CHAPTER IV

THE ARBITRATION HEARING—AVOIDING A SHAMBLES: A PANEL DISCUSSION

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CHAIRMAN JAFFEE: The title of the subject for discussion this afternoon is: "The Arbitration Hearing—Avoiding a Shambles." I suppose that in order to avoid riding madly off in all directions, we ought to have some idea of what we mean by a "shambles."

In the light of the basic purpose of arbitration hearings, hearings can become a shambles in ways other than its most extreme manifestations. An example of an extreme manifestation is a case heard in Chicago some three or four years ago in which the obstructive tactics of counsel for one of the parties caused a hearing, which should have lasted a day or two at the most, to continue in tortoise-like pace until, on the fifth day of the hearing, when the case was only half over, the arbitrator was so disturbed by the obstructive tactics that he announced that his antipathy toward one of the attorneys had become so strong he felt he could no longer act impartially, and would therefore withdraw from fur-

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ther participation in the hearing. The case had to be tried all over again, before a different arbitrator.

The hearing is, of course, not an end but the means to an end, at least theoretically designed as a search for truth. Practically, it is part of the process of persuasion. Fortunately, the extreme example I have given is uncommon, though lesser forms exist. Since the arbitrator is the one to be persuaded, I should suppose that to him, at least, to the degree that what happens at the hearing makes the truth less ascertainable, the hearing may also be said to be a shambles. A myriad of errors, of omission as well as commission, may add up to a shambles. The responsibility for them, it is clear enough, is *initially* that of the parties. But the arbitrator must share a measure of the blame, too.

An examination of hearing deficiencies, their causes, the assessment of the responsibility, and what can be done to remedy the situation, makes up the scope of the present discussion.

To help in this endeavor we have assembled a panel of four capable gentlemen. Two, Messrs. Kampf and Goldstein, represent labor. Two, Messrs. Horvitz and Kleeb, represent management. Messrs. Kleeb and Goldstein are practicing attorneys, for management and labor respectively. Messrs. Kampf and Horvitz are not attorneys but spend their full time for labor and management respectively. We tried to split them up as best we could. I suspect, though, that we will find large areas of agreement between them, certainly in the ends and, in some measure, in the means. I hope they don't agree on details entirely, for controversy begets interest.

I turn now to the introduction of the first panelist—George Kampf, Jr., Assistant Director of the United Auto Workers, Mack Truck Department. Though he is not a lawyer, I think he is a frustrated one. He *can* be—though he usually isn't—more technical than the lawyers. But he always knows what he is doing, and does it not only well but fast. I can remember when George represented the union in one case in which 15 unrelated grievances were presented in about 7 hours.

GEORGE W. KAMPF: Mr. Chairman, fellow panel members, members of the Academy, their friends and their critics. It is my intention, based upon some twenty-and-a-half years of experience

in presenting arbitration cases on behalf of our international union, to give you my views on the avoidance of a shambles in an arbitration hearing.

Need you who enter an arbitration hearing abandon all hope of form? But then, what is form anyway? Merely a few rules of conduct regulated by custom and etiquette, hence empty ceremony, mere formality. If a dedicated union member feels like yelling out, let him yell. He is probably only interrupting an important witness on the stand anyway. That little interruption, that little bellow, could be no worse than the acute neurosis which might develop as a result of forcing such a man to suppress the outburst.

The ceremony has begun, the union anthem has been lovingly sung by the union's chief spokesman; and the ode to the rights of management follows, delivered devoutly by the company's chief spokesman. The somber arbitrator who has applauded neither of these rights, gently raps for a moderate silence.

All of those present, except of course our impartial arbitrator, have previously attended the required briefing session, at which instruction was given in the art of how to win friends and influence people, eliminating the possibility of a shambles, and insuring the probability of order. All witnesses have sworn to tell the whole truth, and even one or two rumors, if necessary.

Testimony and arguments are marked by prolixity—but our language consists of so many charming and persuasive words, that it seems a shame to be succinct, and the succinctness, of course, is never a requirement at an arbitration hearing, especially when an extra word or two amid twenty may work its way subtly into the consciousness of our impartial arbitrator.

Final argument, or summing up, consisting of a few thousand more well chosen words is next in order. The parties have so thoroughly prepared and presented their cases that our impartial arbitrator can render his decision, sustaining the union position, of course, on the spot—except in those instances involving the most complicated type of issue or those of a type that take days to hear. And thus we have avoided the hearing becoming a shambles.

Strict or formal rules governing the conduct or procedure at the

arbitration hearing will not, I repeat, will not avoid a shambles. There is no reasonable manner or way such rules can be enforced. Furthermore, in view of the fact that the very nature of arbitration is voluntary, strict or formal rules should not be enforced. Endless argument and bickering over such rules would be engaged in at one time or another by either of the parties and the result would be, in so far as the hearing is concerned, a shambles.

Common sense, tolerance, and his vast experience in dealing with human beings are among the tools used by our impartial arbitrator when situations arise during a hearing that threaten to turn the hearing into a shambles. The use of the recess to cool irate and aroused tempers; brief joint or separate conferences with the chief spokesman for each of the parties; that anecdote or story that fits the situation; the gentle admonition or suggestion to either or both the parties to attempt to control that which threatens to turn the hearing into a shambles—the use of any one or all of these, techniques by our impartial arbitrator is the way to avoid a shambles at the arbitration hearing.

