CHAPTER 4

A COLLOQUIUM ON THE ARBITRATION PROCESS

DISCUSSION PANEL:
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CHARLES C. KILLINGSWORTH
JOHN J. O'CONNELL
HOWARD OSTRIN
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(*Editor's Note:* This chapter is the edited transcript of an informal panel discussion on topics and issues relevant to the papers published above as Chapters 2 and 3.)

Chairman Gellhorn: Robben Fleming's paper [Chapter 2, above] did not directly assert that there is a constant or pervasive dissatisfaction with the arbitration process. Nevertheless, the existence of dissatisfaction was, at least, one of the implications of his analysis. I want to ask the members of this Panel whether or not they believe that arbitration today does satisfy the needs of the parties with respect to expedition, with respect to expense, and above all with respect to justice.

I would like to combine with that question the rather provocative suggestion made by Bob Fleming, in his paper, that "labor and management do not share a completely common interest in the arbitration device." When we are considering whether or not the device gives satisfaction, we will have to consider, at the same time, what their differing interests are—if, indeed, there are such differences—and whether or not any difference in interests affects the

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degree of satisfaction with the arbitration process. Now, which among you would cast the first stone?

Mr. O'Connell: Well, Professor, I would like to make it clear that we on the company side in the steel industry certainly are in favor of arbitration as a process, as a device. We think it is wonderful. It serves the needs of the parties in a much more realistic way than doing battle in the jungle, but we do believe that arbitrators could help us a lot more if, as Sylvester Garrett suggested in his luncheon remarks, they made their opinions as clear as possible. Arbitrators should not go rambling on and on and on to the degree that we have to tell the people in all the operations in a multiplant company what an opinion means. When our people were not directly involved in the case, it is sometimes difficult for them to follow exactly what happened and what they must do in the future.

I would like to read this one example that we found, not at Bethlehem. This paragraph is the conclusion of the award. This case did not involve a discharge, by the way, but a five-day disciplinary penalty.

> It would seem only fair as a proposition of proof that where a class of employees' behavior when engaged in can contractually concededly be punished by discharge as an initial matter, the quantum and/or quality of proof should be reasonably and sufficiently conclusive in nature and not turn primarily on mere inference circumstantially based. Where circumstances can lead to no other reasonable conclusion but that of guilt, then such circumstantial evidence should be sufficient. Such was not the case here.
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> The grievance is granted. (Laughter)

Chairman Gellhorn: That is blank verse written by e e cummings. It just wasn't set up in type so that you could see the pathos of it. (Laughter) Do you think that if arbitrators could learn to write English, the process might be a satisfactory one? Is that it?

Mr. O'Connell: Well, Professor, of course almost all of us are distinguished writers and very clear. You do see such gems only occasionally, but my heart went out to the poor manager of industrial relations in that company who had to spread that around in all the plants.

Mr. Ostrin: I think that the arbitration process does generally serve the needs of the parties. Sometimes on the union side, perhaps more frequently than sometimes, we complain about the lack of expedition. This is a sore spot with labor unions today: the interminable period of time that may elapse between the selection of an arbitrator or the filing of a demand for arbitration and the day, the eventual day, of the decision. I think that we ought to address ourselves to that particular problem, because I contend that it is a problem and a growing problem today.

Chairman Gellhorn: Let us now address ourselves to the problem you just raised, Mr. Ostrin: the interminable delay between the time a grievance is processed and the time the ultimate decision from the arbitrator comes down. To whom do you attribute that delay? To the arbitrator? To the process of selecting an arbitrator? Or where are the chief delay points?

Mr. Perl: I wonder if we can throw something else in first? Otherwise, we may over-generalize this. There are many ways in which arbitrators are selected, and to attempt to evaluate this question would assume that you do not have an umpire situation with set days, which is familiar to many of us. Let us focus on something which, for my part, is the most significant aspect of the delay feature.

My union clients, I would say, can understand the difficulties of naming an arbitrator, can understand the difficulties of counsel getting available dates to hear a case. Their chief complaint is the delay that is occasioned after the case has been presented and awaiting the arbitrator's decision. This is an entirely different problem.

Mr. Ostrin: I would like to address myself to the latter point, in which connection I blame the parties as well as the arbitrator. First, let us talk about the arbitrator.

All too frequently, hearings are delayed unnecessarily because the arbitrator will admit evidence even after its obvious irrelevance is pointed out to him. All too frequently, the arbitrator will say, "Well, I will accept it for what it is worth." Unfortunately, we advocates do not know what worth the arbitrator is going to place on that particular evidence, and we therefore get off on tangents and start developing a great deal of collateral issues.

I know that one of the answers given by arbitrators is, "Well, sometimes we don't understand the issue;" or, "We don't know what the issue is, and because of that we must necessarily accept the evidence that you or your adversary may consider to be irrelevant."

This may be the situation where the parties are not represented by counsel; but where the parties are represented by counsel, and particularly where the issue has been framed, and after counsel who is objecting to a line of inquiry states the reasons for his objection and is persuasive, then, I submit, the arbitrator should take a firm position on that objection and rule the irrelevant evidence out.

Chairman Gellhorn: All right, I think we understand that point. But you are talking about an imperfection in the process and are perhaps not being responsive to the question about which we want the group's judgment now, and that is, whether the arbitration device is indeed satisfying the needs of the parties.

To say that a device is satisfying the needs of the parties is not to say that it cannot be improved, just as an automobile of five years ago may satisfy needs, but you might have still a better car made at some point. It seemed to me that more fundamental questions were being raised. One of them suggested by Bob Fleming's paper was that management, at least, has perhaps become dubious about the utility of having arbitration at all, even if it be done expeditiously, with good opinions, listening only to what was relevant, and so on. What do you think about that, Mr. Silver?

Mr. Silver: While there has been some generalized criticism of the arbitration process by a number of company people as well as unions, I think that, in the main, most of industry and most of labor today take the attitude that there is really no alternative but to utilize the arbitration process. I think that one of the reasons we tend to stress the technical imperfections is that we have been taken in a good deal by the oft-quoted, trite observation that arbitration is not a substitute for litigation but for the right to strike.

I don't consider that to be the paramount function of arbitration any longer. The function of arbitration, in my view, is to resolve disputes under an existing contract between the parties. Without arbitration there would be litigation. If we are comparing the time required for trying a case in arbitration—even though it takes

much longer than we like—with what it would take to litigate, we are certainly much better off, in that respect, with arbitration.

Mr. O'Connell: Mr. Silver is exactly right. I don't think he intends to convey that we are happy about the delay, by any manner of means. Arbitrators would do a great service to the relationship of the parties if, in addition to being generous with their time in hearing cases, they would set aside a sufficient number of study days to get those decisions out promptly. Nothing is more infuriating to both parties than to have a number of grievants sitting around wondering why this man we have chosen just cannot make up his mind.

