jurisdictional disputes arise frequently, and since after *Carey* the company should have been aware that it would be required to arbitrate such disputes with each of the disputing unions under their respective collective bargaining agreements, the company should have either (1)

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[109]385 U.S. 157 (1976).
[110]*Supra* note 84.
[111]*Id.,* at 265.

contracted with the unions involved for trilateral arbitration, or (2) secured a court order compelling trilateral arbitration under Section 301 of the LMRA prior to the arbitration of the Pulp Workers' grievance. As to the contractual solution, the court noted that in the construction industry, where such disputes are frequent, the unions and employer associations have established a "Plan for Settlement of Jurisdictional Disputes" which is commonly incorporated by reference into local collective agreements. As to the judicial solution, the court cited, without itself deciding the issue, the Second Circuit's opinion in *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Association,* [112] which held that tripartite arbitration of jurisdictional disputes can be ordered under Section 301 of the LMRA prior to the commencement of bipartite arbitration of the dispute under either of the unions' agreements. Because it chose not to take advantage of either the contractual or judicial remedies available to avoid its present predicament, the company, in the court's view, must now bear the consequences of its failure to act.

[112] 414 F.2d 1326, 72 LRRM 2140 (2d Cir. 1969).

APPENDIX C

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1979*

WALTER J. GERSHENFELD** AND GLADYS GERSHENFELD***

Introduction

Significant developments for 1979 include statutory, judicial, and related activity in public-employment dispute settlement at the federal, state, and local levels. There is a state-by-state summary of legislation enacted during the year, a summary of experience under new legislation for federal labor relations, and a digest of significant appellate and high-court decisions. Lower-court or board decisions of particular interest have also been included.

As was true last year, relatively few states enacted new legislation. Connecticut covered teachers, and Rhode Island placed state police under collective bargaining legislation. The City of San Francisco passed a law providing for collective bargaining for its police officers and firefighters. Four states extended or modified existing legislation, and a few states passed legislation or used attorney-general opinions for housekeeping purposes.

A period of statutory stability may be implied from the small amount of new legislation as well as from the fact that no existing legislation either was repealed or failed to be extended. It is also noteworthy that interest-arbitration statutes passed or

*Report of the Committee on Public Employment Disputes Settlement. Members of the committee are: Stanley Aiges, Arvid Anderson, Armon Barsamian, Dana Eischen, Walter Eisenberg, Philip Feldblum, J. B. Gillingham, Milton Goldberg, Donald Goodman, Allan Harrison, Myron Joseph, M. David Keefe, Richard Keefe, Milton Nadworny, William Post, Paul Prasow, David Randles, Charles Rehmus, John Stochaj, Roland Strasshofer, Jr., Marlin Volz, and Walter Gershenfeld, chairperson.

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modified often favored the use of final-offer-by-issue interest arbitration.

On the judicial front, no state statutes were set aside as unconstitutional during the year. Action to set aside a California statute was instituted, while such action remained pending in Connecticut during the year. Interest-arbitration awards generally passed court tests, but procedural limits were imposed by Iowa, and awards in Minnesota and Hawaii were left unfunded. Overall, grievance arbitrability was supported by the courts unless there was a clear contractual or statutory limitation. Some grievance decisions were overturned where the courts found the arbitrator had exceeded his/her authority.

Duty-to-bargain cases showed courts supporting union claims that unilateral management action in mandatory bargaining areas subjected the matter to recall for discussion and negotiation. Scope-of-bargaining decisions were mixed as the courts and boards struggled with the line between managerial policy and working conditions. Some boards and courts elected to spell out the general basis for such distinctions in their localities as an aid to bargainers.

Finally, the continuing role of Proposition 13 and related measures on collective bargaining and dispute settlement is briefly considered.

The overall sense of the year is one of a reach for stability by the parties and the legislatures. Much happened that was interesting but, except at the federal level, little that could be termed new directions for public-sector labor relations. The most ominous cloud, of course, continued to be financial pressures on the parties occasioned by the weak economy.

Statutory and Related Developments

The year 1979 was relatively quiet for new statewide legislation. Only three states passed such legislation, and all three acts were limited to specific groups. The California law covers employees in the state's higher-education system, Connecticut's measure applies to teachers, and Rhode Island's provides for interest arbitration of police disputes. The Connecticut law calls for issue-by-issue interest arbitration, while the Rhode Island law requires conventional arbitration.

Modifications or extensions of existing laws occurred in Arizona, Massachusetts, Montana, and New York. The Arizona law

permits nonlawyers to represent employees at personnel hearings. Massachusetts extended its binding-arbitration law for police and firefighters for a four-year period and continued a joint Labor-Management Committee which oversees these disputes. In addition to the neutral chairman, a neutral vice-chairman was added to the committee. Montana's firefighters gave up the right to strike in exchange for final-offer arbitration of their interest disputes. New York extended its conventional interest arbitration for police and firefighter disputes for a two-year period.

Voters in San Francisco approved a charter amendment providing for final-offer-by-issue interest arbitration of police and firefighter disputes. Housekeeping adjustments were made in a few states. Experience under the Federal Service Labor-Management Relations Statute, which became effective in 1979, is reported in the section on Federal Sector Developments.

Arizona

Effective May 1, 1979, the Arizona legislature enacted a law permitting nonlawyers to represent public employees at personnel hearings. The law was tested immediately when a Maricopa County (Phoenix) hearing board refused an AFSCME official permission to represent an employee in a disciplinary matter. The holding was that county merit-system commission rules require lawyers to represent employees at personnel hearings. The stand was taken on advice of the county attorney whose written legal opinion stated that the practice of law in the state could only be regulated by the judiciary. AFSCME has appealed the matter to the Arizona Supreme Court seeking a ruling on the constitutionality of the law.[1]

California

The Higher Education Employer-Employee Relations Act became effective July 1, 1979, granting faculty and other employees in the state college and university system collective bargaining rights. The law stresses the role of higher-education faculty in governance by reserving to faculty senates matters related to the criteria and standards for appointment, promo-

[1]831 GERR 25 (1979).

tion, retention, and tenure for faculty employees. If the academic senate at the University of California or the trustees of the California State College and University System determine that these matters are no longer under their jurisdiction, they may be included in the scope of bargaining.

The law supersedes existing statutes specifying employee benefits. There are also important sunshine aspects in the law. Provision is made for student representation during the entire bargaining process. Public disclosure is required for all proposals, initial and subsequent, and opportunity must be made available to the public for comment on contract matters.

By a 5–4 margin, San Francisco voters approved a charter amendment providing for final-offer-by-issue interest arbitration for police and firefighter disputes. The law became effective January 1, 1980, and calls for a tripartite board which utilizes majority vote in its determinations. The board selects either the last offer by the parties or may make an award "that is within the parameters of the last offer of settlement by each party on each issue."

Connecticut

The Connecticut General Assembly passed a Teacher Negotiation Act, effective October 1, 1979. The measure provides for issue-by-issue final-offer arbitration of interest disputes. A 15-person arbitration panel is appointed by the governor. Five members are representatives of the interests of boards of education, five are representatives of the interests of bargaining agents, and the remaining five are representatives of the interests of the general public. The latter five are selected from lists supplied by the state board of education. All appointees serve concurrently with the governor, and their appointments require the approval and consent of the general assembly.

If the parties can agree on a single arbitrator, that mode will be utilized. Otherwise, a tripartite board hears the case with the Commissioner of Mediation appointing a third party if the parties are unable to do so. The law requires the hearing to take place on the tenth day following selection of the chairperson. Hearings must be concluded within 20 days, and the report of the board of arbitration is due 15 days after the close of the hearing.

Delaware

The Governor's Council on Labor is codifying administrative rules and regulations governing public-sector labor relations. The project is expected to be completed in 1980. During 1979, legislative hearings were held on a new public-sector collective bargaining law which provides for a limited right to strike.

Massachusetts

The Massachusetts binding-arbitration law for police and firefighter bargaining disputes, scheduled to expire on June 30, 1979, was extended for four years. A joint Labor-Management Committee to oversee these disputes was continued and accorded high marks for its stewardship of police and firefighter disputes. The committee has broad authority to assume jurisdiction over cases and may order the parties to continue bargaining, may mediate, and may specify the form of interest arbitration to be utilized. The committee was additionally granted authority to determine whether an unfair labor practice proceeding before the Massachusetts Labor Relations Commission should prevent arbitration.

Under its original structure, the committee was composed of 13 members, including a chairman. As amended, it now consists of 14 members including a chairman and vice-chairman. As in the past, the other 12 members include three nominees of the Professional Firefighters of Massachusetts, three nominees of police organizations, and six nominees of a local-government advisory committee.

Two statewide units of judicial employees were created by statute. A third such unit was created by the Massachusetts Labor Relations Commission. Judicial employees negotiated for their first collective agreement with the commonwealth in 1979.

Michigan

Last year's report noted that the Michigan electorate approved a constitutional amendment giving state troopers collective bargaining rights culminating in mandatory issue-by-issue interest arbitration. The bill provided no mechanism for implementation. In December 1978, Governor William Milliken vetoed a bill which would have given the Michigan Employment Relations Commission authority to oversee the selection of a

bargaining agent. In April 1979, Governor Milliken rejected a similar bill, arguing that the responsibility for conducting a union election for the troopers was vested in the Civil Service Commission.

The troopers also lost in the courts. In January 1979, the Michigan Court of Appeals denied a suit to allow state troopers to select a bargaining agent without involvement of the Civil Service Commission. In March 1979, the state supreme court refused to hear the troopers' request for an order forcing the state to bargain with them.

Following extended discussion among the concerned parties, agreement was reached to hold a consent election under the auspices of the American Arbitration Association. The election was won by the Michigan State Police Troopers' Association. Bargaining commenced in late 1979 between the association and the Office of the State Employer in the governor's office.

During 1979, two state departments, the Department of Labor and the Department of Management and Budget, released a study which concluded that the state's system of compulsory arbitration for police and firefighter interest disputes promoted collective bargaining and prevented strikes.

Montana

Firefighters in Montana gave up the right to strike in exchange for final-offer arbitration of interest disputes.

The state's public-employment law was also amended during the year to exclude certain confidential and other employees from collective bargaining coverage. Employees of the Board of Personnel Appeals, which administers the law, were also prohibited from being represented by any organization that represents nonboard employees.

New York

"Experimental" compulsory interest arbitration for police and firefighters was extended for two additional years. Governor Hugh Carey, in signing the bill, quoted a New York State Public Employment Relations Board report which found: (1) arbitrated awards were comparable to negotiated settlements, contrary to the belief of some that arbitrated awards were out of line; (2) litigation involving the procedures and circumstances of awards had substantially decreased; and (3) there had been no major

work stoppages, and only two or three stoppages of little consequence, since 1974.

The governor recommended use of final-offer arbitration rather than conventional interest arbitration, but he decided to accept the legislature's bill providing for no change in the method of arbitration to be used in interest disputes. During 1979, Governor Carey also vetoed a bill providing for arbitration of disputes involving state troopers.

A law permitting agency shops to continue to be negotiated in the public sector was also continued for a two-year period.

Ohio

In 1977, Governor James Rhodes vetoed a bill providing comprehensive coverage of public-sector labor relations in the state of Ohio. Since then, a number of bills have been introduced covering various aspects of public-sector labor relations, but none has been enacted. Meanwhile, public employees in Ohio are heavily unionized on a de facto or local-legislation basis. During 1979, the Ohio Supreme Court gave support to de facto bargaining in the teacher area by deciding that a recognition agreement detailing procedures to be followed in collective bargaining was valid and enforceable as long as it did not conflict with state education laws. The decision is discussed further in the Judicial and Related Developments section.

Rhode Island

Rhode Island's public-sector legislation is highly segmented. Prior to 1979, there were five separate pieces of legislation covering state employees, municipal employees, municipal police, firefighters, and teachers. A sixth statute was added when Governor J. Joseph Garrity signed a state-police arbitration act into existence.

The form of arbitration is conventional and tripartite. If the partisan arbitrators can agree on a neutral arbitrator, that individual serves as chairperson of the arbitration board. If no selection can be made, the Chief Justice of the Rhode Island Supreme Court designates the chairperson of the arbitration board, who must be a resident of Rhode Island.

Procedurally, the law is very much like the Connecticut statute for teachers, reported earlier, in that the board must be convened within ten days after appointment of the chairperson

(with at least seven days' notice to the partisan arbitrators), the proceedings must be concluded within 20 days, and the decision of the board of arbitration must be delivered within ten days after the hearings are closed.

Tennessee

A series of opinions by the state attorney-general sought to clarify the Tennessee Professional Negotiations Act for teachers which became effective in 1978. The attorney-general held that assistant principals are covered by the law; only principals devoting a majority of their time to professional personnel management or fiscal affairs are excluded from negotiating units; a school board's negotiators must be supervisors or board members; bargaining and *strategy sessions* [emphasis supplied] must be open to the public; and the negotiation of closed-shop contracts is illegal. The attorney-general also ruled that a board of education may suspend negotiations with a recognized organization if a decertification petition has been presented (at least one year following an election) to the board of education and the board has a good-faith belief that the organization no longer represents a majority of the employees.[2]

A new Tennessee law requires sunshine bargaining between localities and unions representing public employees.