CHAIRMAN JAFFEE: The next panelist is Robert H. Kleeb, of the law firm of Morgan, Lewis and Bockius of Philadelphia. I first became acquainted with Bob Kleeb when we were both with the National Labor Relations Board in the late 30's and early 40's. He has since built up an extensive practice on behalf of management, and he has participated in numerous arbitrations, some before me where his success, if my memory is correct, was somewhat better than middling.

ROBERT H. KLEEB: Sometime ago I was invited to attend a dinner of the Philadelphia Chapter of the National Academy, and they said to me, "Bob would you mind coming out and taking down your hair, putting your feet on the table, and telling us what you think of arbitrators?" So I did. And I must say and confess that since that time I haven't checked to see the direction in which my losses graph has moved, but I do know that since that dinner I have not been invited back.

Now, with that introduction, let me talk to you briefly about the arbitration hearing.

It is true, of course, as one glance at the program will readily

confirm, that there can be no true debate, in the pro and con sense of that term, on the topic of this discussion. I feel certain that no member of this panel, nor anyone else in this room for that matter, would attempt to argue that it is not in the best interest of *all* parties to *all* collectively bargained agreements to prevent hearings before impartial arbitrators from degenerating into shambles. That is not the real issue. Each and every member of this panel, and certainly every arbitrator, stands for the proposition that the arbitration hearing should be an *orderly* proceeding carried on in an *orderly* fashion. In the word, "*orderly,*" however, lies the crux of the problem.

Should there be any objective standards by which arbitration proceedings can be judged as orderly, or should each individual arbitrator, or perhaps each individual party, be the sole judge of what is orderly? Certainly, P. T. Barnum must have considered the three-ring circus as an orderly proceeding. Not that I mean to suggest that anyone in this group would urge that Barnum's standards be used as criteria by which to judge an arbitration proceeding. However, I do suggest, in all seriousness, that many of us in this room have seen, or perhaps have been involved in, arbitration hearings—not collective bargaining negotiations, mind you, but arbitration hearings—which would have failed to qualify as *orderly,* even under Barnum's standards.

Where is the blame to be placed? Certainly, with those who actually engage in the actions which turn a hearing into a shambles. However, we must search further in our attempt to find the real culprit or culprits. Not only must the blame be placed at the doorstep of the individual who allows himself to be used as a ringmaster, rather than as an arbitrator sitting in a quasi-judicial capacity on a matter of extreme importance to the parties involved; it must also be placed at the doorstep of every arbitrator who sits back and allows such patterns of conduct at hearings to become *accepted* patterns of conduct without speaking out against them and without taking some overt steps to correct the situation. Blame must also be leveled at all arbitrators who allow to go uncriticized, and apparently unnoticed by them, those minor but repeated breaches of order, which never quite amount to a *complete* breakdown of the proceedings, but which do, when viewed as

integral parts of the whole proceeding, make that proceeding much less than orderly and proper.

Each hearing falling into such a pattern forms one more link in the chain of evidence now being assembled by those who contend, and are attempting to prove, that since arbitrators are not entitled to any respect and, therefore, cannot be relied upon, the arbitration process should be abandoned as unworkable. There is no doubt in my mind that hearings which fall into this pattern are strong evidence to support their case.

What respect can be given to, or reliance placed upon, an arbitrator who in the conduct of a hearing, and without more than just token attempts at reprimand, allows individuals in the room to yell out and supply answers to, or attempt to contradict, witnesses who are on the stand being examined; who allows anyone in the room to speak out whenever there is any issue which they might think important; who loses such control over the hearing that more time is spent by the parties in calling names and hurling accusations than is spent in discussing the merits of the grievance; who permits representatives of either side to engage in diatribes against the other party under guise of presentation of the case; or who so completely ignores such considerations as burden of proof and relevancy that almost any testimony on any subject is admissible "for what it's worth."

It is no secret that some representatives of parties to arbitration, be they attorneys or otherwise, have adopted as a standard tactic in the presentation of their case the so-called "shotgun method." Under this method they will attempt to cram the record full of as much verbiage as possible, with the hope that somewhere in the great glob of testimony there might just be something on which to "hang their hat." Arbitrators who permit this tactic to continue do no service either to the parties or to the arbitration process.

Nor is it any secret that certain representatives, be they attorneys or not, have developed to a fine art the tactic of intimidation—intimidation of witnesses; intimidation of representatives of the other side; and intimidation of arbitrators. Oftentimes this is done by loud talk, vile language, and accusations. Those individuals who engage in this tactic remind me of the advice which

was given to his class by a law professor. He said to his class, "If you have the *facts* on your side, hammer them in as hard as you can to the jury, and if you have the *law* on your side, hammer it in as hard as you can to the judge." "And if you have neither the facts *nor* the law on your side?" asked one student. The professor thought for a moment and then answered, "Then hammer as hard as you can on the table."