Chairman Gellhorn: One suggestion frequently made in these circles for minimizing delay—a suggestion that has been accepted by some and rejected hotly by others—is that an arbitration hearing should not concern itself with any points other than those fully explored in the antecedent phases of the grievance procedure; that new theories and new informational data should be rejected, thus compressing the area to be covered by the hearing. What do the members of the panel feel about that?

Mr. Ostrin: I would be very much opposed to that, for this reason. In the grievance procedure, the union is frequently not represented by counsel, especially in the lower steps of the grievance procedure; consequently, the union may not have fully explored the ramifications of the issue. Thus, for the parties to be bound by what was said in the grievance procedure, I submit, would serve to make difficult an ultimate resolution of the problem.

Once you get into arbitration, once you get into a hearing, each side should be allowed the fullest latitude in presenting its position and should not be bound by what may have been said in the course of the grievance procedure or by any legal arguments that may have been raised in the course of the grievance procedure. I think that the union would otherwise be greatly disadvantaged, because, in the grievance procedure, the company is more frequently represented by people who are perhaps better prepared to present a case in that early stage of the grievance procedure.

Mr. Fleming: I don't think you can give that question a categorical answer. It seems to me that it depends very much on the circumstances. If you are in a well-established umpire system in which there is a good screening procedure on the way up, then I don't see any necessity or excuse for allowing to be brought into the hearing something which has not been discussed up to that point.

On the other hand, in an *ad hoc* kind of situation where, as we all know, there may not have been a complete exploration of the grievance until the night before, I think you have to let the parties introduce what they find.

Therefore, I don't think you can give a categorical answer to that question.

Mr. Perl: Can I go back a pace? The papers which were read this morning presented something that we have been taking for granted in our discussion here. Professor Fleming, for example, noted in his paper that the critics are stating that arbitration—which was once cheap, prompt, and simple—has now become expensive and legalistically complicated. Our whole discussion assumes that this is an accurate criticism. I wonder if it is.

Professor Fleming's paper seems to me to show that, in the twelve years covered by the study, hearings in discharge cases have not taken any longer; the number of study days used by arbitrators is no greater than it was at the outset; and that the only increase in cost is a cost of living adjustment for the arbitrators. The number of lawyers who participated in such cases has gone down, so apparently the so-called creeping legalism must have gone down too. I wonder then, what is there in the criticism that is valid?

Evaluating it for myself, for the clients that I represent, I came to the conclusion that they can understand the increased cost. The increases in time are not significant. The area, as I mentioned before, that I feel is giving the union clients I represent the greatest degree of trouble is their failure to understand why it takes so long for an arbitrator to render an award after he has heard the case. Everything else they can understand.

Now, this should be put on the table. Of course, this is no personalized criticism against any arbitrator with whom I have or may in the future have any contact. (Laughter) One of the areas that I suspect gets involved is the inability of an arbitrator to say "No" to taking on another case. The new case that is offered, if turned down, may be forever lost; and this, I suspect, is what has happened to some of the professional group who, in their eagerness to keep their case load up, do so at the expense of the decisions that they can get out. How you can cure that, I don't know. Whether it is an institutional problem for the Academy itself to consider, I don't know, not being a member, but to me this is the most critical area in anything I come in contact with, one where the parties have a discontent with the entire process of arbitration as it exists today.

Mr. Fleming: I think that comment is right in many ways, but there is another element, too. All of us have had the experience of getting a telephone call and being asked to take a case and saying, in response to the telephone call, "I couldn't do this for a couple of months and you obviously don't want to wait that long." But then they say, "Yes, we will wait that long."

What is happening, in many cases, is that people who use arbitrators are insisting too much on using only that arbitrator with whom you have had some experience and in whom you have so much confidence that you want to wait for them. Part of the problem is that you are going to have to decide that you are willing to employ people with whom you have had less experience in return for the much quicker service that you can get.

Mr. O'Connell: I think he is dead right, but I also think that you ought to start planting some new blood. The parties—I speak on behalf of at least one member of the steel industry—would be very happy to see some new people coming into this industry. I know that many times Ralph Seward has looked for some aid or assistance. New people are hard to find.

Mr. Silver: I think that arbitrators are prone to the same weakness that lawyers have, that is, the inability to turn down a good client even though you may be very busy on other cases. I think that is the nature of the beast, in the sense that that is the way most of the arbitrators make a living.

I do think, however, that if there is any justifiable criticism it exists in the period of time it takes once a decision has been reached. I must assume that can only be because the arbitrator is too busy hearing and deciding other cases, and the only way we can cure that defect, if there is such a defect, is to increase the number of competent and acceptable people in this field.

Chairman Gellhorn: Now, some comment was made earlier about the crudity of arbitrators' opinions as well as the time it takes, apparently, to write them. How ready would any of you people on this panel be to see a marked diminution in the number of opinions and an increase in the number of on-the-spot decisions? That appears to be anathema to many people. They cannot tolerate that the arbitrator, like a jury, might make a decision right then and there. That would be speedy, but some people would not find it palatable.

Mr. Ostrin: I would. I think that a decision is often delayed only because the arbitrator must necessarily devote a good amount of time to writing his opinion. One way of obviating that, it seems to me, is that, having reached a decision, he ought at least to appraise the parties of what his decision is. He may then follow that announcement with an opinion.

Some arbitrators do resort to that practice with the consent of the parties. I think it could be utilized more frequently than it has in the past.

The question raised by Professor Fleming is a good one, and it was referred to by other members of the panel. One of the difficulties today is that too many people rely on too few arbitrators and somehow do not accept many arbitrators who are in the field. Frankly, I don't know what the answer to that is. I remember sitting in on a committee at the American Arbitration Association when we kicked that around for more than one session. The problem there is the acceptability of new arbitrators to parties and how to try them out. Nobody seems to have been able to come up with that answer and, until that is solved, we are going to find that only a hard core of acceptable arbitrators is available. If that is so, you are necessarily going to have to wait longer for these decisions.

I submit, however, that even there they could expedite decisions if they could issue them without opinions. Then, if an opinion is to follow, it can follow later. What is wrong with that?

Mr. O'Connell: May I go back to the notion that we really don't need opinions. That is entirely too much of a generalization for our industry; it depends on the cases. Most cases are before the arbitrator because the parties need his reasoning and guidance. Again, I am talking about the only industry I know.

Chairman Gellhorn: You are saying that even though you have to wait some time for a decision in a case that has been arbitrated, a well-composed and reasoned opinion nevertheless saves you time in the long run because it enables you to dispose of other controversies that would otherwise require extensive processing; hence, the writing of the opinion is not necessarily, in its net effect, time wasted.