Federal Sector Developments[3]

Federal Labor Relations Authority

Administration. The Authority began operations at the beginning of 1979 with a backlog of 995 cases carried over from the old Executive Order program. Of those 995, 778 were pending with the Authority's nine regional offices, 118 with the Authority's national office, and 99 with the Authority's Office of Administrative Law Judges. In addition, the Impasses Panel carried forward 27 cases filed with it under the Executive Order.

On top of that carryover caseload, 3985 new cases were filed in the regional offices during 1979, of which 3367 were unfair

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[2]826 GERR 12 (1979).

[3]Provided to the Committee on Public Employment Disputes Settlement by Ronald W. Haughton, Chairman, Federal Labor Relations Authority, and Howard W. Solomon, Executive Director, Federal Service Impasses Panel.

labor practice charges and 618 were representation petitions. At the national-office level, 584 new cases were filed with or otherwise reached the Authority for final disposition. The Authority's Office of Administrative Law Judges received 265 cases, and the Federal Service Impasses Panel received 129 requests for consideration. For all constituent parts of the Authority, this caseload substantially exceeded estimates and projections developed in 1978, based upon activity under the Executive Order.

During the year, the General Counsel closed or otherwise disposed of 2982 cases at the regional-office level. The Authority closed 306 other cases at the national-office level. In addition, the Authority's Office of Administrative Law Judges disposed of 210 cases by way of settlement or recommended decision and order. The Federal Service Impasses Panel closed 100 of the 156 cases brought before it in 1979.

Arbitration and Exceptions to Arbitrators' Awards. Some of the most significant changes ushered in by the Federal Service Labor-Management Relations statute were in the area of negotiated grievance procedures and grievance arbitration. Under the statute, as under the Executive Order, negotiated grievance procedures must be included in all agreements negotiated in the federal sector. However, unlike under the order, these grievance procedures are required to provide for binding arbitration as the final step of the procedure. In addition, the statute leaves to the parties the matter of devising a method for resolving questions of grievability and arbitrability—issues which, under the order, generally were submitted to an Assistant Secretary of Labor for resolution.

The statute also greatly expanded the range of subjects covered by negotiated grievance procedures including, for the first time in the federal sector, matters involving major discipline of employees. Under the statute, grievance procedures will automatically extend to all matters covered by the definition of "grievance" in the statute unless the parties specifically exclude any of those matters in their agreement. Thus, parties in the federal sector no longer negotiate matters *into* coverage under their grievance procedure; they negotiate them *out.* And "grievance" is broadly defined as meaning any complaint:

> "(a) by any employee concerning any matter relating to the employment of the employee;
> "(b) by any labor organization concerning any matter relating to the employment of any employee; or

"(c) by any employee, labor organization, or agency concerning—
"(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
"(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

The only matters specifically excluded by the statute from coverage under the grievance procedure are:

"(1) any grievance concerning prohibited political activities;
"(2) any grievance concerning retirement, life insurance or health insurance;
"(3) any suspension or removal for national security reasons;
"(4) any grievance concerning examination, certification, or appointment, or
"(5) any grievance concerning the classification of any position which does not result in the reduction in grade or pay of an employee."

Thus, with the broad definition of grievance and the few matters that are mandatorily excluded, grievance procedures can cover a wide variety of disputes which have been, until now, resolved exclusively under statutory appeal procedures. Moreover, in many of these cases, where the matters have not been excluded by the parties, the negotiated grievance procedure will be the *sole* procedure available to employees in exclusive units for appealing them. In cases where they have been excluded, the statutory appeal procedures will be available, as they will be for employees not covered by collective bargaining agreements. Generally speaking, this will mean appeal to the Merit Systems Protection Board (MSPB).

In cases involving removals or demotions for unacceptable performance, or adverse actions (removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs of 30 days or less), an employee will have an option of raising the matter under the negotiated grievance procedure, if the procedure covers it, or of appealing the matter to the Merit Systems Protection Board. If the employee chooses to use the negotiated procedure and the matter is ultimately submitted to arbitration, the statute provides that an arbitrator must apply the same statutorily prescribed standards in deciding the case as would have been applied had the matter been appealed to the MSPB. And those standards, as established by the act, are: (1) the decision of the agency shall be sustained in the case of an action based on unacceptable performance only if the decision

is supported by substantial evidence, and (2) in any other case only if the decision is supported by a preponderance of the evidence.

Another area in which employees will have an option of using either the negotiated procedure (if the procedure covers it) or a statutory procedure is in discrimination complaints. And in those cases, the statute provides that opting to use the negotiated grievance procedure in no manner prejudices the right of the employee to request either the MSPB or the Equal Employment Opportunity Commission, as appropriate, to review the final decision in the case.

The statute also provides that either party to arbitration (only the union or the agency may invoke arbitration) may file an exception to an arbitrator's award with the Federal Labor Relations Authority, other than an award relating to a removal or demotion for performance reasons, or an adverse action. Awards in these areas are appealable by the employee directly to court. When an award is appealed to the Authority, the statute provides that if, upon review, the Authority finds the award deficient because it is contrary to any law, rule, or regulation, or deficient on other grounds similar to those applied by federal courts in private-sector labor-management relations cases, then the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

In appeals decided thus far under the statute, the Authority, in addition to recognizing that it will sustain a challenge to an arbitration award if it finds the award contrary to law or regulation, has specifically recognized two grounds "similar to those applied by Federal courts in private sector labor-management relations" upon which it will sustain a challenge to an award. These are: (1) the award does not draw its essence from the collective bargaining agreement, and (2) the award is based on a nonfact. However, while the Authority has acknowledged these as grounds applicable in the federal sector, it has not yet overturned an award based on these grounds. The Authority has also made it clear that an arbitrator's award in the federal sector is not open to review on the merits, and that it will not review an arbitrator's reasoning and conclusions, findings of fact, or interpretation of the collective bargaining agreement.

Federal Service Impasses Panel

The significant developments involving the Panel during its first year under the Federal Service Labor-Management Relations statute reflect both a continuation of earlier trends in the resolution of disputes and the new language of the statute. These developments were a very high percentage of voluntary settlements, experimentation with different dispute-resolution techniques, and a clarification of how compliance with orders of the Panel is to be achieved. These will be discussed in turn.

Voluntary Settlements. Firmly believing that informal settlements provide the best kind of dispute resolutions, the Panel has been encouraging voluntarism in the resolution of impasses ever since its inception in 1970. This has been reflected in figures which show that only a small percentage of disputes required the Panel's formal intervention on the substantive issues. Last year was no exception. Sixteen percent of the 100 cases closed by the Panel required either a formal recommendation for settlement or a decision and order. Eliminating those impasses in which recommendations led to a settlement, just 13 percent of these closed cases necessitated final action by the Panel in the form of a binding decision. This represents a small fraction of the roughly 800 sets of negotiations which took place in the federal sector during this period.

Different Dispute-Resolution Techniques. The Panel continued to experiment with different dispute-resolution techniques. This trend began in 1978, but intensified last year under the very broad language of the statute. Indeed, unpredictability and flexibility best characterize the procedural actions taken by the Panel. Some examples follow:

a. Decision and Order After Rejection of Postfactfinding Recommendations. In *General Services Administration,* Panel Release No. 124, the Panel issued recommendations, based on the factfinder's report, calling for the employer to offer office space to the union. When the dispute remained unresolved, a final-action hearing before a subpanel of three Panel members was held. The union, the American Federation of Government Employees (AFGE), AFL-CIO, and the employer remained at impasse over suitable office space following the subpanel hearing. The Panel then issued a *decision and order* directing the employer to identify three alternative office sites for the union's use at no cost.

b. Decisions Based upon Written Submissions. The parties requested the Panel to issue a final and binding decision based upon their written submission in *Kansas Army National Guard,* Panel Release No. 112. The technicians, members of the National Association of Government Employees (NAGE), were directed to continue wearing the military uniform, since they had had insufficient time to assess the effect of their recent agreement to continue wearing the uniform. With respect to another issue, however, the Panel decided that there would be no fee charged to the union for the deduction of dues.

A very different use of written submission was evident in *California National Guard,* Panel Release No. 121. The Panel issued an *order to show cause* why previous recommendations concerning the wearing of the military uniform should not apply. The parties, California National Guard and NAGE, were to indicate what material facts, if any, were significantly different from those contained in earlier Panel cases. After reviewing the written submissions, the Panel concluded that no cause had been shown and ordered that technicians should have the option of wearing either the military uniform or standard civilian attire.

In *Farmers Home Administration,* Panel Release No. 129, the Panel used a final-offer selection procedure to make a binding decision. The union, AFGE Local 3354, proposed a 15-minute paid rest period during each four-hour segment of regular duty or overtime, with an additional rest period at the end of the normal workday for employees who were to work overtime immediately thereafter. The exact times for the rest periods were to be negotiated separately. The Panel selected the employer's proposal of 13-minute staggered breaks with scheduling to be at the discretion of the employer.

c. Supplementary Decision and Order. The FMCS commissioner requested a clarification of certain language in a Panel decision involving the *Oregon Army/Air National Guard,* Panel Release No. 121. The Panel issued a letter setting forth its intent with respect to the language and gave the parties a deadline by which the issue was to be resolved. When no settlement was reached, the Panel issued a supplementary *decision and order,* clarifying its previous *decision and order* to the effect that technicians could wear either the military uniform or standard civilian attire on a daily basis.

d. Panel Recommendations Following Factfinding. The Panel issued a *report and recommendation* in *Department of Defense, Depend-*

ents Schools, Panel Release No. 127, concerning appropriate tours of duty. The union, the Overseas Education Association, represented some 6500 teachers, guidance counselors, and training instructors in a worldwide, consolidated bargaining unit, although the dispute was limited to those assigned to schools in the Philippines. It proposed a one-year tour of duty; the employer sought to continue the practice of two-year tours. The Panel concluded that the two-year tour of duty was reasonable in view of the compensation, the geographic location, and available travel benefits as compared with other federal employees in the same area. Both parties accepted the recommendation.

e. Request for Approval of Arbitration Procedure. The statute places a greater emphasis on binding arbitration by persons outside the Panel; however, Panel approval is still required. There were three requests for authorization of outside arbitration during 1979, all of which were denied.

The parties in *Federal Election Commission,* Panel Release No. 126, jointly requested approval to use an arbitrator in lieu of the Panel in disputes arising from midcontract bargaining, but the request was denied because it failed to meet the requirements set forth in the Panel's interim regulations. Those regulations provided, among other things, that the parties submit a list of the issues at impasse as well as the issues to be heard by the arbitrator.

The two other requests involved the Department of the Interior, Bureau of Reclamation. The Panel denied the request in *Lower Colorado Region,* Panel Release No. 128, for failure to meet the Panel regulations as in *Federal Elections Commission, supra.* In the other case, *Yuma Projects Office,* Panel Release No. 128, the Panel determined that its approval was not required since the request involved the use of advisory arbitration.

Compliance with Panel Decisions. Under Sections 7116(a)(6) and (b)(6) of the statute, it is an unfair labor practice for either party to "fail or refuse to cooperate in impasse procedures and impasse decisions. . . ." In *Puerto Rico Air National Guard,* Panel Release Nos. 107 and 110, the Panel issued a *decision and order* to resolve an impasse over the wearing of the military uniform by National Guard technicians. It subsequently denied the employer's petition for reconsideration and other relief, but the employer then petitioned the Authority for a major policy decision in this case (which petition was later withdrawn). In re-

sponse to the union's request that the Panel enforce its *decision and order,* the Panel noted that no explicit provision of the statute gives the Panel the right to enforce its decisions through court action. Rather, the Panel said, failure to comply with a final action of the Panel could be remedied through the unfair practice provisions of the statute.

Postal Service

In September 1978, Arbitrator James Healy issued an interest award in the dispute between the U.S. Postal Service and national postal-service unions. As part of his decision, he directed the parties to negotiate on the procedures to implement job-security and layoff provisions of his award. The parties were unable to agree during the stipulated 90-day period, and the matter was resolved by a supplemental award by Arbitrator Healy in February 1979.

One of the more unusual cases in a structural sense involved the Northeastern Region of the Postal Service and the American Postal Workers Union. A variety of questions involving a series of pending discharge cases for alleged strike activity were decided en banc by the arbitration panel for the region. Thus, arbitrators Daniel Kornblum, Edward Levin, Herbert L. Marx, Jr., Milton Rubin, Peter Seitz, Allan Weisenfeld, and Arnold M. Zack all were involved in the decision. The number of arbitrators signing the opinion may constitute a record.

Judicial and Related Developments

Constitutionality of Collective Bargaining Laws

In two states, Kansas and Oregon, the constitutionality of collective bargaining laws was tested and upheld. Three other cases involving constitutionality were in process during 1979, but final decisions did not appear in the calendar year. These cases arose in California, Connecticut, and New York.