Whether such a tactic is effective in winning cases or not is really unimportant. What is important is how, when allowed to go unchallenged, such conduct taints the proceedings in the eyes of those who are observing. Nor is it any answer to say that it is only the result or final decision that really counts, and that one of the most important functions of the grievance procedure is its value as a safety valve for the tensions that have been built up in the collective bargaining relationship. These same arguments can be used to support lynching. Certainly, more than one lynch mob must have reached the correct result—punishment of the guilty man. Nor is there any doubt in my mind that those involved in the lynching got whatever tension was bothering them out of their system. Surely, this is not enough. Especially is this true where there is no impairment in reaching the correct result if the proceeding is conducted in an orderly and proper fashion. I doubt very much whether the full and complete airing of the problem, under a system of rules which requires the exercise of minimum propriety and order, would not serve equally as well as a "safety valve" to built-up tension.

Intimidation of arbitrators often takes the form of a threat of a "blackball." Sometimes such threats are veiled or even unspoken except by looks or gestures. Oftentimes, however, they are open and blatant. For an arbitrator to allow such threats to go unanswered or ignored is for him to lose the respect of those who see them being made. Again, this is true whether these threats have any bearing on the ultimate decision reached. Perhaps one method of overcoming this threat of blackball, and for that matter as a method in preventing many of the abuses I have mentioned, would be for arbitrators as a group to have their own blackball list for those who engage in such improper conduct; and no arbitrator would sit on a case where a party was being represented by someone on that list.

Everything that I have said against those proceedings which have little if any resemblance to "orderly" ones does not mean that I advocate perfectly formal arbitration hearings with all the refinements existing in the courts of law. Many of these refinements would be really incompatible with the *voluntary* nature of arbitration. Although, parenthetically, I would point out that this concept of the "voluntary nature" of arbitration should not be used as a catchall defense to excuse the absence of any and all rules. Such requirements as a transcript (perhaps to be supplied by a company under circumstances where the union could show it is not financially able to pay for it), and the individual swearing-in of witnesses (this group swearing-in has about as much psychological impact on witnesses who might be inclined to lie as requiring that they cross their hearts and hope to die—probably even less) would seem advisable for the proper conduct of these proceedings. On the other hand, such evidentiary rules as the hearsay exclusion and the prohibition against the leading of witnesses should not be strictly enforced.

What I propose for arbitration hearings is the concept of "formal informality." Under this concept the hearing is conducted by the arbitrator in an atmosphere of propriety and under a system of rules and regulations, which, while not excessively strict, do insure at least minimal standards of decorum.

In this regard I urge the National Academy, not only to propose such a system of rules and regulations, but also to condemn those arbitrators who conduct their hearings as an exercise in "organized disorder" which make the proverbial Chinese firedrill look like a Marine Corps precision drill team.

CHAIRMAN JAFFEE: Thank you, Robert. I had not met until today the next panelist—Wayne Horvitz, Vice President of the Matson Lines, San Francisco. I do know, however, that he is the son of Aaron Horvitz, Past President of the Academy. When the son concludes his remarks, we should know whether the father is an old block off the young chip.

WAYNE L. HORVITZ: Thank you very much, members of the Academy. This is not the first time I have been introduced as Aaron Horvitz's son, and I hope it will not be the last.

The title of this session seems to me to be, at best, misleading. A literal reading of the subject selected for this discussion might lead a poor practitioner to ask plaintively: "If the arbitrators don't know how to prevent a hearing from becoming a shambles, how in heaven's name can we tell them?"

Although there has been no exchange of ideas between myself and other members of the panel to date (and there may be none here today), it seems clear to me that some members of the Academy are concerned about the conduct of hearings. The day is long past in most industries (not entirely in mine) when the individual arbitrator has to worry about the hearing room becoming a forum for personal vilification or political rallies (on either side). Parenthetically, I recall the "World's Greatest Arbitrator," my father, once telling me of a hearing which, although not marred by small arms fire, was disturbed by both parties appearing openly prepared for such a possibility. The arbitrator in this case, armed only with his wits and a small pencil stub for writing opinions, waved his cigar and his arms at the parties and said: "Aach, who worries about guns?"

I recall also the U.E. conga line outside the hearing room, chanting in unison its collective opinion of the matter before the arbitrator, and reminding that gentleman of the fate in store for the management if by some wild stretch of the imagination he should find for the company.

I am told this kind of occurrence has all but disappeared from the effete East. Vestigial elements survive in the Indian Territory west of the Rockies.

In the "far off land of Aloha," during a recent strenuous set of hearings, the arbitrator had the unenviable task of establishing work rules based on the conflicting testimony of the parties. Much heat was generated in the hearing room. At one critical point, the international officer of the union stated that if the arbitrator's line of questioning and comment implied what *he*, the representative, thought it did, the results would bring the State of Hawaii to a grinding halt. No one, he had already concluded, could or would work under such conditions.

Keeping in mind the necessity for orderly procedures, states-

manlike handling of recalcitrant advocates, and the general need for professional dignity, the arbitrator fixed the speaker with a steely eye and said: "Mr. 'X,' what you know about longshoring you could put in a can of tomatoes." In this dignified and unbiased atmosphere the hearings were eventually concluded.

All this is spice, but the people here today, we hope, are interested in order, in dignity, and the fair treatment of all parties. Most arbitrators, it seems to me, get this result. Then what, if anything, about this subject requires a panel discussion? As a member of the audience, I might say, nothing. As a member of the panel, I feel compelled to take a look.