Mr. Killingsworth: In one permanent arbitration system that I have some familiarity with, under a specific clause in the contract, unless one party or the other at the conclusion of the hearing requires a full-dress opinion, the case will be decided by an award which consists only of a statement of the grievance, a statement of the company's answer, and a statement of the decision, with no opinion whatsoever.

About one-third of the total number of their cases has been decided by awards, and the awards by contractual requirement are issued within seven days following the hearing. Perhaps as a consequence of that provision they also require that opinions be issued within thirty days after the hearing, and the vast majority of opinions are issued within that time limit.

Chairman Gellhorn: In any event, the judgment in the instance you have cited is made by the parties rather than by the arbitrator, and that is how it should be.

A moment ago, I was suggesting that an opinion can be a great time saver in its effect by eliminating future controversy; but I have the impression from a brief conversation with Mr. O'Connell, earlier today, that he has had the experience, not merely of obscure opinions, but of opinions that seemed to him to generate

rather than to settle disputes by reason of the arbitrator's style and tendency to philosophize.

Is that a fair synopsis of the concern you had, Mr. O'Connell?

Mr. O'Connell: That is a synopsis of the concern, but this is not confined or restricted in any way to our umpires; I am talking about the steel industry in general. You can find a whole host of horrible examples of where the arbitrator, in coming to his conclusion under, say, Article 10, says: "Of course, I don't have Article 2, Section 3, before me." Well, the net effect of that is that the staff man who brought up that case is in a bind. He then has to go back home and find a case so that he can urge Article 2, Section 3, and one of the most awful things is, if he brings that case up and gets slammed to the bat, his constituent has no use for him at all.

Mr. Killingsworth: It seems to me that this may spring from the very pernicious doctrine adopted a long time ago by another wise, able arbitrator, to the effect that the proper technique for opinion writing is to give one side the decision and the other side the language. (Laughter)

In all seriousness, I suggest that this was a very unsophisticated approach, and on behalf of my fellow Academy members, I would argue that the more experienced arbitrators have learned that this is not the right way to go about it and it very often does create many, many more problems than it solves. In a permanent umpireship, the same man who issues these open invitations is often confronted by the case that he described in hypothetical terms as the one the union should have brought to him, and it can be terribly embarrassing when that happens. So I think the majority of experienced practicing arbitrators today have the feeling that you don't really win friends, you don't really convince anybody, in that way. Rather, the proper approach is simply to set forth, as clearly and convincingly as you can, the precise line of reasoning that you followed in reaching the opinion in the specific case before you, and then sign off. The hope, of course, is that the losing party, even if he does not concede that you are right, may at least concede that you made an honest mistake. I think that there is a much greater tendency, these days, for arbitrators to take that

approach rather than the approach of describing all kinds of hypothetical cases that could have been brought to him by the losing party.

Mr. Fleming: We got started in this discussion because we raised the question of whether an opinion is necessary. I have always had an open question in my mind as to whether arbitrators, however articulate and persuasive—and, obviously, they all are—really convinced anybody as a result of their opinions; or whether the function of the opinion is not really to convince, even though one does his best to do that, but rather to guide. This ties in, it seems to me, with what Charles Killingsworth says. I have long ago given up the hope, myself, that I really convince very many people by how I rule; but if you at least guide the parties by making it clear why you reached that decision, maybe that is the best one can do.

Mr. Perl: I think that it should be a very rare instance in which the arbitrator will come down with a decision in which he follows a line that is a complete surprise to you. Certainly, if you are any kind of an advocate, you sit down and analyze your cases from the various points of view. You will present every point of possible success that you think might appeal to the arbitrator and hope that he will pick one of them. If he does not, it is a very infrequent occasion that he comes down with a line that was not within your contemplation. From that point of view, what has been said here has been very true. No opinion really convinces. It may help the lawyer to show his client why he lost the case; but, in terms of getting ultimate conviction and of having parties exclaim: "We are wrong, and now we will embark on a new course of conduct"—you will never accomplish that response.

The point we should remember is that the opinion does serve as a very necessary tool for the guidance of both parties for the future; but, do they have to be as comprehensive, as long winded, as many are? One could easily demonstrate that some arbitrators have the knack of saying in a few pages what others take a dozen pages to say, and if the time involved in writing and in reading these, and if prolixity gives rise to greater confusion, then certainly the accent should be on shorter and more-to-the-point opinions. Much could be done in that area.

Mr. Silver: I think that as long as we use men rather than machines for the resolution of disputes, we are going to retain some imperfections in the process and in what is said. Many of us who read court decisions by some of the most respected judges in some of the highest courts in the land know that sometimes they, too, are very difficult to understand.

If I may, I would like to comment on one of the points on the time-lag situation and on the use of new arbitrators.. Perhaps this is a revolutionary suggestion, but it has always seemed to me that when parties agree on the use of arbitration as a means of resolving their disputes, it does not necessarily follow that they must agree on the man who is going to act as the arbitrator any more than the use of the judicial process means agreement in advance that you are to have a particular judge to argue your case before. One way that we can introduce new blood into the field is to have the appointing organizations, such as the American Arbitration Association and the Federal Mediation Service, clear panels in advance with committees of labor and managment representatives and, at least in some cases, get the acquiescence of the parties for the direct appointment of an arbitrator instead of the sending out of panels from which the parties must select the arbitrator who is to be appointed.

Chairman Gellhorn: Mr. Silver just suggested something that the parties themselves can do to improve the arbitration process. I would like to continue that line of speculation for a moment. I do not mean to suggest that we have exhausted all the things that arbitrators can do to improve the process but, for the moment, let us think about the parties themselves.

I would like to ask whether, in the view of this group of experts, internal union politics have a substantial impact upon the arbitration process? I refer, of course, to unions other than those represented by Mr. Perl and Mr. Ostrin when I refer to the possibility that internal union troubles may affect the course of arbitration. Isn't it possible that some of the difficulty with getting prompt decisions stems from the fact that too many decisions are sought? Perhaps some of the decisions are sought, not because anybody has confidence in their merits, but because of internal pressures?

Mr. Perl: I think you want prompt decisions even in political cases. The answer is, of course—since we are discussing unions which Ostrin and I do not represent—that all unions operate as political entities, and a certain percentage of cases are as purely political from the union's point of view as they are from management's point of view.

However, it does not appear to me that such cases, apart from problems occasionally arising from the sheer numbers thrown into the hopper, have any effect on the individual case-handling basis.