The role of the Secretary of Human Resources was challenged by the school board in Bourbon County, Kansas. Under the Teachers' Collective Negotiations Act, the secretary is authorized to take part in and mediate negotiations. The school board argued that this role interfered with the "general supervision of public schools" assigned to the State Board of Education.

The state supreme court found no interference and no viola-

tion of the constitution. The court said: "The functions of the Secretary of Human Resources under the act are limited and confined to professional negotiations, an area not considered by the court to be within the basic mission of the public schools of this state."[4]

The Oregon case involved the compulsory-arbitration provisions of the state's public-employment statutes. A bargaining dispute between the City of Medford and its firefighters went to arbitration, but the city would not sign an agreement as required by law. The city claimed that the arbitration process violates the home-rule provisions of the Oregon constitution and delegates legislative authority without adequate standards or safeguards.

The court of appeals followed a previous state supreme court case and found that "Requiring arbitration in lieu of strikes is a substantive state policy which the legislature clearly intended to prevail over conflicting local preferences."[5] On legislative authority, the court pointed to eight criteria for arbitral determination, with judicial review as an additional safeguard.

In California, the state's attorney-general filed a suit challenging the constitutionality of the State Employer-Employee Relations Act, passed in 1977 to cover approximately 130,000 state civil-service employees.[6] The act does not affect teachers, higher-education employees, or local government workers, all of whom are under separate bargaining systems. The suit charged that the law removed from the State Personnel Board its constitutional power to determine salaries and working conditions for state employees. In 1980, the Third District Court of Appeal ruled in favor of the attorney-general. A final report on the case is likely to include an appeal to the California Supreme Court.

The Connecticut story continues from last year's report of a 1978 lower-court ruling against the compulsory final-offer arbitration amendment to the Municipal Employee Relations Act. The case was appealed to the state supreme court, but a decision was not forthcoming in 1979.

New York's situation involved appeals of the constitutionality of amendments to the state's Financial Emergency Act for the City of New York. The Patrolmen's Benevolent Association

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[4]*National Education Association—Fort Scott* v. *Board of Education, Unified School Dist. No. 234, Bourbon County,* 225 Kan. 607, 592 P.2d 463, 101 LRRM 2827 (1979).

[5]*Medford Fire Fighters Ass'n Local 1431* v. *City of Medford,* 595 P.2d 1268, 102 LRRM 2633 (1979).

[6]*See Pacific Legal Foundation* v. *Brown,* 103 LRRM 3131 (1980).

challenged the provision that impasse panels must accord substantial weight to the city's ability to pay when considering demands for increases in wages or fringe benefits. A New York supreme court upheld the constitutionality of the amendments in 1978. The appellate division affirmed the lower-court ruling in 1979.[7] It can be noted here that a final motion to appeal to the state's highest court, the New York Court of Appeals, was denied in 1980.

Interest Arbitration

Legislative Funding. The right of legislative bodies to countermand "final and binding" arbitration decisions was tested in two states, and the arbitration process was left the loser in each case. The issue in Minnesota went to the state supreme court, while in Hawaii it remained with the Public Employment Relations Board.

Under their state public-employment law, the Minnesota Education Association and the Minnesota Community College System submitted a salary impasse to binding arbitration in 1977. The parties then signed a contract incorporating the award. The legislature subsequently funded less than the contractual increases, based on increases granted to state university faculty. When the education association filed suit at the district-court level, the state argued that both the contract and the law require wage agreements to be approved by the legislature; therefore, the union had waived its right to judicial appeal. The lower court disagreed, accepting the union's right to bring suit and the validity of an unfair labor practice charge in not complying with the arbitration award.[8] The court distinguished between voluntary bilateral agreements and arbitrated settlements, and ordered $1,500,000 in back pay.

On appeal, the Minnesota Supreme Court reversed the district court, considering the final contract, not the arbitration award alone, as the agreement submitted for legislative review.[9] Under this interpretation, the legislature had a statutory right to modify the arbitration award.

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[7]*Samuel DeMilia, President of the PBA* v. *State of New York,* 421 N.Y.S.2d 70 (1st Dep. 1979).

[8]*Minnesota Education Association* v. *State of Minnesota,* 804 GERR 17, 101 LRRM 3068 (1979).

[9]*Minnesota Education Association and Minnesota Community College Faculty Association* v. *State of Minnesota,* 282 N.W.2d 915, 103 LRRM 2195 (1979).

The Hawaii issue was left without judicial review as the result of a negotiated settlement. Under the state's comprehensive bargaining statute, final-offer arbitration is provided for firefighters. A panel in 1979 awarded a cost-of-living adjustment along with specified wage increases over two years. Governor George Ariyoshi took issue with the COLA provision and did not take the award to the legislature as required for funding. Consequently, the legislature adjourned in April without appropriating money to fund the "binding" award.

The firefighters voted to strike as of July 1, 1979, and also filed unfair labor practice charges with the Hawaii Public Employment Relations Board. On June 15 the board, in a split decision, dismissed the charges, finding that the "final and binding" arbitration provisions really meant "advisory arbitration." Narrowly averting a strike, but leaving the statutory issue of finality unsettled, the parties reached a settlement with more money and no COLA in the second year.

Substantive and Other Issues. Two cases in Pennsylvania supported the decisions of arbitrators in settling interest disputes, while procedural limits were imposed in two cases before the Iowa Supreme Court. In New Jersey, the state's Cap Law on budget increases was applied to interest arbitration awards.

An interesting additional note in Iowa, under its state law requiring binding arbitration for all public-sector negotiations, is the award handed down in a dispute between the United Faculty at the University of North Iowa at Cedar Rapids and the Iowa State Board of Regents. It represented, according to the university, "the first time in the United States that a collective bargaining agreement at a public university has resulted from binding interest arbitration imposed by the state."[10]

One case in Pennsylvania brought the question of a two-year award to the commonwealth court.[11] Employees of the Media Police Department challenged the award, arguing denial of their rights under Act 111, which states, "Collective bargaining shall begin at least six months before the start of the fiscal year. . . ." They also argued that the borough council could not bind its successors. Affirming a common pleas court decision, the commonwealth court turned down the appeal, citing labor stability rather than denial of the right to bargain as the result of

[10]805 GERR 22 (1979).
[11]*Borough of Media* v. *Media Police Dept.*, 397 A.2d 844, 101 LRRM 2137 (1979).

two-year agreements from negotiations or arbitration. The court considered a two-year term reasonable and legitimate since it was not "indefinite or long extended."

The second case in Pennsylvania arose from an arbitration award resolving a negotiations impasse between the City of Harrisburg and AFSCME-represented city workers. One issue was a residence requirement, and the arbitrator ruled that city residence was not required.

The city council filed a petition for review with the county court of common pleas, which found that (1) employee relations is in the domain of the mayor and not the city council under the "Mayor-Council Plan A" form of government, and (2) the Public Employment Relations Act takes precedence over a city residence ordinance, since residency is a mandatory subject of collective bargaining.[12]

Procedural questions came to the Iowa Supreme Court in 1979 from an impasse between the Maquoketa Valley Community School District and the Maquoketa Valley Education Association. Reversing a district-court ruling, the high court remanded the case to the parties, permitting new final offers and different arbitrators.[13] The primary errors were: (1) A final offer on salary had to be selected in toto as an "impasse item" under the law. This decision conforms with *West Des Moines Education Association* v. *PERB* (1978), which interpreted "impasse item" to mean "subject category." (2) The panel report exceeded a 15-day limitation deemed essential to the law in meeting budget-submission dates.

The ruling on meeting budget-submission dates followed another Iowa Supreme Court case that called for completion of impasse procedures by March 15 since cities, counties, and school districts have a state-imposed budget deadline.[14]

The Public Employment Relations Board had permitted binding arbitration after March 15 in a 1977 impasse, but the court found that legislative intent required adherence to the time limits in order to assure "effective and orderly operations of government."

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[12]*City of Harrisburg* v. *American Federation of State, County, and Municipal Employees, AFL-CIO, Local 521*, 836 GERR 11 (1979).

[13]*Maquoketa Valley Community School Dist.* v. *Maquoketa Valley Education Association*, 279 N.W.2d 510, 102 LRRM 2056 (1979).

[14]*City of Des Moines* v. *Public Employment Relations Board and Des Moines Association of Professional Firefighters*, 275 N.W.2d 753, 101 LRRM 2026 (1979).

New Jersey passed a Local Government Cap Law in 1977, limiting annual budget increases to 5 percent. Unions in Atlantic City and Irvington claimed that allowable exceptions should include compulsory arbitration awards, because the arbitration provisions of the Employer-Employee Relations Act were passed after the Cap Law. The state supreme court said no, acknowledging that cities would have to cut expenditures in other areas to fund mandatory awards.[15]

The court reasoned that if the parties reached a settlement without arbitration, the costs would be included in the 5-percent limitation. They should not be able to avoid the law by going to arbitration. The court also stated that the legislature could have excluded the awards if it so intended. What it did was include the Cap Law constraints as a criterion to be considered by the arbitrator.

Grievance Arbitration

Arbitrability. Arbitrability issues arising in education settings were subject to judicial review in eight states during 1979. Overall, more decisions supported than denied arbitral determination, although some of them occurred at lower-court levels. Noneducation cases on grievance arbitrability are reported from four states: California, Illinois, Michigan, and New York.

In the first of the education cases, Chicago teachers were awarded $2.8 million in back pay by the Cook County district court as a result of an early school closing in June 1977.[16] The Chicago Teachers Union grieved the loss of a day's pay, the Board of Education claimed that layoffs were a nonarbitrable matter of board policy, and the court sustained the board's position. The court distinguished between grievances of individual employees under a contract and matters of enforcing an agreement on compensation and duration of employment. The court itself then went on to decide the substantive issue and found that the board used "accounting legerdemain" to avoid its agreement on a full, 39-week school year.

A certificated employee's right to transfer from a position of librarian to that of elementary teacher was upheld in arbitration

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[15]*City of Atlantic City, PBA Local 24, IAFF Local 198, and Teamsters Local 331* v. *John F. Laezza,* 403 A.2d 465, 102 LRRM 2409 (1979).

[16]*Board of Education, City of Chicago* v. *Chicago Teachers Union, AFT Local 1,* 808 GERR 13, 101 LRRM 3045 (1979).

and appealed for enforcement to the Maryland Court of Special Appeals. The court ordered compliance, finding that by taking no action the board of education had exceeded time limits for vacating the award under the Maryland Uniform Arbitration Act.[17] The opinion stated, "We think they have not only slept on their rights but have made the bed in which they slept."

The Massachusetts Court of Appeals sustained a superior court's stay of arbitration in a grievance filed by the Burlington Education Association after a strike at the start of the 1972–1973 school year.[18] The school committee docked the teachers' pay for strike days, although the agreement contained an annual salary and a fixed number of school days. Two aspects of the case were judged nonarbitrable—payment for strike days, illegal under the state law; and rescheduling the number of school days, a matter of educational policy. One aspect could be arbitrated—compensation for days tacked onto the original school calendar.

In Minnesota, the state supreme court found that neither the Education Association contract nor the individual teacher's contract made nonrenewal of a coaching assignment a grievable condition of employment.[19] Certified as a wrestling coach and having coached winning teams for over 20 years, the teacher was reprimanded for using "unprovoked discipline" on a team member and subsequently was not renewed. Under the contract, grievances are disputes concerning "terms and conditions of employment," but coaching assignments must be expressly identified as part of a teacher's continuing contract. In this case, the assignment was not so identified, and the school district was not required to go to arbitration.

The New Jersey Supreme Court expanded on bargaining issues established narrowly as mandatory or nonnegotiable in the 1978 *Richfield Park* case.[20] The agreement between the Bernards Township Board of Education and the Bernards Township Education Association provides arbitration with the arbitrator's "authority to advise" on withholding a teacher's salary increment

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[17]*Board of Education, Charles County* v. *Education Association of Charles County*, 398 A.2d 456, 100 LRRM 3112 (1979).

[18]*School Committee of Burlington* v. *Burlington Educators Ass'n*, 385 N.E.2d 1014, 101 LRRM 2478 (1979).

[19]*Albert Lea Education Ass'n* v. *Independent School Dist. No. 241*, 286 N.W.2d 1, 103 LRRM 2378 (1979).

[20]78 N.J. 144, 393 A.2d 278, 95 LRRM 3285 (1978).

for "inefficiency or other just cause." The board claimed that the issue was a management right under the state education law. The court, however, distinguished between advisory and binding arbitration, finding in this case that the arbitrator's decision would not replace review powers of the Commissioner of Education.[21]

Similarly, the New York Court of Appeals, the state's highest court, expanded on a landmark case, the *Liverpool Central School District* case.[22] In that case, the court rejected the private-sector presumption of arbitrability and approved public-sector arbitration only if (1) it is not prohibited by statute, decisional law, or public policy; and (2) the particular dispute clearly comes within the arbitration clause of the contract. The court's decisions in 1979 charted an erratic course in school district-teacher association cases:

In *Mineola Union Free School District,*[23] where the agreement provided for authorization of dues deduction and the arbitration clause defined a grievance to include application of any provision of the agreement, the court found that a dispute over the obligation to deduct dues owed by terminated employees was arbitrable.