It seems to me that arbitrators may be concerned about: (1) the kind of hearing they think the parties want; and/or (2) the kind that will produce the result the arbitrator feels bound to reach, i.e. a full and fair hearing leading to a supportable and workable conclusion for the parties. (I am thinking here more of grievance arbitration than contract terms.) The parties may not be thinking of these problems, but the arbitrator is, we hope. His dilemma, therefore, is twofold. Let us say he has a predisposition for informality, by temperament or belief, but his clients prefer formality; or he may be faced with an insistent representative of one side who argues for procedure A, while his counterpart across the table pleads with the arbitrator for procedure B. In this atmosphere, the arbitrator presumably is arguing with himself. About what? About what he thinks the parties ought to want if they weren't all idiots. The ultimate solution to *this* particular dilemma is best illustrated by the ever present joust on the admissability of some slip of evidence. The arbitrator looks at the ceiling with a slightly pained but thoughtful expression, and after a dutiful pause for deliberation, says (The chorus may now join in): "I'll take it for what it's worth." This classic retreat into the limbo, where such arguments obviously belong, has all the ritual of a commedia del arte performance as it is repeated over and over again in hearing after hearing.

That point, perhaps, is the one I want to make in the initial time allotted to me on this panel. I hate to defend arbitrators, but when the parties ask the arbitrator to decide the kind of question alluded to above, they are, in a sense, asking him to set the

form and style of the hearing for them, an assignment which he naturally ducks. The parties, in other words, for a variety of reasons are asking the arbitrator to tell them how to act, or more cynically perhaps, to protect their interest in form by embracing it or rejecting it—either decision has its uses.

I do not mean to say that the style will always be the same. The parties' needs as a part of the total process will determine that, and the parties should let the arbitrator know how they wish to be served—not by intricate argument on technical points, but by *overall conduct.*

On this panel, I must apparently choose a position. As the son of a lawyer turned arbitrator (at the time of this defection he was so ashamed he told my grandmother he was going to play piano in a house of ill fame), and as a management representative for some years, if I must choose, I will, and it would be for intelligent informality to which all participants could contribute. But I don't really like to make the choice. I may have a chance to elaborate on that point during the discussion.

In the meantime, I would continue to argue that the parties should embrace the arbitrator in *their* process (it might not be mine and mine might not be yours), and out of this integration movement will come a solution to the problem of avoiding a shambles—if one is needed.

One final word, if I may, to the beleaguered parties. Give no business to Aaron Horvitz—he now refuses to will his case load to Tom Knowlton, thereby reneging on an historic promise, and he has eliminated me from his will. This action forecloses my inheriting his sizable estate and condemns me to that permanent limbo to which all management practitioners are assigned by the Great Pumpkin in the Sky—a lifetime of failure at securing clear rulings on procedure from bewildered arbitrators!

CHAIRMAN JAFFEE: The final panelist who will address you is M. H. Goldstein, a famous Philadelphia Lawyer. When someone is referred to solely by his initials, he is a V.I.P. I have never heard "M. H." referred to other than as "M. H." He even signs his letters that way. Management representatives may sometimes call him by other names, but if they do, it hasn't been done in my presence.

I do want to tell one story about him, however, because it fits the subject of this program. Last week I was talking with an attorney for a large company in Philadelphia. He asked me who the panelists would be today and I told him. He then asked me what position M. H. would take. I said I wasn't sure but M. H. would probably favor informal hearings. The attorney snorted. He said that was not so. M. H. believed and practiced what the attorney called the "M. H. approach," which is to be quite informal when M. H. presents his case, but to be quite formal and restrictive when the company begins putting in its case.

M. H. GOLDSTEIN: Mr. Chairman, members of the panel, members of the Academy, and visitors: I have to ask your indulgence, since you won't receive a formal talk from me. I have just come from and shall shortly return to a shambles that has been going on all week, so that I haven't had an opportunity to write a paper.

I do know one thing, that the title under which this panel was to operate, as it was originally told me, has been altered. The title, I was told originally, would be: "The Hearing—Shall It Be Formal or a Shambles?"

I don't know that these are the two sole and necessary alternatives. Informality need not convert the hearing into a shambles, nor will formality assure that it won't be converted into a shambles. I think I detected in what all three of my fellow panelists here said the note that does determine whether or not the hearing, or the proceedings as a whole, will be a shambles—namely, the character of the arbitrator and his ability to imbue the parties with a view of the proceedings, that he, as a member of your Academy, should, and so far as my experience has led me to form an opinion, almost always does have.

I am quite certain that the conduct we would expect of a Stuffed Shirt or a Starched Mind is not the pre-condition for avoiding a shambles at the hearing. Nor is even a decorous and orderly hearing a guarantee that the proceedings, let alone the hearing, will not be a shambles. I have a couple of examples to illustrate this point.

The question of whether formality or informality is preferable raises a number of subsidiary questions, it seems to me. The first

question is: To what phase of the hearing or the proceeding are you referring when you speak of formality or informality? Are you referring to the demeanor of the parties and the witnesses? Well, Mr. Kleeb covered that very well, although he did give hypothetical situations which I have never run into.

Another phase of the question of whether formality or informality is preferable may be addressed to the question of procedure. You have heard that too. What shall be the relationship between the arbitrator and the parties? What shall be the order of presentation of each side of the case. What shall be the method of presenting each side's case? What about the oral arguments? Shall they be required, and, if so, under what rule? What about the briefing and rules covering it?

Another subsidiary question, as to what we are talking about when we speak of the formality or informality of a hearing appears to me to be, what is the meaning of formal and informal?