The question was raised by almost every speaker this morning about the difference in point of view of what unions and managements expect from the arbitration process. This is a part of a good deal of the difficulty you get with regard to answers for the different questions you pose in this field. To me, in representing a union, I frequently find that I am storming a citadel to present a case to an arbitrator. Bringing the case to arbitration, the press of getting it there, the press of framing the issue, the press of determining in what order and priority cases will be heard before the arbitrator, are all roadblocks which are often placed in the path of my desire to resolve a particular problem.

It seems to me that in this whole area, in order to evaluate the validity of any of the criticisms concerning the question of time element in delay of cases—I hope that the gentlemen at the table will understand the reason why I say this—the professions I have heard by managements about their desire to get cases disposed of expeditiously and quickly do not always ring a bell. I have found, as I say, and I must state this, that in many instances management is perfectly content to have a large backlog of arbitration cases which can be used as a buffer in order to slow down the whole process. Now, if anybody can find a way to cut through this I, for one, would be glad to know the answer.

Mr. Ostrin: I have not had the experience that you have. My experience has been that employers with whom I deal are just as anxious to have prompt disposition of grievances as is the union. I am sorry to hear that your experience has been different. My one complaint about some managements is that when they get into a case, a hearing which should take a day or two can be drawn out for about five or six sessions.

Mr. O'Connell: You were doing fine right up until then.

Mr. Ostrin: Then, there is the question of briefs. This is one of the complaints that I have. There is one employer with whom I deal who makes it a policy that under no circumstances will he let a case go to an arbitrator without a brief, even though the issue is a very simple one, even though the arbitrator knows the problem, and even though the arbitrator might indicate that he doesn't need a brief. Nevertheless, the brief must go in; and when the brief goes in, you have to wait two or three weeks before this burdensome record is completed by the reporter after which you have three weeks to a month in which to file a brief. Then, obviously, the arbitrator is going to need time to study the transcript. This occurs mainly with the large corporations.

Mr. O'Connell: You must be talking about an outside lawyer, because within the corporations we are not interested in putting in post-hearing briefs. Why couldn't he put in the brief in advance?

Mr. Ostrin: They put them in in advance, they put them in at the end, and if you don't put one in the arbitrator gets the impression that the union isn't interested in the case, so you have to put a brief in, too.

Chairman Gellhorn: Whose job is it to decide whether briefs are or are not necessary? It that something the arbitrator can determine, or must he yield to the wishes of either one of the parties in that respect?

Mr. Silver: I should think the opinion of the parties should be given great weight by the arbitrator. That is a decision the parties themselves should make, I almost feel, because at the outset of the hearing I don't think the arbitrator is in any position to determine the importance of the issue that is being presented to him. Many times, a seemingly unimportant issue may be, from the point of view of management or the union, a very vital one. If the issue is important and the parties wish to submit pre-hearing briefs, they should be permitted to do so.

In the last analysis, it does not seem to me that the difference of two or three weeks or even a month in the decision of a case

can be of that great importance to either the union or the company.

Mr. Perl: I would strongly disagree with that. In passing, may I note that I don't think you are saying anything different than I, just from a different point of view. You are a little more tolerant than I am. I feel very strongly on the question of briefs. I make it an inviolable practice, if I can, never to file a brief. I feel that if at the conclusion of a well-presented arbitration case the arbitrator does not know what the issues are, if he does not know what the theories are, there isn't a darned thing you can do in light of a brief to help him. If you have said everything you want to say when you rest your case, then there is something wrong with you, as an advocate, if you have not made the arbitrator understand what you have presented. That is a personal point of view, and I wonder if the man who asks to file a brief is not usually trying to delay the proceeding. That is my judgment. I would like to see arbitrators take the position that, if they are satisfied at the conclusion of the case, they have the right (as few of them will do) to say, 'I don't need briefs in this case."

Mr. Fleming: The point is frequently raised as to whether the arbitrator should take a position on transcripts and briefs. It has been suggested that sometimes he has to rule on this. I happen to be one who does not feel very strongly that transcripts are needed. As a matter of fact, I don't think they are needed in the majority of cases; but, nevertheless, I don't see how it is possible for an arbitrator to say to the parties, when one asks for a transcript or the right to file a brief, "You cannot do that." After all, this is fundamentally a process, unlike the courts, in which you people control; and I think the arbitrator can discourage rebuttal briefs and that kind of thing, but I have never seen how you can really expect the arbitrator to take a position that you cannot have a transcript or that you cannot file a brief.

Mr. Silver: I agree.

Mr. Ostrin: I agree that the arbitrator should not determine whether or not there should be a transcript; I think that should be left to the parties. But I think that the arbitrator should, at least, make known to the parties that he does not require a brief and that he fully understands the issue before him, especially in

the case where there is a transcript and especially where both parties not only have fully stated their position but have also summed up.

Let us bear in mind that we are not in a court. We are before a sophisticated arbitrator, one who is knowledgeable in the field of labor relations, and he does not have to have chapter and verse by a brief which supplements, if you will, arguments made in the course of a hearing.

Mr. O'Connell: Sometimes it is helpful to encourage your opponent to file a brief. We had a case before Ben Aaron and we encouraged our opponent to write a long, tedious brief which so nettled Mr. Aaron that he commented on it.

Mr. Silver: If a transcript is not taken at the hearing, it seems to me you are placing a heavy burden on the arbitrator in his taking of notes to write a decision on an important case without a review of the facts and the arguments that you might want to present. In my experience, there are very few arbitrators who take sufficient verbatim notes, as it were, to be able to write an opinion that meets the problem. Also, we make the assumption, it seems to me, that the arbitrator leaves the hearing room and goes back to his office and begins to dictate his opinion and award with a fresh recollection of the case in his mind. We know from the criticisms just engendered in this discussion that this is not what takes place; that the arbitrator may have ten or fifteen or twenty other opinions to write before he ever gets to the opinion-writing in this particular case. I know, representing employers as I do, that I frankly don't want to take the risk of leaving to the arbitrator's memory, some weeks hence, the recollection of the important things that took place at the hearing when he is writing his opinion and award.

Mr. Perl: I have two comments to make here: First, an earlier point raised was the question: Can we do anything to cut down on the cost of arbitration. We certainly let that fly out the window. One of the most costly points of arbitration is the cost of a transcript. From the union's point of view, I can never place myself in a position, with the exception of perhaps one case out of fifty, of justifying the necessity for a transcript in presenting a case.

Secondly, I do not share with Mr. Silver the experience which apparently he has had that arbitrators are not capable of taking adequate notes. I would say that in my area this is the practice, not the exception. The arbitrator who calls for transcript, I think, in my experience, would be putting himself at a tremendous disadvantage because there are many arbitrators who are quite capable of taking notes and reducing them to intelligible opinions reflecting the positions taken by the parties. Even nuances of testimony are noted in a manner that is sometimes quite surprising. That is our experience in the New York area.