In *South Colonie Central School District,*[24] charges were filed against a teacher under a provision of the Education Law which provided a statutory method of review. The agreement contained a broad arbitration clause covering disputes "arising from events and conditions of employment as well as interpretation of the Agreement . . . ," but which excluded from arbitration any dispute for which a method of review is prescribed by law. The court stated that it must stay arbitration unless there is "an express, direct and unequivocal agreement to arbitrate the dispute. . . ." Since the grievance filed in this case fell within the ambit of both the inclusionary and the exclusionary provisions of the arbitration clause, there was no express and unequivocal agreement to arbitrate.

In *Wyandanch Union Free School District,*[25] the court found that although a substantive clause in the contract might be ambigu-

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[21] *Board of Education of Bernards Twp., Somerset County* v. *Bernards Twp. Education Ass'n,* 79 N.J. 311, 399 A.2d 579, 101 LRRM 2251 (1979).
[22] 42 N.Y.2d 509, 399, N.Y.S.2d 189, 96 LRRM 2779 (1977).
[23] 46 N.Y.2d 568, 101 LRRM 2220 (1979).
[24] 46 N.Y.2d 521 (1979).
[25] 48 N.Y.2d 669 (1979).

ous, a grievance relating to that clause was arbitrable under a provision defining "grievance" to include all controversies "affecting the meaning, interpretation or application" of the agreement.

In *Norwood-Norfolk Center School District,*[26] the arbitrator's award was upheld where the employer's argument—that dismissal of a teacher was required by statute because of her failure to obtain permanent certification under the Education Law—was first raised in the arbitration proceeding. The court said, "Unless law or strong public policy prohibits its submission, a party that wishes to challenge the arbitrability of any issue must do so before the process gets under way."

The North Dakota Supreme Court upheld arbitrability in a Grand Forks case emanating from the school district's instituting a one-hour hall-monitoring program to reduce vandalism.[27] A contract had been signed with the teachers, providing two preparation periods a day. The matter of changed working conditions was negotiable, but after the contract was signed the grievance procedure was the proper avenue for appeal.

Two cases on arbitrability arose in California outside the education setting. In the first, the City of Berkeley argued that its charter grants the city manager exclusive power to discipline and remove employees. The state's supreme court ruled that such authority does not preclude a discharged employee from seeking reinstatement through arbitration,[28] thus affirming an award that modified the discharge of a police inspector. The court found no bar in the charter to an agreement on binding arbitration of personnel matters.

The second California case involved time limits in the grievance procedure of Napa County and its employees. The county claimed that the union waived its right to arbitration because a request was not timely. The court of appeal reversed the trial court, indicating that the obligation to follow contractual time units was a matter for the arbitrator to weigh.[29]

Not leaving the determination of an arbitrable grievance to

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[26]____N.Y.2d____, decided December 29, 1979.

[27]*Grand Forks Education Ass'n* v. *Grand Forks Public School Dist No. 1,* 285 N.W.2d 578, 103 LRRM 2945 (1979).

[28]*John L. Taylor* v. *Charles Crane* and *Berkeley Police Ass'n* v. *City of Berkeley,* 595 P.2d 129, 101 LRRM 3060 (1979).

[29]*Napa Ass'n of Public Employees* v. *Napa County,* 98 C.A.3d 263, 159 Cal. Rep. 522, 103 LRRM 2499 (1979).

the arbitrator, the Appellate Court of Illinois, Second Judicial District, found that the issue of additional pay for firefighters performing the duties of acting officers was outside the agreement.[30] The agreement provided for arbitration of grievances involving "the interpretation or application of the express provisions of this Agreement. . . ." Therefore, the dispute was found a proper subject for a grievance but not for arbitration.

Deputy sheriffs and police officers received opposite rulings on arbitrability in two Michigan cases. One arose from a 1972 grievance filed by a deputy sheriff not reappointed in St. Clair County after 15 years of service. The trial court found appointment and termination of deputies a legal prerogative of county sheriffs. The court of appeals found arbitration mandatory under the Police and Fire Department Compulsory Arbitration Act. Finally, the supreme court majority found that the Compulsory Arbitration Act applies to negotiations impasses and not to grievance disputes. It does not, then, supersede the 1846 law on appointing deputies.

Police officers in Clinton Township negotiated a contract adopting civil service hearings plus the option of binding arbitration. When an employee's dismissal was grieved, the township claimed that the arbitration provisions conflicted with the civil-service law. The Michigan court of appeals, however, deemed civil-service hearings "permissive rather than mandatory" and the contract a supplement to the law.[31]

The New York City Board of Collective Bargaining contributed two rulings on grievance arbitrability. In *Matter of the City of New York and Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO,* Decision No. B-10-79, the board found that the union's grievances alleging violation of two contract clauses were not arbitrable. One grievance dealt with fire department policy on assignment and transfer of uniformed personnel. The other concerned the change of annual leave to sick leave. Resolution of the cases depended on interpretation of the phrase, "The Department's decision is [shall be] final." Despite the policy of favoring arbitration of grievances, the clear and unambiguous wording of the clauses made the fire department's decisions final on the relevant subjects.

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[30] *Croom* v. *City of DeKalb,* 389 N.E.2d 647, 102 LRRM 2947 (1979).

[31] *Township of Clinton* v. *William Contrera and Police Officers Ass'n,* 284 N.W. 2d 787, 103 LRRM 2464 (1979).

In its Decision No. B-8-79, *Matter of the City of New York and Patrolmen's Benevolent Association, Inc.,* the board denied the union's request for arbitration because relief was first sought in the Supreme Court, New York County. As a condition to the right to invoke arbitration under New York City public-employee law, both the employee organization and the grievant are required to sign a waiver of the right to bring the dispute to another forum except for enforcement of an arbitrator's award. Although the union maintained that the proceeding in this case was only to gain injunctive relief prior to arbitration, the city's answer to the union's complaint addressed the substantive issues. The board said that the court found no merit in the underlying complaint and it had no power of review over decisions of a New York State supreme court.

Substantive and Other Issues. A range of substantive issues arose in grievance arbitration cases that brought arbitrators' awards before the courts. Generally, the courts had to decide whether the arbitrators exceeded their authority. Unlike the arbitrability cases reported above, relatively few substantive cases are reported for 1979.

In *Cupertino Education Association* v. *Cupertino Union School District,*[32] the California Court of Appeals upheld an award calling for fringe-benefit contributions for October 1976, when the teachers were on strike. In the employer's view, the "payment would constitute a gift of public funds." The arbitrator found the employer's action punitive, contrary to a reprisal clause in the contract. The court pointed out the lack of defects in the arbitration process and also considered the substantive claim, finding adequate consideration for the transfer of money in the agreement reached by the parties.

An arbitrator was judged to have exceeded his authority in a Massachusetts case heard by the appeals court.[33] A Boston police officer served a year's suspension and a year's probation after threatening civilians with his service revolver when off duty and intoxicated. The employer requested a psychiatric evaluation before reissuing the gun, backed by state law on the police commissioner's authority to control weapons. The officer grieved. The arbitrator found the denial of the revolver punitive after the employee's return to duty and ordered return of the

[32]*Cupertino Education Ass'n* v. *Cupertino Union School Dist.,* 817 GERR 9 (1979).
[33]*City of Boston* v. *Boston Police Patrolmen's Ass'n,* 389 N.E.2d 418 (1979).

gun. The court found the public safety "policy consideration concerning the issuance of a weapon here far outweighs any other concern," and, further, the psychiatric evaluation was a proper condition for reissuance.

Public safety was an issue, too, in the *Grand Rapids Employees Benefit Association* case.[34] A school-bus driver was dropped under Michigan Board of Education regulations because she accumulated more than seven points for driving violations. She was offered alternative employment at less pay until her driving record improved. The employee association argued that the board of education lacked authority to issue the seven-point rule. The arbitrator agreed that the rule was not authorized by statute. But the circuit court found that the arbitrator was not authorized to decide on the validity of the regulation. Substantively, the court found the seven-point standard rational, based on empirical data, and within the authority of the board to insure the safety of the school-busing program.

Money remedies in arbitration cases are frequently questioned as to amount or propriety. Two cases, in New York and Pennsylvania, reached the courts on such questions.

In a *Niagara-Wheatfield School District* case, the New York Court of Appeals upheld an arbitration award of $1500 to a teacher who had been improperly bypassed for a guidance-counselor position. The arbitrator did not specifically detail the manner of arriving at the amount of damages. The court stated:

> "Merely because an arbitrator's award is not arrived at by precise mathematical computations does not make it punitive. Indeed, much of the laudatory value of arbitration lies in the arbitrator's power to construct a remedy best suited to the situation without regard to the restrictions or traditional relief in a court of law. . . . Merely because the computation of damages may be so speculative as to be insupportable if awarded by a court does not make the award infirm, for, as we have firmly stated, arbitrators are not bound by rules of substantive law, or, indeed, rules of evidence. . . .
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> "Having chosen arbitration as their forum, the parties must recognize that an award may differ from that expected in a court of law without being subject to attack for that reason alone. . . ."[35]

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[34]*Grand Rapids School Employees Benefit Ass'n* v. *Board of Education, City of Grand Rapids, and State Board of Education,* 803 GERR 15 (1979).

[35]*Board of Education, Central School Dist. No. 1, Towns of Niagara, Wheatfield, Lewiston, and Cambria* v. *Niagara-Wheatfield Teachers Ass'n.,* 46 N.Y.2d 533, 415 N.Y.S.2d 790, 101 LRRM 2208 (1979).

The court also allowed interest on the damages from the date of the award.

A matter of interest computed on state paychecks delayed by a budget impasse in the state legislature came before the Pennsylvania Commonwealth Court.[36] An arbitrator had directed 6-percent interest on about $19,000 withheld from 66,000 employees for three weeks in 1977. The state's agreements with AFSCME call for salary payments every other week, but the state argued that the constitution prohibited salary payments without legislative authorization. The court, like the arbitrator, found a contract violation and found no prohibition against the interest as a remedy.

Duty and Scope of Bargaining

The duty to bargain and the scope of bargaining are interrelated. The duty to bargain is a broad concept referring to any procedural or substantive aspect of the parties' legal obligation to bargain. The scope of bargaining is substantive, dealing with the actual topics on which the parties may reach an agreement.

Disputes over the duty and scope of bargaining can reach adjudicatory bodies either because management takes a unilateral action or because there is a refusal to bargain over a given topic during negotiations. The cases below include 1979 disputes that arose from both circumstances.

In the first case, the Indiana First District Court of Appeals supported the Indiana Education Employment Relations Board and a trial court to the effect that the Evansville-Vanderburgh School Corporation had improperly instituted a teacher-evaluation plan without discussion with the Evansville Teachers Association. The appeals court concluded that an unfair practice had been committed because the evaluation plan fell within the required bargaining area of working conditions. Since the evaluation plan might result in recommendations for transfer or dismissal, the appeals court ruled that the association was entitled to an opportunity for input prior to establishment of the plan.[37]

The Massachusetts Supreme Judicial Court supported an ar-

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[36]*Commonwealth of Pennsylvania* v. *Council 13, AFSCME, AFL-CIO,* 401 A.2d 1248, 102 LRRM 2356 (1979).

[37]*Evansville-Vanderburgh School Corp.* v. *Roberts,* 392 N.E.2d 810, 102 LRRM 2872 (1979).

bitrator's award which stated that the Boston School Committee had an obligation to consult and negotiate with the Boston Teachers Union before implementation of final examinations for elementary-school students. The agreement between the parties included a clause that required the committee to consult and negotiate over any change involving a proper subject for collective bargaining. The arbitrator found the final examinations to be a proper subject of collective bargaining and thus subject to the consult-and-negotiate obligation of the agreement. The Massachusetts Superior Court disagreed, holding the award would infringe on the prerogative of the school committee to establish educational policy. The supreme judicial court noted that the matter was arbitrable, and it was not reviewing the merits of the arbitrator's decision. The narrow issue before the court had to do with the possible existence of a noncontractual, legal barrier. The court concluded that the contract clause involved might under certain circumstances improperly obstruct the freedom of a school committee to promulgate policy, but such was not the case here. The court found the committee more likely to benefit from consultation with trained professionals over final examinations.[38]

The Minnesota Supreme Court held that an agreement between the St. Louis County Independent School District 704 and General Drivers Union Local 346 precluded the school district from contracting out its bus services. The parties were in agreement that contracting out is a mandatory subject of bargaining under the state's Public Employee Relations Act. The school district relied on a broad management-rights clause as the basis for its subcontracting. The court found that any waiver of the statutory right to bargain over a mandatory subject must be clear and explicit. Since that was not the case here, the school district was ordered to refrain from contracting out its bus services.[39]

The New York County Supreme Court held that the use of one-man supervisory patrol cars was a mandatory subject of bargaining because of certain safety factors involved. The court upheld a decision of the New York City Board of Collective

[38]*School Comm. of Boston* v. *Boston Teachers Union Local 66, AFT, AFL-CIO,* 372 Mass. 605, 389 N.E.2d 970, 103 LRRM 3095 (1979).