I think that in this area what is sauce for the goose may not be sauce for the gander. What may be informality to a timid and tremulous goose may be the height of formality for an ardent and impatient gander.

I would like to talk for a few minutes on the application of our query to the procedural phases of the hearing and of the proceedings as a whole. It appears to me that I will be adding very little to what our other panelists have said if I tell you that a good deal of freedom ought to be given to the arbitrator and that he ought to exercise it in conducting the hearing. If he wants to try to mediate, he ought to have the right to do so and, lawyer or no lawyer, there should be no vocal protest about it. You can discourage him without vocal protest; you can encourage him without vocal approbation. He ought to be encouraged to meet separately with the parties or their representatives to probe whether the extent of the hearing can be curtailed, whether the issues to be debated can be minimized, and to take other steps that will help in expediting the procedure and in getting both a mode of procedure and a result that will serve the purposes for which arbitration is intended.

With respect to the order of presentation and the method of

presentation, a great deal of freedom, I think, should be accorded to the arbitrator. As a man of common sense, he will, of course, guide himself largely by the type of case that is before him, by the attitudes of the parties, by the needs of the situation.

I attended, as a representative of one of the parties, a hearing recently in Philadelphia, in which your program committee chairman served as the arbitrator. In another situation, perhaps before another arbitrator, I would have raised the roof over what he did. He held separate meetings with the parties, a joint meeting, a pre-trial conference. Then he announced that on a very major issue he would receive no testimony or evidence, but would give the representative of each party 25 minutes to state the facts. And he got away with it, and got away with it, I submit, to the best interests of all concerned, although there were about three or four parties involved in the case.

Now that might not have worked out either with me or with the representatives of the other parties had we not held the preliminary meeting, had we had an arbitrator other than Lew Gill, had we had a different type of situation. But he did have the freedom to say, "This is what I am going to do," and the parties sensibly, having appraised all the factors I have mentioned, let him get away with it, much to the benefit of all concerned.

On the question of the method of presentation of testimony or evidence and the acceptability of it, you run again into the problem of what shall be the arbitrator's role. It seems to me that here again rigidity on either side, whether you want to call it formality or informality, does not best serve the purposes of arbitration. A steady practice, a rigidly adhered-to practice of informality can become as much of a chain of formality as the contrary practice rigidly adhered to.

I recall one case in which an arbitrator, who shall this time remain nameless and unidentified, overruled my persistent objections—because it was the company that was presenting the case—to the admission of certain testimony. He followed the rule of, "Well, let's hear it for what it is worth." The result was 18 days of hearing, at the end of which the parties were rewarded with an opinion in which the testimony and the documentary evidence offered during 16 days was rejected by the arbitrator as inadmis-

sible and irrelevant. Now, I submit to you that although the 18 days of hearing were among the most orderly and decorous that I have attended, they actually were a shambles, so far as the proceedings as a whole were concerned.

The solution, I think, lies, as Mr. Horvitz has indicated and Mr. Kampf has indicated, in the common sense of the arbitrator, in his willingness and ability to look at the situation, appraise it from every angle, and then try to fulfill the purpose of arbitration, which is not just to let people, as Bob Kleeb thinks is the notion of some arbitrators, get rid of their tensions, but to get rid of the problem in a fashion which will make both sides believe that rapt attention has been paid to their problems, that great devotion has been shown to their best and legitimate interests, and that justice has been done.

CHAIRMAN JAFFEE: Thank you, M. H. As chairman, it seemed to me that the burden of developing the present subject should be borne by the panelists. But I was told I should also make a formal presentation even though, after the four panelists finished theirs, there might be little left for me to say. I shall, therefore, review the situation somewhat and try to fill in any interstices.

As I indicated at the outset, a hearing need not degenerate into a free-for-all to become a shambles. If it does become, or threatens to become a free-for-all, the basic remedy at that point is an arbitrator who should know how and when to apply courage. But I would rather discuss the shambles that are created in less startling ways, in ways that are far more common.

Much has been said as to whether hearings should be formal or informal. I don't think the distinction too important, for it does not reach to the core of the problem. If by formality we mean the formality of a court trial, especially a rigid adherence to the "rules of evidence," then I doubt that any arbitrators go quite that far. I should suppose that formality as it should be understood here essentially means opening statements, the presentation of evidence, the cross-examination of witnesses and rebuttals, followed by oral argument, and sometimes by briefs. The hearing remains formal even if the rules of evidence prevailing in courts are not rigidly adhered to.

Now, there's nothing necessarily wrong with this approach. And this, or something like it, is, I suppose, the way most arbitration hearings are conducted at least in ad hoc cases.

But cases are presented, in whole or in part, in ways less formal than this, and quite successfully so. Let me illustrate with the procedure followed by a company and union who have had most satisfactory relations with each other for a quarter of a century. I inherited the role of permanent arbitrator for these parties from Bill Simkin when Bill left to become head of the Federal Mediation and Conciliation Service. An indication of how these parties present their cases became evident in the first case I heard. The union representative began with what I assumed was an opening statement of what he intended to show and his basic contentions. The company representative responded with an opening statement. The union representative then began his reply with the words, "The evidence thus far shows—." I stopped him. I said that according to the method of presentation with which I was most familiar, I could not consider that *any* evidence had thus far been received. The union representative replied, "Mr. Jaffee, we don't do business that way. When I make an opening statement and tell what I *understand* the facts to be, you may take what I say *as* fact unless it is contradicted by the other side. Likewise, if the other side makes statements as to fact, and I don't contradict them, you can take what *they* say as fact." The company representative agreed.