Chairman Gellhorn: We have been spending a lot of time on what is, after all, only one aspect and a rather secondary aspect of the conduct of an arbitration hearing.

I wonder if the panel has any comments to make on the manners of arbitrators as hearing conductors—present company excepted, of course. We are speaking about arbitrators who are not here rather than about those who are here in anything that might be said. I have heard of arbitrators, acting as therapists, taking some of the emotion out of the situation, whereas others can by abrasiveness of manner, insensitivity, or other personal failings, provoke newer and hotter emotions.

I wonder what the experience of this learned group has been with arbitrators in that respect.

Mr. O'Connell: Ralph Seward has a great manner of not injecting himself into the hearing, while at the same time keeping it under control. As a matter of fact, I compare my experiences with him to an experience I had before I was un-frocked, practicing here in New York, and I would like to share this experience with my brothers who are still doing this.

Never, never try a case if your adversary does not show up. I had the experience of being sent out on a case when John Morse had to go somewhere else. He said, "Nobody can lose this case." He asked me to substitute for him and pulled me out of the litigation department to try a labor case. I had never been in an arbitration and I didn't know what to do. We went over to the Bar Association and the people didn't show up. We called around, but couldn't find anybody. An hour and a half later, as you do in

court, I arose and said, "I move to dismiss." The umpire said, "Are you ready to go on?" I thought he was just setting the stage, that if the other fellow didn't answer, it would be all through, so I said, "Certainly." He said, "Proceed."

I made a fine opening statement, I thought, put my first witness on, and let me tell you, he put that fellow through the wringer. So I tried another witness, and he almost killed him. I tried feebly to object. He overruled the objections, of course. At the end of that, I had the feeling that I had been murdered. The representatives of the client sort of shied away from me as we went outside and I said: "I've really had it." Fortunately, Professor, I am sure *you* have forgotten all this. (Laughter)

Chairman Gellhorn: You are in contempt. (Laughter)

Mr. O'Connell: That is the way I felt, only beneath contempt. Fortunately, you ruled for the client. How, I don't know, after what you had done to him. But thank you very much, Professor, for not shutting off my career at that time.

Mr. Silver: I don't think that many of the lawyers with whom I discussed this subject have an objection to the conduct of most arbitrators in the pursuit of arbitration. I think most of them conform their conduct to what apparently is the need and desires of the parties in a particular case, and I think, by and large, their conduct has been temperate in the handling of cases. In that respect I have very little criticism, if any, of the conduct of arbitrators.

Chairman Gellhorn: I would like to ask Professor Killingsworth an unrelated question: In his very interesting presentation today he was talking about the marked diminution in volume of cases going to the permanent umpires in the various systems that he was discussing, and he ascribed this to, first, a resolution to have an adjudicatory type of proceeding rather than a conciliatory consensus type of proceeding; and, secondly, to the sifting techniques of the unions that were involved, who sought seriously to reduce the cases that would have to be processed.

The question I want to put to him and, indeed, the rest of you, is whether the possibility of effective screening is going to be enhanced or diminished by the present emphasis—to me, on balance,

the desirable emphasis—placed on union democracy. Does Landrum-Griffin lead to a sense of insecurity on the part of union leaders that would make it less probable rather than more probable that unmeritorious grievances will be sifted out?

What do you think of that?

Mr. Killingsworth: There has been this tendency in reduction in case load observable in both the impartial chairman systems and in the umpire systems in many cases, although obviously not in all. I ascribe that primarily to the development of what I call constraints or guideposts for the arbitrator which the parties can as readily apply in as many situations as the arbitrator can apply them. In my travels about the country, however, I have heard a great many union representatives express concern about the effects of Landrum-Griffin on the washing out of grievances. I don't know that any careful study has been made as to the effects of this fear, which has been expressed by a surprisingly large number of union representatives. I know of some situations in which the case load has diminished in the last few years since the passage of the Landrum-Griffin.

Could I append one more footnote? It is not simply a matter of union screening, of course. In some of the situations that I have familiarity with, the reduction in case load has resulted from a kind of reciprocal action. What has generally happened has been that the union has taken a resolution to cut down the case load either because of costs or because of other considerations. This has a reciprocal effect on the company. Very often company representatives will feel that if there is no real screening on the union side, there is not too much point in company screening; but when the union gets serious and sifts out the obviously unmeritorious cases, then the company, almost as a matter of self defense, will undertake the same kind of process.

Now, if Landrum-Griffin is having and is to have the effect that some union representatives claim it is having now, we may see the reciprocal action working in the other direction, toward a snowballing of case loads; but I would be interested in hearing the opinions of people who are actually on the firing line on this question.

Chairman Gellhorn: We will hear, first, from one who is just a step behind the firing line. Go ahead, Bob.

Mr. Fleming: This is in extenuation of what Charles has been saying, not answering what he has just been posing. If you talk about the question of costs in arbitration, one of the first things you ought to be talking about is the number of cases that goes to arbitration, because that is what creates the costs in the first place.

I, like Charles, have talked to a great many union representatives around the country who keep telling me that they are filing a great many more cases because of Landrum-Griffin than they did before. I think that all of us who hear grievances and who, particularly, hear multiple grievances, are perfectly aware that there are many companies, who, in the course of multiple grievances, throw in the give-aways which are obviously in there for the purpose of giving the arbitrator a chance to balance the scales. This is the frequent thing that happens, and we all know it happens.

But one of the things we don't know enough about is what I would call the institutional factors which cause companies or unions to bring grievances, occasionally, that obviously have little or no merit. Let me give you one example.

I think of a grievance I heard within the last year in which the union fairly obviously and almost from the outset had no real confidence or expectation as to the case. As the hearing went on, it became perfectly evident that the reason we were really there was because there hadn't been anything exciting going on around this plant in a long time; there hadn't been a strike in years and years, they hadn't had a grievance in years and years, there was a new slate of officers, and it became perfectly clear that everybody had said, "Let's have a day off, let's arbitrate."

Now, maybe they were doing this to get themselves prepared for the real case that was coming on later, and this would be a practice session. I think there are many reasons like that why individual *ad hoc* cases come up that are not related to the merits of a particular grievance.

Chairman Gellhorn: Do any of the rest of you want to comment on that point?

I think that Bob's last illustration does suggest rather strikingly the possibility that free access to the arbitration machinery may have an impact upon labor morale, on the spirit of the plant, that it may be not an unmixed evil to have a contest, that maybe it takes some steam off that would otherwise be expended on other pursuits. That, of course, is a speculation.