[39]*General Drivers Union Local 346* v. *Independent School Dist. No. 704, Proctor School Board,* 283 N.W.2d 524, 102 LRRM 3004 (1979).

Bargaining which ordered the city to bargain with the Sergeants' Benevolent Association and the Lieutenants' Benevolent Association regarding three safety-related factors. The board had found that the reductions in manning achieved by the one-man patrol plan were appropriate management objectives, but that certain safety factors which were present in a similar plan for rank-and-file officers were lacking in the plan for sergeants and lieutenants.[40]

The Pennsylvania Supreme Court for the Eastern District ruled that the Williamsport Area School District acted improperly in unilaterally modifying the terms and conditions of its professional employees represented by the Williamsport Education Association while they were working after the contract expired. The supreme court thus agreed with the Pennsylvania Labor Relations Board and the Court of Common Pleas of Lycoming County, but overruled reversal by the commonwealth court. The supreme court found that good-faith collective bargaining was impossible if the status quo was not maintained as to the terms and conditions of employment.[41] The ruling on this case was an affirmation of a decision in 1978, *Cumberland Valley School District,*[42] covered in last year's report.

The Supreme Court of the State of Washington supported lower court decisions by holding that the Blaine School Board violated its agreement with the Blaine Education Association by unilaterally imposing a mandatory retirement age. A previous agreement had required retirement at age 65, but the section was removed from the agreement at the request of the association. When the superintendent of schools informed a teacher that she must retire at age 65, she indicated her intention to continue working. The school board thereupon voted in 1976 to reaffirm the mandatory retirement age of 65. The court held that the school district had abandoned its compulsory retirement age and could not reimpose it unilaterally.[43]

Considerable interest has been expressed in developments in

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[40]*Sergeants' Benevolent Ass'n of the Police Dept. of the City of New York and the Lieutenants' Benevolent Ass'n of the Police Dept. of the City of New York* v. *Board of Collective Bargaining of the Office of Collective Bargaining of the City of New York and Police Dept. of the City of New York,* 832 GERR 12 (1979).

[41]*Pennsylvania Labor Relations Board* v. *Williamsport Area School Dist.,* 406 A.2d 329, 103 LRRM 2299 (1979).

[42]482 Pa. 134, 394 A.2d 946, 100 LRRM 2059 (1978).

[43]*Tonevold* v. *Blaine School Dist. No. 503, Whatcom County,* 91 Wash. 2d. 632, 590 P.2d 1268, 101 LRRM 2279 (1979).

New Jersey following two New Jersey Supreme Court decisions reported last year. The *Ridgefield Park* case eliminated the permissive category of negotiations, and the *State Supervisory Employees Association*[44] case established that provisions in excess of maximum standards are neither negotiable nor enforceable. New Jersey's Public Employment Relations Commission (PERC) received many cases during 1979 requiring interpretation of the supreme court decisions. One of the more important cases involved the promotion clause in the agreement between the State of New Jersey and the New Jersey State Troopers Association. In this case, PERC held that the state was not required to bargain over criteria for promotion, but must bargain over promotion procedures.

More important, PERC's opinion made its position clear on a number of issues. PERC first noted that police officers are covered by a separate statute which explicitly contemplates permissive negotiations. Thus, the *Ridgefield Park* decision was not applicable. Moreover, PERC held that the same standard for mandatory bargaining subjects applied to all public-employee bargaining in New Jersey. Thus, the *State Supervisory Employees Association* decision was read as limiting negotiations to those terms and conditions within the discretion of the public employer and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives involved in the determination of government policy.[45] PERC used this standard to make its decision on numerous cases involving negotiability of topics and arbitrability of grievances.

In an unusual Indiana case, a Madison County Superior Court judge set aside an agency-shop provision in an agreement between the Anderson Community School Corporation and the American Federation of Teachers, Local 519. The negotiated clause was challenged by 115 teachers supported by the Legal Defense Committee of the National Right to Work Committee. The court found no express statutory authorization for an agency shop and noted that job termination for breach of the agency-fee clause would be a cause for dismissal not contem-

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[44]*State of New Jersey* v. *State Supervisory Employees Ass'n Local 195, IFPTE, and Local 518 SEIU*, 78 N.J. 54, 393 A.2d 233, 98 LRRM 3269 (1978).

[45]*State of New Jersey and State Troopers NCO Ass'n of New Jersey*, N.J. PERC No. 79–68, 816 GERR 20 (1979).

plated by the law governing teacher tenure. The clause was ordered purged from the agreement.[46]

An important "test state" for the scope of bargaining was Kansas. There, amendments to the state's Collective Negotiations Law led to a deluge of cases involving the scope of negotiations. An illustrative case involved the Topeka Board of Education and the National Education Association-Topeka. In that case, the supreme court held that class size and removal of disruptive handicapped children from class were not mandatory bargaining subjects, but dues checkoff, paid leave for transacting union business, use of interschool mail systems, distribution of copies of the contract, and conditions of extended employment were mandatory bargaining subjects.[47]

Shortly afterward, the Kansas Supreme Court made an effort to curtail the large number of scope-of-bargaining cases by issuing standards for district courts to follow. Among these standards were the following:

> "In determining a proposal sought to be made mandatorily negotiable under the 'impact test' portion of K.S.A. 1978 Supp. 72–5413 (1), the district court should consider (1) the nature of the mandatorily negotiable items specifically included in the statute; (2) that these specifically enumerated items relate directly to terms and conditions of professional service; (3) the fact that each of the specifically enumerated items would be equally appropriate to negotiations for factory workers, maintenance people, etc.; (4) that for any proposal to be made mandatorily negotiable under this test it should have a similar relationship to terms and conditions of professional service; (5) that any such item should be a logical extension of the enumerated items and not an unauthorized invasion into the board's policy-making duties and obligations."[48]

The following four cases, all at the state supreme-court level, illustrate the range and diversity of scope-of-bargaining determinations. In the first case, the Iowa Supreme Court held that health-and-medical insurance coverage for family members and dependents of Charles City Community School District teachers was a mandatory subject of collective bargaining. At the same time, the court ruled that a proposal from the Charles City

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[46]*Edna Mae Alexander* v. *Anderson Federation of Teachers,* 818 GERR 15 (1979).

[47]*NEA—Topeka, Inc.* v. *Topeka Board of Education, Unified School Dist. 501* and *Shawnee County* v. *National Education Ass'n—Topeka, Inc.,* 225 Kan. 445, 592 P.2d 93, 101 LRRM 2611 (1979).

[48]*Chee-Craw Teachers Ass'n* v. *Unified School Dist. No. 247, Crawford County,* 225 Kan. 561, 593 P.2d 406, 101 LRRM 2774 (1979).

Education Association to permit its grievance committee members to work on grievances during regular business hours without loss of pay to be a permissive, but not a mandatory, bargaining issue.[49]

In a case involving the State Education Association, the New Hampshire Supreme Court laid down rules harmonizing the state's 1975 bargaining law with its 1950 statute setting up the state's personnel system. The court ruled that matters regarding the policies and practices of the merit system were outside the scope of collective bargaining. Thus, such issues as employee classification, promotions, layoffs, seniority rights, employee discipline and termination, and wage and salary administration were not negotiable. The court added that the existence of a state personnel commission rule on a subject did not eliminate the topic from bargaining. The restricted bargaining area covers that portion of managerial policy within the sole prerogative of the employer.[50]

The often difficult-to-determine line between policy and working conditions was illustrated by a Michigan case involving Central Michigan University. An administrative law judge supported an unfair labor practice charge filed by the Central Michigan University Faculty Association following unilateral implementation of a teaching-effectiveness program by Central Michigan University. The Michigan Employment Relations Commission disagreed, finding the matter to be primarily an issue of educational policy not mandatorily negotiable. The commission decision was upheld at the court-of-appeals level, but reversed in a split decision by the supreme court, which found the teaching-effectiveness program to be more a condition of employment than an educational policy, and therefore mandatorily negotiable.[51]

Another case involving educational policy and working conditions took place in Nebraska. There, the Nebraska Supreme Court overruled the Nebraska Court of Industrial Relations when it held that Metropolitan Technical Community College was not required to negotiate with the Metropolitan Community

[49]*Charles City Community School Dist.* v. *Public Employment Relations Board,* 275 N.W. 2d 766, 100 LRRM 3163 (1979).

[50]*State Employees Ass'n of New Hampshire, Inc.* v. *New Hampshire Public Employees Relations Board,* 805 GERR 15 (1979).

[51]*Central Michigan Faculty Ass'n* v. *Central Michigan University,* 273 N.W.2d 21, 100 LRRM 2401 (1979).

College Education Association over the workload of its faculty, counselors, vocational evaluators, and librarians. The court found the number of contact hours for faculty, for example, to be a fundamental value judgment which was at the heart of the college's educational philosophy and therefore not bargainable.[52]

The final case reported is a New York City Board of Collective Bargaining case. The case shows the interplay between the nonnegotiable and negotiable portions of a topic. The board ruled that a demand to guarantee the higher salary of Principal Administrative Associates serving in Levels II and III of the broadbanded title regardless of lower-level assignments is a demand relating to wages and is therefore a mandatory subject of bargaining. The board noted that there was no indication that the demand would infringe on the city's right to classify personnel, but conceded that there might be an impact upon the related management right to make unilateral assignments within titles. However, the issue, the board said, is whether a demand that provides for a guaranteed pay level following satisfactory performance in a job title is a mandatory subject of bargaining and not whether the demand may, even in part or indirectly, aim at controlling assignments. Recognizing that management has the prerogative to determine assignments unilaterally, the board noted that the union has an equally clear right to bargain on a demand to give permanence to wage levels achieved and maintained by covered employees.[53]

The scope-of-bargaining cases considered here point up real difficulties in making negotiability determinations. Bargaining-scope decisions were almost equally split between the parties in the cases reported. It is noteworthy, however, that the determinations varied considerably from state to state. Thus, that which may be a mandatory topic of bargaining in one state may well not be negotiable under similar language in another state.

Other Judicial Issues

Discrimination and Individual Rights. Three cases involving charges of religious, racial, or pregnancy-related discrimination

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[52]*Metropolitan Technical Community College Education Ass'n* v. *Metropolitan Technical Community College Area*, 281 N.W.2d 201, 102 LRRM 2142 (1979).

[53]*Matter of the City of New York and Local 1180, Communications Workers of America, AFL-CIO*, Decision No. B-19-79.

are reported here. Two additional cases are interesting because of "ethical" objections to union dues.

The first case involving discrimination occurred in California, where a teacher was discharged for absences without permission to observe holy days designated by the Worldwide Church of God. The California Supreme Court found the Ducor Union School District in violation of the state constitution.[54] The court found that the constitutional ban against disqualification from pursuing employment because of creed implies a duty of reasonable accommodation. In this case, adequate substitute teachers were available to replace the plaintiff with no additional cost to the employer. The teacher's absence for five to ten days a year was not deemed "a hardship sufficiently severe to warrant disqualifying him from employment as a teacher."

The pregnancy-related ruling interpreted state law in Michigan, where the legislature had amended its state antidiscrimination law to include pregnancy-related disabilities under the definition of "sex." The state attorney-general held that such disabilities could be used to draw sick-leave days from sick-leave bank plans negotiated in collective bargaining agreements.[55] Where employees agree to pool sick-leave days, they may use them in the same manner as individual sick-leave days, and therefore exclusion of childbirth- or pregnancy-related disabilities would violate the law.

A charge of discrimination was raised by a black employee disciplined under an agreement between the New York State Department of Correctional Services and AFSCME Council 82. The U.S. District Court for Southern New York denied his charge, rooted in a 1975 criminal complaint alleging public lewdness.[56] The employee was first suspended and later dismissed, although the criminal case was dropped. Among the claims of the former corrections officer was that the parties' prehearing suspension procedure discriminates against blacks, who are more likely than whites to be arrested. The plaintiff failed to use the contractual grievance procedure, again charging an adverse impact on blacks. The union in this case demonstrated that there was no evidence of discrimination based on

[54]*Rankins* v. *Commission on Professional Competence of Ducor Union School Dist.*, 154 Cal. Rep. 907, 593 P.2d 852, 19 FEP Cases 925 (1979).

[55]Opinion of the Attorney General, State of Michigan, Opinion No. 5475, April 6, 1979.

[56]*Smith* v. *Carey*, 473 F.Supp. 268 (1979).

arrest records. The court also found no violation of due process in the clause permitting summary suspension of corrections officers for criminal charges.

Objections to payment of union dues were raised in Hawaii and in Oregon. Plaintiffs in both cases failed to show violations of their constitutional rights.

The case in Hawaii related to the Public Employee Relations Board's review of service fees collected by the Hawaii Government Employees' Association. The case came before a U.S. district court after a series of challenges by one retired nonunion employee before HPERB and state courts. The plaintiff was joined by a current nonunion employee. Together, they alleged that fees approved by HPERB resulted in monies deducted from their pay in violation of their First Amendment right of freedom of association. They also claimed the monies were used for other than collective bargaining purposes. The court found HPERB's actions to be constitutional and also held no proof of intent to misuse funds was present.[57]

The Oregon case turned on the difference between "ethical" and "religious" grounds for nonpayment of union dues. The Oregon Court of Appeals approved the deduction of an agency fee from a teacher's salary in the Douglas County School District. She had requested that the agency fee be paid to a designated charity, based on the state public-employment law which specifies "bona fide religious tenets." The union requested a letter from a minister, but she submitted personal ethical tenets and claimed First Amendment protection.