As I have said, the relations between these parties are most satisfactory. They believe in the honesty of each other. I was quite delighted to see the best proof of this following the recess after the opening statements. For when the recess was over, the union representative said that he wanted to correct one statement of purported fact he had made earlier. He made the correction. It is significant that the earlier statement had not been challenged and thus, under the procedure these parties followed, I would have been quite justified in accepting its validity. The point here is that the correction hurt the union's case somewhat, but it was made despite the lack of earlier challenge. In short, these parties do not treat arbitration hearings as a game, but as a means of arriving at the truth so that the correct result can be more readily reached. Of course, to the extent that the parties disagree on the

facts, they present evidence, though somewhat informally. But after hearing some 70 grievances for these parties, I am amazed that there has been so little factual dispute.

Perhaps this type of informality is extreme. I am not sure. I am sure, however, that for these parties it works very well; this approach may not at all be feasible for other parties. Essentially, it is for the parties to indicate, one way or another, which type of handling they prefer. Most arbitrators will be quite happy to accommodate them with either.

The nature of the issue may dictate somewhat the kind of hearing most appropriate. A factual dispute may lend itself more readily to a more formal approach, especially one that may have emotional overtones, a discharge case, for example. A pure dispute over contract interpretation may lend itself as readily to an informal approach as to a formal one.

In my view, the most important factor which tends to make a shambles of the hearing is poor preparation. The kind of hearing that results depends most on how well, or how poorly, the case has been prepared. And if it is well prepared it is generally well presented, for the qualities which make one are, in arbitration, in the main the same qualities which make for the other.

Poor presentation may result in putting in too little or too much evidence or putting in sloppily what is put in. The preparation, and especially the presentation, has to be organized to fit a theme, premise, or argument. Parties should remember the 5 W's—*when* the incident happened, *where* it happened, *who* was present, *what* was said or done, sometimes *why,* and generally in that order.

As far as the "rules of evidence" are concerned, they are not without importance, but they are not Holy Writ. Any competent arbitrator should be able to separate what is legitimately persuasive from what is not or should not be. It must be remembered that the rules of exclusion—which make up the main body of the rules of evidence—were designed essentially so that the jury would be less likely to be misled by evidence that is incompetent, irrelevant, or immaterial. But an arbitrator is not a jury, and even in court some of the rules are not in practice as restrictive as some parties think, especially in cases heard by a judge alone.

A common failing among non-lawyer representatives, especially union representatives, is lack of knowledge of how to frame questions properly. It is not uncommon for some of them to mix their own purported testimony with the questions, or arguing with the witness. Keeping the questions short generally serves to overcome this fault.

A more common deficiency is interrupting the opponent too frequently, resulting occasionally in what sounds like a free-for-all. The cardinal rule here is, "One at a time, gentlemen."

Why do we have hearings that result in a shambles? Sometimes it is ignorance, just plain laziness, claimed lack of time or money, or occasionally pure cussedness.

What is the remedy? It is usually a combination of things. For some it is learning how to prepare and to present a case. For others, who know how to prepare a case, it consists in doing just that—preparing it. I am sometimes told by representatives of the parties that they don't have enough time to do so, or there is not enough money available for that purpose—to which I can only respond that this is a perfect example of being penny-wise and pound-foolish. For losing a case that should have been won, because it wasn't prepared or presented properly, can result in loss of more time and more money in the overall relationship between the parties.

At least an outline of what a party intends to present should be written up in advance and an order of presentation set out in it. To avoid confusion, the arbitrator should be given a list of names, abbreviations, and technical terms that may come up at the hearing, with a copy for the reporter if one is used. There should be a greater use of exhibits than is presently the case, if only to inhibit the uncertainties of oral testimony.

There is one overall guiding principle for the parties. Their job is to convince the arbitrator, no one else. They can do so best by presenting simply and logically the fruits of a well-prepared case, and calmly so. For one is less convincing when he speaks constantly in italics, or bickers with his opponent, or fails to keep his eyes on the ball.

The arbitrator is not without considerable responsibility in the

conduct of hearings. First and foremost, he has to know how to maintain control and how to apply this knowledge. If the hearing is to be informal, it should be a controlled informality, although arbitrators vary in their ability to control these things. If the parties are too formal, he can loosen them up. If they get too informal, he can tighten them up, as by discouraging the use of too many spokesmen.

As near the beginning of the hearing as possible, or even later if necessary, it is generally wise for him to try to narrow the area of disagreement. A judicious question or two, timed properly, will often work wonders.

He should not let evidence in "for what it is worth." Though not bound by the rules of evidence, he must recognize that there are limits to the receipt of irrelevancies.

Even obstreperous representatives or attorneys can, properly handled, be quieted down in the right way and at the right time. The arbitrator may quietly but firmly explain that the victor is not necessarily the one with the highest score on the decibel scale, and that light, not heat, is more conducive to the right result. The arbitrator has to know when to use sugar, and when to apply the vinegar. Some arbitrators are too abrasive, or overly impatient, or butt in too much or too soon.