Mr. Ostrin: My experience has been that Landrum-Griffin has had the effect of encouraging the processing of more grievances through arbitration by unions. The unions reason that it is cheaper for them to process even a grievance that has no merit than to be exposed to what inevitably follows if they do not process the case through arbitration; that is, an investigation of the charge at the National Labor Relations Board, and finally a court action brought by the grievant. Consequently, the unions have begun—this has been my experience—to submit the case to arbitration, notwithstanding that it has no merit, and thus get it disposed of once and for all.

Mr. O'Connell: I would say that Landrum-Griffin has an effect on this problem because everything has an effect on it. Somebody will always say, "I am prosecuting this grievance in which I do not believe because of something." Fortunately, it has been the experience in our company at most places that the staff men responsible go ahead and screen their grievances there without fear of lawsuits. If they were always afraid of being sued, you would never get any work done. Somebody is always anxious to sue you.

Mr. Silver: I think we have tended to exaggerate the effect of Landrum-Griffin on the screening and processing of union grievances. In my experience with many of the unions with which I deal, it is very apparent that good union leadership is not at all affected by Landrum-Griffin in determining what grievances to pursue to arbitration.

Mr. Perl: I disagree with that. The problems from the union's point of view are quite different than from management's point of view. I would certainly state that I have had submitted to me factual situations in a great variety of cases where the union asks, "What is the best position for us to take on this? We think there is no merit to this. Can we, in justification, take this case down and take the consequences?" From a cautious view you would have

to point out to them that, while you don't think you could sustain the case in arbitration, the union may have to sustain the case before the N. L. R. B. or in a lawsuit, and it must therefore decide which is the easier course to take. Frequently, it comes out that the easier course to take is through arbitration. You win it or you don't, and that will be the end of it. I will certainly say that there are many cases, from the union's point of view, that have no greater merit to them, if that be merit, than: "This is the easier way to handle the case."

Chairman Gellhorn: Situations may be different in different unions. Some may feel more secure and others less.

I have been putting a lot of questions here and I think the time has come to see if there are some questions from the floor. Would you be good enough when you stand to give your name so that the reporter can put it in the record. Then speak into the microphone as loudly as you can.

Samuel Kates: I would be interested in getting the reaction of the members of the panel as to just what period of time, after final submission of a case to an arbitrator, would seem to be reasonable for the opinion and award to be issued?

Mr. O'Connell: It depends on the case, obviously.

Mr. Silver: I think it should be enough time to have him decide the case in my favor.

Mr. Ostrin: I think it depends on the case. If it is a discharge case, it should be decided as promptly as it can be. If it is a matter of overtime, if it is a matter of pay, if it takes the arbitrator thirty days in which to make a decision, I don't think anybody would be mad at him.

Mr. O'Connell: Let me elaborate on why I said it depends on the case. For example, a problem of safety is extremely important to us. If somebody comes up with a safety complaint, we have a procedure for scheduling the hearing for the very next day, if at all possible. The arbitrator has, in one case, given an oral opinion at the end of the day; in another, he has delayed for as long as a whole week.

Mr. Killingsworth: This may be a bit of reiteration, but it does seem to me that on a lot of these things, such as transcripts, briefs,

and so forth, it is worthwhile for the profession to emphasize that the parties have basic control over this. You can get instant justice if you want it. For example, on the West Coast in the Longshore Industry, they have arbitrators on call twenty-four hours a day. If they get a problem on the docks or a problem of safety, a man can be called out at 2:00 o'clock in the morning and a case will be decided. How is that for instant justice? But there are other situations, of course, in which the institution has been built up in such a way that it is literally impossible for an arbitrator to render a decision in less than sixty to ninety days. It is up to the parties.

Chairman Gellhorn: Who else has some sage observation or question?

Mark Kahn: I have often asked advocates who complain about the length of time arbitrators take to render decisions whether or not they have ever recruited an arbitrator by saying to him: "Mr. Smith, we would like to use you for this case, but a condition of your employment is that you agree to get your decision in within two weeks. If you can't do it, please decline the case." I am invariably told that they have never broached so delicate a condition of employment to an arbitrator that they have selected and about whose delays they later complain. I would like to know whether the people on the panel have ever done this.

Mr. Ostrin: I have. An arbitration was held in October or November and we are still (January 30) waiting for a decision.

Mr. Silver: Perhaps many of the people here do not realize that in at least two industries in New York, the Brewing Industry and one phase of the Maritime Industry, the contracts now provide for a hearing in certain cases within twenty-four hours of the request of either party and decision within hours after the end of the hearing. It has proven very successful in many cases in which the parties want to rush through the hearing and get a decision.

Russell Greenman: My question might be addressed to many of the arbitrators in this room today, and to many of them I do not apologize.

In order to ask the question I may have to make a preliminary statement. I venture to guess that many of us in this room, on the

management side as well as the labor side, who handle the final or semi-final stages of a grievance, have just as many complex decisions to make as you gentlemen in the profession have. Normally we have five days to convince management or write an opinion. I have heard it said that many arbitrators wait the full time of thirty days to preserve the illusion of busyness. If that be wrong, tell us.

Chairman Gellhorn: I believe that the Fifth Amendment will prevent any answer to that question. (Laughter) We will take it under advisement.

Bert Gottlieb (AFL-CIO): I would like to make one quick statement. Unfortunately, the panel seems to be loaded in terms of the steel industry. We all know about the tremendous arbitration job done by the steel industry and the steel unions, and the large number of people working full time in that industry and that union; but many of the questions which have been raised here are probably of much greater concern, I would venture to say, to the tens of thousands of cases which occur every year that are handled by people in small local unions—by a business agent or a representative of the union who is not an attorney. Frequently, on the company side, labor relations personnel will handle an arbitration, or maybe a vice president or a production manager. Legal counsel is not involved. Many of the questions you have been discussing have very different meanings in that kind of situation. In terms of a future discussion of these problems, I would like to see wider representation on the panel from that group of people.

Chairman Gellhorn: We are going to give you, by unanimous consent, a two-minute extension on your two minutes, so that you can highlight for us some of the different results or comments that you think would have come forth had a union representative instead of one of these learned lawyers been on the panel.

Mr. Gottlieb: I am not objecting to the learned lawyers at all. I thank God when I have one on my side.

Chairman Gellhorn: You made a good point about different dimensions of experience. If you have any further observations that relate to that, please feel free to make them right now.