The court held: "Granted the defendant has shown that she has certain arguably religious beliefs, and assuming without deciding that such beliefs are entitled to constitutional protection, an examination of the record reveals that the defendant has failed to carry her burden of demonstrating the nexus between her beliefs and her unwillingness to join or pay dues to the association."[58]

Procedural Issues. The right of union representatives to perform their designated functions was considered in three states —Alaska, Florida, and Maryland. Other procedural problems in

[57]*Jordan* v. *Hawaii Government Employees' Ass'n Local 152, AFSCME, AFL-CIO,* 472 F.Supp. 1123 (1979).

[58]*Gorham* v. *Roseburg Education Ass'n,* 808 GERR 26 (1979).

bargaining and grievance handling brought decisions from the U.S. Supreme Court and two state supreme courts.

The Alaska Supreme Court ruled that the Kenai Peninsula Borough School District cannot grant its noncertificated employees the right to bargain collectively and decree (1) who the employees may send to the bargaining table, and (2) with whom they may affiliate.[59] The court's ruling upholds the Alaska superior court, which ordered the school district to resume negotiations with the Kenai Peninsula Borough School District Classified Association on the ground that the restrictive provisions of the school district's labor policy were unconstitutional.

In Florida, the First District Court of Appeals held that the Duval County school board was not guilty of an unfair labor practice involving lack of union representation at a predismissal conference.[60] The state Public Employees Relations Commission had found that the school board in 1977 illegally refused to allow representation at a teacher's conference with her principal on insubordination. The court reversed the PERC order because the state law as it existed in 1976 did not provide an employee with standing to bring the charge and did not provide language for the substantive right of union representation. The statute's language was changed subsequently to cover representation, but was not retroactive.

In Maryland, 1800 members of the Montgomery County Education Association sought direct action to set aside a collective bargaining agreement substituting per diem summer work for previous 12-month contracts. The Maryland Court of Appeals held that the dissatisfied minority of former 12-month employees could not bypass the exclusive bargaining agent for their unit. The court said: "They are not entitled to have certain provisions of that agreement set aside or renegotiated, regardless of whether the School Board negotiated in good faith with the Association. Once the union fulfilled its duty to fairly represent the employees, it alone may pursue avenues of relief against the employer."[61]

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[59] *Kenai Peninsula Borough School Dist.* v. *Kenai Peninsula Borough School Dist. Classified Ass'n*, 590 P.2d 457, 100 LRRM 3116 (1979).

[60] *Barbara Seitz* v. *Duval County School Board and Public Employees Relations Commission*, 366 So.2d 119, 100 LRRM 2623 (1979).

[61] *Offutt* v. *Montgomery County Board of Education*, 285 Md. 557, 404 A.2d 281, 101 LRRM 3035 (1979).

The U.S. Supreme Court became involved in procedural issues when the Arkansas State Highway Commission refused to consider grievances that were not submitted in writing by the employees to the employer's representative. The union, Arkansas State Highway Employees Local 1315, first submitted the grievances. The employer refused to act until the employees filed written complaints, although the union represented the employees at subsequent meetings.

The High Court reversed the Eighth Circuit Court, which found a First Amendment violation of the union's right to submit grievances. The Supreme Court held:

> "The fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable, hardly establishes that such procedures violate the Constitution. Although the First Amendment protects public employees' right to associate, the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or, in this context, to recognize the association and bargain with it."[62]

Constitutional rights to due process were judged by the Kansas Supreme Court to be properly waived by a negotiated grievance procedure. The case arose from discipline assigned to two police officers charged with violating state gambling laws. The officers and the trial court considered a grievance hearing before union and employer representatives to be influenced by the authority of the chief of police over police officers on the joint grievance board. However, the higher court found otherwise, holding that the parties' memorandum of understanding contained "reasonable and workable provisions for the protection and enforcement of officers' rights."[63]

Having previously found in *Dayton Teachers Association* v. *Dayton Board of Education* that boards of education have the authority to negotiate collective bargaining agreements that do not conflict with their statutory duties, the Ohio Supreme Court now upholds an agreement outlining procedures to be followed in reaching such an agreement.[64] The "recognition agreement," which was voluntarily signed in 1972, provides that the board of

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[62] *Maurice Smith* v. *Arkansas State Highway Employees Local 1315*, 809 GERR 29 (1979).
[63] *Richard Gorham and Alfonso Sanchez* v. *City of Kansas City, Kan.*, 590 P.2d 1051, 101 LRRM 2290 (1979).
[64] *Loveland Education Ass'n* v. *Loveland City School Dist. Board*, 58 Ohio St.2d 31, 387 N.E.2d 1374, 102 LRRM 2594 (1979).

education cannot "reduce, negotiate, nor delegate its legal responsibilities." The court found that arbitration of proposed terms would be an illegal delegation of such responsibilities.

Proposition 13 and Related Matters. Last year's report noted that "bailout legislation" passed after approval of Proposition 13 by California voters in 1978 provided state funds for counties and cities. The caveat was that wage increases for local employees were to be limited to those granted to state employees. Governor Edmund G. Brown, Jr., vetoed a wage increase for state employees. Thereupon, a number of suits were filed by employee organizations representing county and municipal employees seeking implementation of previously negotiated wage increases. On February 15, 1979, the California Supreme Court decided that the public-employee pay-freeze portion of the bailout legislation was illegal and negotiated wage increases must be granted.[65]

Later in 1979, California voters approved Proposition 4, which amended the state constitution to place limits on appropriations of state and local governments. One outcome of public spending and taxation limitations, reported by some California observers, has been an increase in the militancy of public workers.

In addition to California, eight other states have approved some form of limitation on taxation or spending. The states involved are Arizona, Colorado, Hawaii, Idaho, Michigan, New Jersey, Tennessee, and Texas. Idaho's version may have been the most stringent, providing that property taxes are limited to 1 percent of market value. Assessments may rise no more than 2 percent per year. One aspect of the New Jersey legislation was a 5-percent limitation on spending increases for school districts, counties, and municipalities. As noted earlier in this report, the New Jersey Supreme Court held that the 5-percent limitation on spending applied regardless of the amount awarded in any statutory interest arbitration.

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[65] *Sonoma County Organization of Public Employees* v. *Sonoma County*, 23 C.3d 296, 152 Cal.Rep. 903, 591 P.2d 1, 100 LRRM 3044 (1979).

APPENDIX D

1980 REPORT OF THE COMMITTEE ON THE DEVELOPMENT OF ARBITRATORS*

EDWIN R. TEPLE**

During the past year the committee has given increasing attention to the intern method of developing new labor arbitrators. Reports have been received from members of the Academy engaged largely in ad hoc work, who were finding it feasible to use assistants who became interns as their training progressed. Inquiries disclosed that more than 20 Academy members, apart from the large umpire offices, were using interns in various ways, and this led to the intern program which the committee arranged in conjunction with the Academy's Annual Meeting in May 1979 at Dearborn.

The program started with an informal, get-acquainted breakfast which Secretary Richard Bloch generously offered to have in his suite; attending were six mentors, ten interns, several members of the committee, and eight or ten candidates from the national training program for women arbitrators who accompanied Jean McKelvey and Alice Grant. On Wednesday afternoon, more than 30 interns, mentors, committee members, and guests took part in a more formal session to compare experiences and gain greater insight on gaining acceptability. John Van N. Dorr, Arnold Zack's intern, served as chairman, and the speakers were Lawrence Schultz of the Federal Mediation and Conciliation Service and Thomas Colosi of the American Arbitration Association. Although the chairman could not be present

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for the entire meeting, he received reports that the discussion was lively and helpful.

Encouraged by the success of the Dearborn program, the committee arranged for a similar program on Wednesday afternoon, June 11, during the Annual Meeting in Los Angeles. This time the speakers were Michael Hoellering (AAA) and Lawrence Schultz (FMCS), and John Van N. Dorr again served as chairman. Following the program, a video tape on "Problems of Evidence," produced by Arnold Zack and Richard Bloch, was shown and discussed.

Early in 1980, the committee mailed out a request for information about intern arrangements. Responses were received from 24 Academy members, 15 of whom indicated that they were currently working with one or more interns. Five others reported that they had used interns in the past, and four said that they would be interested in working with interns. On the basis of the interest expressed in these responses, a questionnaire was formulated, designed to obtain further information about methods of utilizing interns as well as background information that might be helpful with future intern arrangements. It was sent to our list of interns, two-thirds of whom responded. The results were analyzed by John Van N. Dorr, who made his report during the intern meeting on June 11. His analysis is attached as an addendum to this report.

In view of the popularity of the intern program and the committee's new emphasis on the use of interns, the special session for interns will no doubt become an annual event on the committee's agenda. In addition, permission has been obtained for interns currently working with Academy members to accompany their mentors to the seminars arranged by Arnold Zack's subcommittee both at the Annual Meeting and at other locations. Interns are also free to attend the Thursday and Friday programs during the Annual Meeting if they have registered. Altogether, this should afford valuable training for interns associated with Academy members.

The chairman has received several inquiries from Academy members, including one of the large umpire offices, about people who might be available for internships and their particular background and training. As more members come to recognize how useful interns can be, it seems likely that the number of inquiries of this kind will increase. Thus, a subcommittee has been created to maintain a list of people who have completed

formal training programs in various parts of the country, together with what background information is available, for reference when such inquiries are received. Members of this subcommittee are James Gross, Paul Prasow, and Jean McKelvey, chairperson.

Continuing National Training Program

The committee has continued to take an active interest in the establishment of a continuing training program for qualified candidates who aspire to become labor arbitrators. The program was described in previous reports.

The chairman met with Richard Reilly, manager of the AAA office in Boston, and Michael Hoellering, AAA vice president, to get a better understanding of the Boston office activities that are designed to assist interns and others interested in gaining broader acceptance as labor arbitrators. That office maintains a list of people recently added to the labor panel in its region and others with ample qualifications, and it sends them notices of seminars, meetings of the Industrial Relations Research Association, and "Meet the Arbitrator" sessions that the Boston office arranges periodically. It also encourages them to contact experienced arbitrators in the New England area, largely Academy members, to arrange to attend hearings as observers; the expectation is that subsequently they will write practice opinions.

A similar program is being conducted in the Academy's Ohio region, under the auspices of the Cleveland and Cincinnati offices of the AAA, with the Cleveland FMCS office assisting. Two candidates in the Cleveland area have completed the formal requirements of this program, and both have been placed on the AAA labor roster; one is also on the FMCS labor panel, and the application of a second person is pending. Of the five candidates presently preparing applications for entry into the program, two are women. The six candidates in the Cincinnati-Dayton area are in various stages of their careers as arbitrators. Four are hearing their own cases. One has been admitted to both the AAA and FMCS labor panels.

Inquiries about this program have been received from the AAA regional offices in Atlanta and Dallas. An outline of the basic approach was forwarded to each office, but as yet there have been no reports on progress.

Traditional Training Programs

A new arbitrator-development program was organized last winter in St. Louis, under the auspices of the Labor Law Section of the St. Louis Bar Association. John Dunsford, an experienced St. Louis arbitrator and member of the Academy, was selected to conduct the academic part of the program. According to Professor Dunsford's report last April, six candidates who met the requirements of background or experience in labor relations were selected by a Bar Association committee for the three-day course. Six or seven others were admitted on an audit basis. Those officially enrolled will continue the course by attending hearings with experienced arbitrators and writing practice awards.

Twenty-three candidates completed the national program for training women labor arbitrators, co-sponsored by the American Arbitration Association, the Federal Mediation and Conciliation Service, and the New York State School of Industrial and Labor Relations at Cornell University, and a luncheon was held in their honor on November 14, 1979, in New York City. Jean McKelvey, director of the program, was the principal luncheon speaker and chose as her subject "Arbitration and Affirmative Action." Attending the luncheon were representatives of law firms, employers, and unions as well as those who taught the various sections of the course. At least two of the graduates of this program are serving as interns with members of the Academy.

The American Bar Association's Section of Labor and Employment Law announced in its spring bulletin that eight of the fourteen participants in the training program given at the Columbia University College of Law had satisfactorily completed phase two, during which they observed arbitration hearings and wrote practice awards, and were entering phase three, during which they were to be selected as arbitrators. Three other candidates are still working in phase two.

The Los Angeles training program, also previously reported, is in its final stage during which the candidates observe actual hearings with experienced arbitrators and write practice awards. So far as the committee has been advised, no figures have been released as to the number of candidates expected to complete the program.

Report on a Survey of Arbitration Interns[1]

Those wishing to become labor arbitrators have available to them three primary routes by which to enter the field—a training program, an internship, or merely hanging out a shingle. The aspiring arbitrator's central challenge, whatever approach is used, is the achievement of acceptability by the parties.