If the arbitrator is to retain control of the hearing, he must set its tone fairly quickly. If he does so properly, he will create not only respect for him but for the process itself. And if he sets the right tone, the parties are more likely to follow it. While the proper conduct of a hearing is initially the responsibility of the parties, the arbitrator cannot lie back supinely and blame the parties for everything that goes wrong. The overall responsibility is just as much his as theirs. He can be flexible, yet firm. His guiding principle must be a full, fair, and orderly hearing, to the end that the truth will emerge. He will be more likely to achieve consummation devoutly to be wished if he has a good measure of confidence in himself and, more important, in the integrity and worth of the arbitration process—and this whether he be an extrovert, an introvert, or an ambivert.

We started late, but I think we ought now to switch to the

informal. In this part of the program, which can quite inaccurately be called a round table, I suggest to the panelists that they fire some questions at one another, and if you don't, I shall have to do it. We will start out this way, but if we find we are lagging, we will invite some questions from the audience. Do any of the panelists have any questions to ask of one another, or generally?

MR. KLEEB: I would like to ask M. H. this question: You referred to mediation by arbitrators. Do you mean that the arbitrator should, on his own, mediate the grievance that is before him, if the parties don't ask him to?

MR. GOLDSTEIN: I have no objection to that at all. I am in favor of it. The parties, as you know, frequently approach the arbitration proceedings with minds and emotions so stiffly set as to blind them to what the realities are, so that it becomes to them a *cause celebre,* without any real reason or substance for deeming it so.

Often an intramural as well as a political problem is also involved. If the arbitrator sees he has a situation that can be resolved by the parties themselves, an effort, when not too strongly resisted by both parties, to get them together, to see the common sense of the situation, and to see the common sense of it in perspective, is a very welcome and wholesome thing in the arbitration process. I have never overcome the feeling that the arbitration process is the most highly civilized way of handling disputes between human beings. That being the case, when you have a human being whom you trust sufficiently to take your case to him, he should feel free to act as a person you do trust should act under the circumstances, namely, to bring you together if he can.

CHAIRMAN JAFFEE: I would like to comment on that myself.

I think that most arbitrators who are perfectly willing to act as mediators would not do it on their own. I think the more critical aspect is this: a good arbitrator can sometimes create an atmosphere where mediation is suggested to him. Sometimes it can be done somewhat deviously, but the actual formal request must come from the parties. I don't think arbitrators, certainly in an ad hoc setup, would want to step out on their own and mediate, unless it is some highly exceptional or unusual situation.

MR. GOLDSTEIN: I have seen it happen time and again. I have seen cases where the arbitrator will listen to the opening statements of the parties and say, "Look here, it seems to me both of you are risking a messy possibility of a decision that will hurt. Has that occurred to you?" I see nothing objectionable in that. I think it is perfectly proper and certainly helpful; the arbitrator shouldn't have to wait for a formal request. If the situation is a tight one, with much tension, he will use his common sense as to what is proper timing and put his question.

CHAIRMAN JAFFEE: That is right. The arbitrator asked a question. He was, therefore, creating a climate. I shall never forget a case I heard for a large concern in Pennsylvania, the first case I had with them. Within a half-hour it developed that it was not money that was concerned—about 90 cents was at stake—so I was certain that some principle was involved in the dispute. I listened and listened but couldn't find any principle. I finally could restrain myself no longer and I said, "Gentlemen, this hearing evidently involves 90 cents. I am willing to give you the money, but what is the principle in this case?" They looked at me with some surprise and said, "It is quite simple. The real issue here is whether the foreman was telling the truth on this particular occasion, or whether the employee was." I said, "In short, you want me to make a liar out of somebody for 90 cents?" So they looked at me with some surprise. I said, "Now, do you want to go out in the corridor and talk about it?" They went out and came back in about three minutes and said, "Well, we have gone this far. If you can write up a quick decision, we will go along with the company paying the 90 cents."

I dictated an award to the company's stenographer, called in from the other room, for which I didn't charge them. It went something like this: "The issue in this case essentially depended upon the validity or accuracy of the testimony between Foreman X and Employee Y. The parties have evidently misunderstood the situation. In order to maintain good labor relations the company has offered to pay the 90 cents involved, without prejudice or precedent."

WAYNE HORVITZ: May I comment on this? I think the real problem has been ignored. The real problem is the one that Mr.

Goldstein alluded to—the idea that the arbitrator will make an independent decision to turn into the role of mediator in a particular situation.

As a rule, certainly in my experience in management, if I want any mediation done, I will get it done in one or two ways: We have a procedure in the maritime industry under certain contracts where we have a role specifically for the arbitrator to play as a mediator. We can make it clear to him what, at that particular hearing, he may mediate if he wants to. It says so in the contract. We make it clear when we want him to act as a mediator, and when we want him to be an arbitrator.

It seems to me that this kind of buck-passing, which ends up in an arbitration hearing which we don't want to be an arbitration hearing, is ignoring the process. If you want mediation, get it, and if you want arbitration, use arbitration. But this open-door policy, it seems to me, leads always to the hope by the party who feels in the weaker position that, somehow, this guy will rescue him. I cannot embrace that.