Mr. Gottlieb: If you would like me to do that, I could mention a couple of points. One is the question of Landrum-Griffin in this respect. I can, without question, state that it has had a significant effect because I have been called into local union situations where the local union people have raised this particular problem. Now, unfortunately, I am not ready to say that that is the only reason, but it looms very large in the local union president's mind. He is not an attorney. He doesn't know the Board decisions on Landrum-Griffin. He doesn't know the background. He has no knowledge in terms of the cases that have come up where some union member alleges that he has not been properly represented. These people raise this question with me during a situation where I go over the facts in the case, and say, "Gee, I don't think we have a good case here under the contract." And they will say, "Isn't it better to take it and lose it? At least the member won't give us all kinds of trouble under Landrum-Griffin."

It may be true that this is caused by their ignorance of Landrum-Griffin and its interpretations by the Board and so on. However, it is a fact, at least in my experience, that that question looms large.

I want to point out, however, that, Landrum-Griffin or not, we do have a very serious problem of the rights of a local union member and it does not seem to me that experienced or "responsible" union leadership is the answer. I am the industrial engineer for the AFL-CIO, so I usually work on technical cases. Recently, however, I worked on a case where a worker hit a time-study man, knocked him down, and broke his nose. The local union invited the International to come in, and the International sent a person in to investigate it. The answer was almost unanimous. When the local union went to the university and asked a couple of professors who were arbitrators what they thought of it, they all gave the opinion that it was a bad case and the union couldn't win. But the worker insisted on his right to take it to arbitration. During the course of the arbitration case, the worker pushed the attorney aside and demanded to be allowed to ask the time-study man certain questions. When he did, he proved more than sufficient provocation and was reinstated in his job. In other words, it is easy for us to say that responsible union leadership should screen a case; but I think we also have to be concerned about the guy who

has been accused of doing something wrong, and even if all we "responsible" people may think he was wrong, he knows he was right.

Chairman Gellhorn: An arbitrator would wonder what his version of the case was before it went to arbitration instead of afterwards. Perhaps it is not a question of responsibility, but thoroughness.

Mr. Gottlieb: My point is that neither party before arbitration seemed to be able to find this out, and the arbitration process was therefore vital to this worker in a depressed town with practically no other job opportunity.

Let me also say a word about briefs. For the local union president who handles a case or for the business agent who handles ten states or more, a brief presents a much more difficult problem than it is for an attorney or for a staff person who has a desk. I have asked arbitrators, "Would you tell us whether you think you need a brief in this case," and arbitrators have refused to give me that kind of guidance. I think it should be given if one side requests it. If the arbitrator thinks he has taken good notes, or if there is a transcript and he thinks he has heard all there is to hear, I think the only function of the brief in many cases is that we do part of the arbitrator's job for him, we summarize our positions. I have had arbitrators tell me that the briefs were so good they didn't bother to read the transcript.

Chairman Gellhorn: Those were very helpful interventions. As an arbitrator, I would say on the last point you have just made —about the arbitrators not making a clear response to a question that had clearly been presented to him—that it is a failure of conduct on the part of the arbitrator. I think the arbitrator owes to the parties not merely his best judgment in his decisions, but candor and helpfulness; and I think that would be an occasion for candor and helpfulness.

Mr. Morton (Minneapolis, Minn.): I understand one of the panelists suggested that the Code of Ethics should be revised. I wonder who that was.

Mr. O'Connell: I plead guilty. I mentioned something about leaving sufficient study time. I just mentioned that tangentially.

Chairman Gellhorn: I have often thought one way to get rid of that problem would be to have a higher per diem charge for days of hearing and no charge whatever for study days. So, if an arbitrator took ten days of study time in some cases and no study days at all in others, it would average out over a period of time. It seems to me if you just about doubled the present fees for time spent in hearing, it would average out quite realistically in terms of the work actually done.

Mr. O'Connell: That is a wonderful suggestion but all the arbitrators I know would quit.

Miss Ruth Fried (New York): I have another suggestion, after which you can throw me out. I suggest no arbitrators hold hearings on Wednesdays, so that on that day everybody can sit down and discuss their cases, something like the dentists do.

Chairman Gellhorn: Are there any other questions from the group?

Louis Yagoda: I didn't hear enough comment from the panel on Ed Silver's revolutionary suggestion that we go away somewhat from leaving choice absolutely in the hands of the parties who have made such a big deal about acceptability. How would the others on the panel react to the idea of a somewhat mandatory designation by an appointing agency, possibly with consultation of a general nature between representatives on a wide scale?

Chairman Gellhorn: You are not suggesting the equivalent of a labor court, a tribunal where you have to go?

Mr. Yagoda: "Court" is a kind of dirty word.

Chairman Gellhorn: I just wanted to know if you were using it. I know it is a dirty word.

Mr. Yagoda: I suggested it in a more delicate manner.

Mr. Ostrin: I think Ed's suggestion is a very good one, but I seriously doubt that the parties, either unions or employers, are ready for it. I think it is a revolutionary suggestion but one which I doubt can be implemented, certainly not at this stage. Perhaps in some relationship between employers and unions there is this

mutuality of confidence which I think would be so necessary to implement this proposal. I don't think, however, that most parties are ready for it.

Mr. Perl: I think there has been some slight advance in that direction, in the form of rotating panels, a group of acceptable panels, from whom they take the top men. There it would have possibilities. In its present status I don't think anybody would give anyone the absolute power of naming an arbitrator. That would take half of the fun out of life.

Jack Boyd (Akron, Ohio): May I, as a local union president, comment on this? I do not myself encounter this problem of taking cases on because of Landrum-Griffin. In the rubber system, in Goodrich, we rely heavily on local union autonomy. We have not put one case in because of fear of Landrum-Griffin. Our membership is 6300. We have been threatened with it, but we have had the backing of the United Rubber Workers International Union in seeing that the process is followed. A person that has a complaint goes to the International. It is referred back to the local union. It is handled there through the Board and the membership before it can go on. Why should we fear Landrum-Griffin?

Chairman Gellhorn: We are going to refer you to your counsel, or you can try to get free legal advice from any of these fellows after the session. (Laughter) Now I think we have gone around the room reasonably well. I promised the panelists that at the close of the afternoon session each of them would be able to proceed under the two-minute rule to offer any observations or beneficial suggestions that occurred to him or that he felt he had been deprived of an opportunity to give during the conversation up to this point. I will start with Mr. O'Connell. If you have anything to say, say it now or forever hold your peace.

Mr. O'Connell: In connection with the writing of decisions, I want to make this point: Even the best of arbitrators inevitably come up against a case that wrings their heartstrings and somehow or other at that particular point a skillful advocate, who didn't have any case at all, plays on the heartstrings of the umpire. He suddenly decides that management doesn't have any heart and didn't take "the equities" under consideration.