To ascertain what the salient characteristics and problems of the internship process are for individuals presently following that route into the arbitration field, an eight-page, 20-question survey was sent in January 1980 to 30 selected individuals believed to be interning with established arbitrators. Twenty-one questionnaires were returned, but only 13 of those responding had an intern relationship with one or more mentors. Five respondents had completed the Cornell/AAA/FMCS Women's Arbitrator Development program but were not interning, and three respondents were not actively involved in arbitration but would like to become arbitrators.

The survey reveals that the one-on-one relationship that is usually associated with the intern approach is viewed by the interns as a major asset in learning the art of labor arbitration. It provides most interns with an opportunity to observe hearings, to discuss "real" procedural and decisional issues, and, for many interns, to participate in the decision-making process by preparing practice opinions or preliminary drafts for their mentor's use.

The intern approach is clearly a highly personal one in which the nature of the participant's relationship can have great impact upon how fruitful the process is for the intern. Having a mentor who is outgoing, well regarded by the parties, and with many contacts in the field is viewed as an asset. Similarly, having a mentor who can comfortably discuss his/her decisions on procedural points in a hearing, elucidate the principles guiding his/her thinking in a case, and present a broad range of experiences (including mediation and fact-finding) is most useful to the intern.

The mentor and intern should expect a relationship that lasts at least two, and perhaps four or more, years. There appears, however, to be a lower age limit of about 30 years below which

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[1]Prepared for the Committee on the Development of Arbitrators by John Van N. Dorr III, Manchester, N.H.

only the exceptional person can become a full-time arbitrator, no matter what the intern's experiences and the mentor's efforts may be.

There is, of course, the prospect that the successful internship will result in a transfer of some clients from the mentor to the intern. The possibility of friction resulting over such loss of clients must be considered part of the relationship.

Finally, once the intern begins to receive his/her own cases, it is likely that at least some of these will be discussed with the mentor. The implication of such discussion for the intern's role with the parties who selected him should be considered by the mentor and the intern.

The following is a summary of the data and other information garnered from the responses of the 13 interns who are working with Academy arbitrators.

Intern Demographics

The average intern's age was 36 years, and ages ranged from 27 to 58 years. Seven interns were male and six were female; eleven were married, one was divorced, and one was single. Six respondents were based in New England (three in Massachusetts), four were from the Central States, two were from the Middle West, and one was from the West. Five respondents have J.D. degrees, two have M.B.A.s, four have Ph.D.s, and two have either a B.S. or an A.B.

Internship was a part-time activity for the respondents, and they support themselves primarily through law practice, professorships, miscellaneous part-time work, their spouse's income, or combinations thereof.

Intern course work in the labor relations field ranged from none to a Ph.D; most had had between two and four courses dealing with some aspect of labor relations.

Internship Characteristics

Most respondents had between three and four years' association with their mentors; one internship had been interrupted and one intern had changed mentors. The interns had observed an average of 22 of their mentor's cases, although one had observed none and another had observed 60. In this regard, the respondents fell into two general categories—those having observed 25 or more cases, and those who had observed 12 or

fewer cases. The interns had also observed an average of three arbitrators in addition to their mentor, and they had attended an average total of four cases with these arbitrators.

Most respondents expect an internship of four or fewer years (although one stated that the relationship would be permanent), and most also expect to maintain contact with their mentors after they start hearing their own cases on a regular basis (four stated that they did not expect to do so). Most did not view the intern relationship primarily as a financial base for the first years of arbitration work, but rather as a vehicle for learning.

The intern relationship involves not only attending hearings, but also, for 10 of the 13 interns, drafting some of the mentor's decisions and, for seven of them, doing research for the mentor. Other duties include reviewing of records and transcripts and preparation of factual backgrounds; reviewing and commenting on the arbitrator's decision before it is sent to the parties; and listening to hearing tapes and reviewing evidence for the mentor. None reported doing office work and case scheduling.

Of those who attend the mentor's hearings (all but one of the respondents), five "usually" or "always" obtain permission from the parties to observe the hearing and seven "occasionally" or "never" do. The interns sit at the head of the table with the mentor (six of the interns also do so when observing other arbitrators) and take notes. However, only three reported suggesting comments or questions, and none reported doing direct questioning during the course of the hearing.

While most interns expressed a desire to sit as a hearing officer, only four reported having done so and another reported being twice accepted as hearing officer in an arrangement in which the parties were to tell the intern before the hearing whether they wanted him to be arbitrator of record. In both cases he was selected as arbitrator of record.

Eleven interns attend hearings in the vicinity of their home or office, while nine reported also attending hearings out of town. Most mentors provide the intern's transportation (the intern riding with the mentor) and pay for meals. Some mentors also pay for their intern's lodging expenses and provide other financial assistance when it is needed.

There was a broad range in the number of draft opinions written by interns for their mentor's use. One respondent estimated having written between 190 and 300 opinions, while another reported writing 75, another 40, and the rest 25 or

fewer. Usually the intern's drafts are based on his notes and the case is discussed with the mentor before the draft opinion is written. Some interns write the opinions before discussing them with the mentor. Normal practice is for the mentor to state who wins, usually why, and then the intern writes the draft for the mentor's review. By way of comparison, only one of the ten respondents who reported writing practice opinions discussed the cases with the mentor prior to writing, but all exchanged awards with the mentor after the practice award was written. The amount of revision carried out by the mentor was not ascertained. Most interns are paid either per opinion, or at hourly rates, or one-third of their mentor's study time, or an amount proposed by the intern.

Development of Contacts with the Parties

Most interns are introduced at hearings and at labor relations functions attended by the mentor as "a new arbitrator working with me." All 13 respondents reported receiving active encouragement from their mentors to get on arbitration panels, nine reported that their mentors lobbied in their behalf to get them on panels, six reported that their mentors encouraged other arbitrators to support their efforts to get on panels, and one reported that the mentor helped solicit recommendations for places on panels where recommendations were required.

Nine interns reported attending an average of three training and social programs each year where employer and union representatives were present; AAA-sponsored programs were the ones most frequently attended. Given the excellent opportunities such programs afford for meeting the parties, learning something about them and their concerns, and letting them attach a face to a name, the infrequency of attendance at such meetings is surprising. One explanation may be that different panel administrators attach different priorities to facilitating interchange between the parties and the neutrals, thereby not giving interns in some regions the opportunities available to those in other regions.

Another important way for interns to gain professional contact with the parties is through sitting as hearing officers. Yet only six interns reported that their mentors suggested that parties use them as hearing officers. The four who had sat as hearing officers either took notes for their mentor's use, drafted

awards for the mentor's signature, or drafted awards that both they and their mentors signed. Normally, the intern is suggested as a hearing officer when the mentor's schedule does not permit a hearing within the time desired by the parties. The infrequent use of interns as hearing officers may be due to a reported reluctance of the parties to use someone other than the arbitrator they have selected.

Another method by which interns can meet the parties on a professional level is by attending the mentor's mediation sessions or fact-finding hearings. Five interns reported having attended mediation sessions, but only one actively participated in the process. Five attended fact-finding hearings. One respondent reported mediating during the course of the mentor's fact-finding hearing.

Status as Arbitrator in Own Right

Most respondents perceived becoming listed on a panel of arbitrators as a prerequisite to developing a regular arbitration practice. However, five of the interns, including three who had been interns for more than three years, were on no panels. The period between internship and listing on a panel ranged from zero months to more than three years. Three had been listed within less than one year and four were listed two or more years after becoming an intern. No single reason was given for the delays in listing, although some interns expressed frustrations over the qualification requirements of some agencies.

Seven of the interns had been selected as arbitrators, fact-finders, or mediators independent of their roles as interns, and in each case their first selection had occurred by the end of their second year of internship. Six reported having served as arbitrator in up to 16 hearings (average of eight), two reported serving as fact-finder in five and ten cases, respectively, and the same two had also served as mediator in 13 and six cases, respectively. The AAA was the most frequent source of cases (five interns reported receiving between one and nine cases through the AAA), while two persons reported direct selections by the parties and two reported appointment by state panels or from state lists. The data did not reflect general increases in caseloads in the second and third years, probably because of the low number of responses to this question.

Notwithstanding the intern's activity as a neutral in his/her

own right, almost all reported discussing the cases with the mentor before sending out the award, five of the seven reported that their mentor had at least occasionally reviewed the award before it was sent out, and three reported having changed their minds as a result of discussions with their mentor. Thus, the mentor generally serves as a sounding board and teacher after the intern has begun to try his own wings.

Other information obtained relative to the interns' arbitration practice was that the per diem ranges from $150 to $250, with most per diems set at $250; and that most interns issue their awards within 20 to 30 days after hearing or briefs.

Suggested Activities to Increase Intern Acceptability

There are four principal factors that can significantly influence the speed with which an individual gains exposure to the parties and, the intern hopes, acceptability: the effort he makes on his own behalf, the effort the mentor makes on the intern's behalf, the activities of neutral agencies in increasing the exposure of new arbitrators, and the potential formal role of the National Academy of Arbitrators in the internship process. Information as to the interns' experiences in each of these areas was elicited by the questionnaire.

Of primary importance to an intern's advancement are the efforts he makes on his own behalf. The often-repeated advice given to aspiring arbitrators is that they should try to gain the broadest possible exposure short of pushing themselves onto the parties, both by writing for publication and meeting the parties. Most interns reported doing at least some writing or speaking on labor relations matters. It is impossible to tell from the data what the impact of these efforts have been, although the responses show that almost equal proportions of those who have written or spoken, and those who have not, have heard cases of their own.

Other activities by interns include attending hearings, writing practice opinions, attending training programs and workshops (both for their educational value and to meet the parties), and researching and keeping current on the literature in the field.

The mentor's activities can also be crucial to an intern's rapid development. These activities can range from simply being a highly regarded arbitrator whose decision to select an individual as an intern imparts an initial aura to the intern, to the arbitra-

tor's taking the initiative in approaching the parties and neutral agencies on the intern's behalf. Some arbitrators are reported as limiting these activities to introducing the intern as an associate at hearings and little else.

In addition, the mentor performs a vital training and teaching role—answering questions, discussing issues, providing advice on decision-making and procedural matters, and restoring enthusiasm which often flags during the long early intervals between the intern's selections as arbitrator. All interns reported receiving this kind of support.

Finally, various responses alluded to close personal relationships between mentors and interns, involving not only financial assistance and emotional support, but also close friendships; most interns reported that they had great respect for their mentors.

The data suggest that because an internship involves a close relationship between two individuals, candidates should be wary of undertaking an internship with an arbitrator with whom they feel less than comfortable. Similarly, arbitrators considering taking on an intern should be able to withstand close questioning about their conduct of hearings and their decision-making process since the internship involves an intensive learning process in a field in which there is, at times, more than one defensible answer to an issue and more than one way of dealing with procedural matters arising at a hearing.

Neutral administrative agencies were seen by respondents to be a source of both frustrations and opportunity. The frustrations stem primarily from the requirements for listing on the AAA and FMCS panels. It was suggested that research and writing work for the mentor should carry some weight in the evaluation process for listing.

Opportunities lie in the relationship of the neutral agencies and the parties. In this regard, it was suggested that the agencies should encourage the use of new arbitrators; that they should send out the names of new arbitrators as often as possible; that they should arrange gatherings at which new arbitrators can have the opportunity to meet the parties; that they should afford interns an opportunity, with agency blessing, to observe other arbitrators at work; and that they should sponsor education workshops for new arbitrators. It was also suggested that the agencies might inform new arbitrators of how the parties rate them in the selection process and that they might ascertain from

the parties their evaluation of various aspects of the intern's performance—to be released to the intern once there are sufficient responses to protect the parties' anonymity.

Most of the suggested practices are already being used in one or more AAA regions. The AAA Boston regional office has been notable in its efforts on behalf of new arbitrators. Not only is the New England area one in which the AAA is the most frequently used administrative agency, but its Regional Director, Richard M. Reilly, has taken a personal and active interest in expanding the ranks of arbitrators available to the parties. So far as the committee has been advised, there is no feedback system in any of the regions which informs new arbitrators of what they are doing "right" or "wrong."

Finally, with regard to the role of the National Academy of Arbitrators, it was suggested that the Academy could in various ways lend its expertise to the development of new arbitrators via the intern route. Among activities suggested were the formal adoption of a policy to encourage the use of new arbitrators by the parties; the development of a list, to be made available to the parties, of Academy mentors and their interns; and permitting interns to attend Academy training sessions and meetings where the mentor is not present, but upon his recommendation. It was also suggested that the Academy might fashion a process whereby interns could meet other Academy members and they, in turn, if they feel comfortable with the intern and his work, could recommend him to other parties.

The thrust of the suggestions was that Academy members, generally recognized as at the top of their field, both can and should take an active role in the development of new arbitrators. It is interesting to note, however, that although seven of the interns responding to the questionnaire reported local NAA meetings in their areas, only two had attended these meetings. These two found the meetings very helpful.