I just want to say on behalf of all my colleagues in this business, we know that bad cases make bad law and we don't want inequitable cases to come up, but I would like you to listen to this little dilly. For twenty pages this estimable gentleman went on in a case that I knew about and then said:

> For these reasons, then, the Umpire believes that he has no choice but to uphold the discharge action. To hold that Management did not act within its contractual rights—that "just cause" for discharge did not exist—would require either disregard or gross misapplication of the facts.
>
> The Umpire, however, will not stop there. To him, this is one of those occasional cases where it is hard to repress one's real feelings. There *is* another side to this case. And in choosing to touch on it, the Umpire is merely reflecting the fact that arbitrators, too, are human beings.

He concludes by saying that it is really not for him to officially recommend that this lovely lady be reinstated; she hasn't done anything wrong, really, just a little girlish prank; but he does wish that management would put her back, although obviously without back pay. I was not manager of industrial relations at the time, thank God. I did not lose my mind, but the man who was managing our industrial relations nearly lost his. All that I am urging arbitrators to do, if they feel impelled to urge management to do anything, is to call us up and say, "Don't you have a heart?" In which case we will tell him the real story of why she was discharged. (Laughter) Thank you.

Mr. Perl: I am very glad to have had the opportunity of participating in this session, particularly because I am going back with something I will have to think about. Professor Killingsworth explained to us, in his wonderful paper, why the umpire system has been the prevalent system for handling arbitration. He finished, however, with an indication that because of some deficiencies the parties may be going back in some areas to the impartial chairman idea. Syl Garrett followed this at the luncheon with a recital of seven cases which certainly sounded like they would have been better handled on an impartial chairman basis. Indeed, I thought that even the invocation of the Rabbi had overtones of an impartial chairman approach. (Laughter)

As a practicing lawyer, I must confess that I have always approached the arbitration of particular cases from the point of view, perhaps a legalistic point of view, of trying to get a particular result in a particular case and squaring it, if I could, with the language of the contract being arbitrated. I have now asked myself, "Isn't it a fact that the arbitrator should sometimes act more as an impartial chairman rather than an adjudicator?" Might this not achieve a better labor relations result than if you just found out what the particular language of the contract represented?

Mr. Fleming: We are not really a typical audience with respect to the arbitration problem, but all of us, in a sense, have a stake in it. I believe that we therefore tend to exalt the arbitration process above its actual status. This is by way of saying that, to me, one of the great problems of arbitration is that labor and management really do not, at the grass roots level, have quite the same expectations of what they want to achieve through this process. For instance, I think that typically, although not in all cases, a company has less interest in the cost problem than the union has. On the other hand, I think management has much greater interest in the management prerogative question than the union has. So there are real differences.

What impresses me particularly is that, while the arbitration profession is not without fault, one continually finds himself going back and saying that the problem is within the control of the parties—whether it be the cost problem, the time-lag problem, or the management-prerogative problem—and it seems to me it is at that level that these problems have to be resolved.

Mr. Ostrin: I may have leveled some criticism upon both management attorneys and arbitrators, but I would like the record to show that as an advocate for labor I think a great deal of the arbitration process. Whatever its shortcomings may be, until a better system is devised it is something we ought to stay with.

I would, however, urge upon arbitrators to consider the proposal that I made, and that is: the parties willing, to issue a decision prior to the opinion in order to expedite matters; also, to consider the desirability of ruling out irrelevant and immaterial testimony that may crop into a case as a way of shortening the hearing and reaching a more expeditious result.

I join with my colleague Alan Perl in urging that arbitrators, although they are called upon by the parties to render a decision, should not be bashful if they see a possibility of mediating, this notwithstanding the views of the American Arbitration Association. I think that an arbitrator can often serve a very salutary purpose if when, in the course of an arbitration, he senses that there is an area of adjustment which can better be resolved through mediation, he would urge the parties to mediate.

Mr. Silver: I would just like to start by saying that with respect to what Mr. Ostrin just said, I would urge that arbitrators do not mediate unless it becomes clearly obvious that both parties, not just one party, wish him to use his mediatory efforts. At least from management's point of view when we get into an arbitration case, we would like the case to be heard and decided on the basis of the merits of the case and on the basis of the contract.

I am somewhat heartened by the discussion we have had here today, both this morning's and in this panel. In spite of the many criticisms that have been leveled at arbitration and arbitrators, it is inherent in whatever has been said here today that we do not believe that there is any real substitute for arbitration at the present time. We are not willing to go back to the law of the jungle, nor are we willing to substitute litigation, which would not really be an acceptable substitute under present arrangements. Instead of using all the time we do to criticize the process, if there is anything we can do in an affirmative way to make it more salutary, more acceptable to both employers and unions, we will be doing the industry and labor people a great service by coming up with it.

I would like to repeat the suggestion I made before—we should give some constructive thought to the selection of arbitrators. I think we have to consider the fact that many arbitrators do this for a living and I think we would be getting better arbitrators and perhaps better decisions if we could come up with a system that gave the arbitrator more security.

Mr. Killingsworth: As I think back over the last hour or two of discussion, it seems to me, with all deference, that it must be characterized as a great deal of buck-passing. Bob Fleming and I, as arbitrators, have kept insisting that arbitrators are what the parties make, whereas these able advocates talk about new blood,

more well-trained people, cutting down the transcript, elimination of briefs, and so forth. This may well reflect, I think, one of the not basic, but nevertheless important, problems in arbitration today; that is, some fuzziness as to just where the responsibility rests for various kinds of procedural decisions. In line with the request for affirmative proposals, it strikes me that there might be merit in suggesting that many parties ought to consider formulating a clear-cut definition of where the responsibility for various kinds of decisions does rest.

I am reminded that in one umpireship, a permanent umpireship I know about, the parties recently have specifically restated in their agreement that, if the arbitrator so chooses, he may at the conclusion of the hearing specify that he will decide the case without a transcript. Obviously, if he does not so specify, the transcript is prepared. The reporters don't like that very much since they are paid on the basis of time only rather than pages plus time in that situation; but it does offer an opportunity for expediting the proceedings. The same agreement, incidentally, also specifically declares that no post-hearing briefs shall be filed unless one party or the other specifically requests permission of the arbitrator and the arbitrator in his discretion decides to grant that permission. In these instances the parties have clearly chosen to delegate to the arbitrator decisions which it might be argued are basically theirs to make.

I don't think that the arbitrators themselves can really do very much about the selection process in purely *ad hoc* situations; but there are many areas in the conduct of hearings and other aspects of the business end of the business, so to speak, where a great deal might be gained if the parties would clarify just where the responsibility rests.

Chairman Gellhorn: Ladies and gentlemen, I join with you in thanking our learned panelists for their very candid and very stimulating remarks this afternoon. I join with them in thanking you for your attention and your participation in the discussion.