Conclusion

A significant number of people are interested in becoming labor relations neutrals and have taken the initiative to seek an association with established arbitrators. While the details of such associations range broadly, it is clear that most of those who have undertaken the intern route have found it personally rewarding. The results in terms of gaining caseloads are not

clear. The participants are unanimous, however, in their view that the intern process, when undertaken with a serious commitment by both participants, is the best way to train new arbitrators and helps give them an opportunity to establish themselves.

APPENDIX E

REPORT OF OVERSEAS CORRESPONDENT*

BRITISH INDUSTRIAL RELATIONS: ANOTHER TURNING POINT?

T. L. JOHNSTON**

At the turn of the year 1979–1980, the main focus for industrial relations discussion in Britain was the newly published Employment Bill. It takes up a limited number of specific issues which have been proving troublesome. Yet the bill, viewed in a broader setting, is simply another milestone, staging post, or turning point in the process of adjustment of British industrial relations which has been in train throughout the 1970s.

It seems appropriate, therefore, to use the occasion of this note on the developments of the last year of a decade to set the bill in the context of the next decade and to look back over the ten-year period. Of course there is no neat starting or cut-off point in these matters. Ten years ago, for instance, in 1970–1971, the country was in the throes of discussing the Industrial Relations Bill, leading to the Industrial Relations Act 1971, which the newly elected Conservative government at that time had placed before Parliament. That, in turn, had been preceded by the Donovan Royal Commission (1965 to 1968) and by the abortive attempt on the part of the then Labour government to introduce legislation which would, in its judgment, have promoted industrial peace "In Place of Strife," to quote the title of the controversial White Paper of 1969.

With all due recognition of the difficulty, indeed, impossibility, of corseting such a complex subject as industrial relations legislation into a temporal box of a decade, let us cast an eye over the highlights of the 1970s.

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The first feature is that there has been a remarkable amount of industrial legislative enactment in Britain in that period. This makes utter nonsense of the curious myth that somehow or other British industrial relations is distinguished by "the voluntary principle." Commencing in the 1960s with the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965, which did much to strengthen the contractual and property rights of employees, there has been quite a spate of legislation. In the area of central controversy concerning the "balance of power," the most comprehensive enactment was the controversial Industrial Relations Act 1971, which endured for three years. It identified a range of unfair industrial practices (a new concept in British industrial relations), provided for registration of unions and employers' associations, sought to provide standards for union rights, introduced the presumption of legally enforceable collective agreements, and, not least and most enduringly, gave birth to the concept of unfair dismissal. Much of this act was repealed by the new Labour government of 1974, by passage of the Trade Union and Labour Relations Act 1974. In part, this was a grand gesture of putting to the sword an act which had become the focal point for bitter political controversy.

Very sensibly, however, the 1974 act substantially reenacted the arrangements which the 1971 act had introduced for protecting employees against unfair dismissal. This has continued throughout the remainder of the decade as the one key area in which there is now a consensus. Criticism of unfair-dismissals principles and practices is now concerned largely with detailed worrying that the procedures are becoming too legalistic and, significantly, with the fear that the workload of cases on unfair dismissal is threatening to become excessive. This latter worry explains in part why the Conservative government, elected in 1979, has now extended the period of employment leading to entitlement of protection against unfair dismissal from six to twelve months. There is no doubt, however, that the concept of unfair dismissal has in the 1970s become a well-established and understood part of the British industrial relations scene.

There has been other legislation, too. The Employment Protection Act of 1975 contained a whole range of supplementary or additional measures aimed at shifting the balance of power in favor of employees. This approach was a quite explicit response by the new Labour government to the deal which it had

worked out with the trade union movement under the broad banner of "the social contract."

Apart from that, most of the remaining legislation was not controversial and aimed at the elimination of various types of discrimination; one thinks of the Equal Pay Act 1970, the arrangements to promote equality between sexes and races, and so on. Somewhat at a distance from the more controversial centers of labor relations, the 1973 Employment and Training Act incorporated the second stage (the first being the Industrial Training Act 1964) of a broadly based consensus aimed at developing in Britain an active labor market policy. Under the 1973 act, the Manpower Services Commission was established as the prime custodian of this range of work.

This new agency is but one of a number of developments in the 1970s which showed an emerging awareness in Britain of the wisdom of involving "the social partners" in the running of key parts of industrial relations and the labor market. Indeed, one of the most remarkable features of the 1970s has been the development of new institutions to undertake functions which were previously tucked under the skirts of the mainstream government department, the Department of Employment. That department has spawned the following agencies: the Manpower Services Commission, already mentioned; the Advisory, Conciliation and Arbitration Service (ACAS), established in 1974 and placed on a statutory footing by the 1975 Employment Protection Act; and the Health and Safety Executive, established under the Health and Safety at Work Act.

Each of these bodies has responsibility on an agency basis for the broad range of work indicated by its title; each has the image of an active, managing agency, quicker on the draw than a traditional government bureaucracy; and each, not least, is governed by a commission, council, or executive composed of representatives of trade unions, employers, and independent members. Here, too, we have a developing sense of consensus, and students of industrial relations, not to mention constitutional history and law, will increasingly find these agencies interesting examples of new, and so far successful, forms for policy-making and practice. They have demonstrated, perhaps to the surprise of the British themselves, that institutional change is still possible in our society.

What, however, of the explosive issues on which controversy still rages? Three main hard areas come to mind. First, there is

the perennial problem of incomes policy, of which the sensitiveness of the trade union movement to the legal enforceability of collective agreements may be viewed as part. It is hardly an indictment of the British industrial relations system to conclude that the decade now ended produced no permanent solution to the pay and prices dilemma. Who, if anyone, holds the key to that particular castle? But we cannot be accused of lack of effort, or of pragmatic ingenuity. The decade began with the ceremonial execution of the Labour government's Prices and Incomes Board by the new Tory administration, committed to the free market. The decade ended with a new Tory government similarly convinced that no government or proxy for it can control labor markets, at least over a lengthy period. In between, the 1970 Conservative government had itself been forced to intervene substantially, while the period from 1974 to 1978 saw the Labour government's social contract with the unions succeeding in bringing some understanding, based on consent, into pay bargaining. Even that proved ephemeral, however, for the death of the Labour government in 1979 was due in fair measure to its inability to persuade the unions to "hold the line" for a fourth phase (year) and to the subsequent winter of discontent and industrial chaos, not least in some public-sector industries.

As was hinted above, the unions remain neurotic and suspicious about legalized intervention in collective bargaining, and they have succeeded in resisting suggestions that there should be a legal underpinning to negotiated agreements. To that extent, Britain remains a maverick among nations.

A second area of controversy concerns industrial democracy, or participation. Ten years ago this was a nonissue, treated in 1968 by the Donovan Commission, for example, with the barest civility. Again, however, in the context of the social contract, the labor movement by the mid-1970s was bent on shaking the established tree of boardroom bureaucracy and infiltrating its "worker directors" into boardroom power situations. Hence, the Bullock Report on Industrial Democracy, published in January 1977. At the time this generated furious passions about principle and practicability of having workers appointed as members of company boards. By the end of the decade, the heat had gone out of the debate, not only because of the change of government in 1979, but because the Labour government, which was in power in 1977, could not generate an internal agreement as to what should be done with Bullock. The prob-

lem remains, and the EEC continues to talk of "the democratic imperative" of participation. As we enter the 1980s, the Conservative government is content to pursue a "bottoms-up" approach to the problem, allowing participation to "broaden out from precedent to precedent," supporting, via tax concessions, etc., efforts which industry may initiate to promote employee shareholding. The Confederation of British Industry (CBI) has all along favored gradualism, backed as appropriate by some pressure to make progress toward a more participatory style of industrial relations involvement. During the remaining term of the Conservative government (which could take us to 1984), it is unlikely in the extreme that any bold new initiatives will be taken to match the grand design proposed by Bullock. Participation will creep, Fabian-style.

The third controversial area is the most fundamental of all in terms of enduring controversy. It concerns the way in which an acceptable "balance of power" is to be attained and maintained. As we have seen, implicitly or otherwise, much of the controversy of the 1970s has been about the balance of power. As a broad generalization, there is no doubt that this balance swung in favor of the worker, the employee, the trade union, in the course of the decade, particularly after the passage of the Employment Protection Act of 1975. Yet there is clearly dissatisfaction with the balance, a desire to shift the pendulum, certainly on the part of the employers. Significantly, the CBI now has a steering group hard at work on identifying the shortcomings of the British system, with a view to promoting an improved set of arrangements.

It is the broad equity or balance of the system which the present government is also seeking to appraise and redress in the kinds of legislative proposals such as those contained in the Employment Bill mentioned at the beginning of this note. Having learned from its experience in 1970 and 1971 that it may make sense to pursue industrial relations reform step-by-step, rather than through a comprehensive enactment such as the Industrial Relations Act 1971, the government has selected a number of themes on which it proposes to enact changes. The Employment Bill seeks to encourage the use of secret ballots in union elections and in voting on industrial action by making public funds available to unions for the costs they have incurred in such balloting; it endeavors to extend the protection afforded to individual "objectors" in union-membership situations; and

it has also endeavored to grasp the nettle of secondary picketing by proposing that lawful picketing should be restricted to one's place of employment.

This last has already begun to prove a Pandora's box, not only because of the difficulties and controversy inherent in the proposal, but because the current state of the law has been thrown in doubt through judgments handed down by the highest court in the land, the House of Lords.

In *Express Newspapers Ltd.* v. *McShane,*[1] a case involving journalists who had "blacked" a newspaper that was not a direct party to the dispute they were pursuing, the Lords interpreted the protection which the unions enjoy under the law in a very broad way. They declared that acts of trade union officers done "in contemplation or furtherance of a trade dispute" had to satisfy a subjective test. If the doer of the act honestly thought at the time that the act or acts would assist it to achieve its objectives in a trade dispute, the party enjoyed protection under the law. The expressions "in . . . furtherance of a trade dispute" refers to the subjective state of mind of the person doing the act and means that he so acts with the purpose of helping parties to the dispute to achieve their objectives in the honest and reasonable belief that it will do so.

This judgment in itself was enough to raise eyebrows. Come now over the threshold into the new decade, however, and in particular to the industrial dispute involving the nationalized steel industry for the first three months of the year 1980. After failing to make speedy progress with their claim via direct pressure on the British Steel Corporation, the unions resorted to strike action against the private sector of the industry, as a means of widening the dispute, staunching the flow of steel, and thereby bringing the corporation to an agreement.

Private steel employers appealed successfully to the Court of Appeal against this "secondary industrial action," the appeal court taking the view that the unions had gone beyond acts in furtherance of a trade dispute. They were trying to put pressure on the government, the ultimate paymaster. The House of Lords subsequently reversed this judgment, following the views expressed in the *McShane* case referred to above: the unions were satisfying the subjective test of honestly thinking that their

[1]Industrial Case Reports Part 2, February 1980, at 42 et seq.

action might serve to bring the original dispute to a successful conclusion.

The House of Lords did, however, make it clear that, while it had to interpret the law as it stands, it was not especially happy with the broad protection which the legislation, dating from 1906, does give to trade unions. One of the law Lords, for instance, said that such protection could mean that "almost any major strike in one of the larger manufacturing or service industries, if sufficiently prolonged, might bring the nation to its knees." It gave the unions great industrial muscle. (Connoisseurs of the Industrial Relations Act 1971 will recall that Sections 138 to 140 provided procedures for dealing with what, more popularly, are known in the trade as emergency disputes.) The Lords went on to make the point that if the national interest did require that some limits should be placed on the use of such industrial muscle, the law as it stands must be changed—and only Parliament can do that.

As we have noted, the Employment Bill now before Parliament represents the first stage in the efforts of the 1979 Conservative government to "redress the balance of power" by a step-by-step process, taking up particular problems which have caused difficulty in the past. But the House of Lords' decisions have demonstrated that the attempt in the bill to look first at secondary action in the form of secondary picketing is not going to be contained readily in the ongoing debate. Already the Government has had to widen out its perspective and to have regard for the wider range of secondary action, such as "blacking" and strikes, for which the present law provides immunity. The Government, accordingly, published a working paper, a consultative document, on the theme of secondary industrial action in February 1980. The scene is therefore set for an important legal, but also a technically difficult, industrial relations debate about the scope of secondary industrial action in Britain.

This note has suggested that in two important areas of industrial relations arrangements, the apparently turbulent decade of the 1970s did produce important new and agreed arrangements dealing with (a) unfair dismissal, and (b) major matters of conciliation and arbitration, health and safety, and manpower training and development, via the new agencies established to manage these parts of the national policy. In other matters, however, there is much still to be done before a balance has been struck which is regarded as equitable, particularly with respect to in-

dustrial action and the powers that may be deployed in pursuit of it. This is likely to be the topic that dominates the early years of the 1980s, and which will certainly cause the unions greatest concern. On other topics, such as participation, change is likely to occur slowly but, one may hope, with some awareness of "the democratic imperative."

CUMULATIVE AUTHOR INDEX*
1973–1980

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*For the Cumulative Author Index covering the period 1948 through 1972, refer to Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting of the National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 355 *et seq.*

B

C

L

M

N

O

TOPICAL INDEX

B

R

S

T

U

V

W

Y