MR. KAMPF: I would like to turn to another matter that alarms me somewhat—the apparent view that in some manner or to some degree an arbitration hearing is an exercise in futility, when the point is made that the important thing is not winning. From my point of view, if a group has a grievance, and, if after all due consideration, it is felt that the grievance is just and warranted and should be carried to the final and binding process that the parties have under the contract, I fail to see why winning is not the important thing, rather than decorum, dignity, formality, informality, or the use of vile language.

Would you care to comment on that Mr. Kleeb?

MR. KLEEB: Well, I agree with you, George, that decorum is not necessarily the important thing, nor is arbitration the forum for vile language. I think arbitration is a forum where people should present relevant facts and have an arbitrator decide the issue. I object very much to having arbitrators intruding themselves into grievances as mediators. I also object very much to arbitrators permitting parties to take over hearings.

I have been criticized by some arbitrators for calling an arbi-

tration proceeding an adversary proceeding. I think it is an adversary proceeding. Yes, it is the last step in the collective bargaining process, but I do not accept it in the collective bargaining concept. We are not bargaining; we are resolving grievances. If you don't have a forum in which to do it, let's get a forum in which to do it and do it properly.

MR. GOLDSTEIN: Something has bothered me for years. My unease arises from the professionalization of arbitration, both in having professional arbitrators and having lawyers like Bob and me step into these proceedings. There we are very much in danger —and I am just as prone to fall victim to that danger as any other fellow—we are very much in danger of converting the arbitration proceeding to the kind of thing that has become of the proceedings under what I still like to call the Wagner Act, although it is no longer the Wagner Act. That was an Act, the purpose of which was to settle certain disputes in such fashion that the untrained layman could have justice done, forgetting for the moment all the complaints about its being a one-sided Act and all the other recriminations and incriminations concerning the motivations that lay behind the Act and its administration. What has happened to it as the result of lawyers intruding themselves into the proceedings of the National Labor Relations Board, and other professionals whose minds did get starched, is that today you have a labor relations code which cannot possibly be administered without the intervention of a lawyer at every stage of even the simplest case. And we are tending to do the same thing with arbitration.

I don't see why we are so scared of having an arbitrator seize upon the facts, the picture, the color, and the atmosphere of a situation as a basis for saying, "Let's try to settle this."

Bob and I would never dare say to a judge, "We don't want to go into your chambers to discuss a settlement," if the judge called us in. Why all this fear of the action of the arbitrator in attempting sensibly, where the circumstances seem to him to call for it, to mediate and settle the dispute without the necessity of going through the hearing, writing a decision, and having each lawyer send in a voluminous brief? The parties can readily reject the

effort if it is an unwise one, or if it is inappropriate in the particular situation. Why all of this fear of lack of rigid formalism?

WAYNE HORVITZ: I think he has things mixed up.

MR. GOLDSTEIN: I usually do, my opponents say.

WAYNE HORVITZ: I would agree with you about formality and informality; I think all our remarks would lead to that conclusion. I am talking about the kind of role you want in a collective bargaining relationship. I, too, think there are too many lawyers in labor relations. The point is, what do you want the process, not the lawyers, to do in arbitration? You are asking for one kind of terminal point in your grievance procedure by the use of the arbitration process. If you want mediation, do it some other way.

When I decide to take a case to arbitration, I assume all my efforts at settlement have been exhausted, and at that point—and I don't mean this in a very strict sense—I don't need anybody from the National Academy of Arbitrators to tell me that I have erred.

MR. GOLDSTEIN: There is nothing to prevent you from telling the arbitrator, when he attempts to mediate, to go to hell in his own way. I merely suggest that the arbitration proceeding need not be considered so rigorous an adversary proceeding that you cannot permit the same sort of human and flexible freedom to the parties and their judge as you would in a court of law.

MR. KLEEB: The difference between the two is that a judge is either elected or appointed for life, while an arbitrator is expendable—that makes a big difference.

MR. KAMPF: Except that I think there is a possible deviation from the extreme points of view here, and that is, if there is a relationship between the parties which has some sort of permanency to it, I don't think there is anything remiss about an arbitrator or a permanent umpire in a given situation suggesting on his own to the spokesman of the parties the possibility of mediation. Obviously, the parties themselves know how far they can go with their own principles in the matter.

WAYNE HORVITZ: That is a good point, and I suspect that in a

situation where you have umpireships, it is more likely to be acceptable.

MR. KAMPF: Except in an ad hoc arbitration, I see nothing wrong with an arbitrator suggesting it to the parties. My personal fear would be that if the arbitrator were suggesting this, I would get a feeling that he had a preconceived notion of what the decision was going to be, which would shorten the hearing. So those are the dangers in an ad hoc situation from the union's point of view of an arbitrator injecting himself without first consulting the parties. If there is mutual agreement, however, I see nothing wrong with it.

CHAIRMAN JAFFEE: Does anyone in the audience care to make any comment or ask any questions?

FREDERICK ANDERSON: I wonder if this could be handled as a labeling problem, particularly since there is such an interest in accurate labeling today. Some people, obviously, want arbitrators to make unsolicited efforts to mediate, and some do not. Perhaps the appointive agencies could be induced to put a line in the biographies of the arbitrators saying, "This arbitrator feels entitled to make unsolicited efforts to mediate," rather than having it come as a surprise to the parties. If you are of Mr. Kleeb's view, you don't take him; if you are of Mr. Goldstein's view, that is your man.

CHAIRMAN JAFFEE: Saul Wallen's letterhead says "mediation and arbitration." But I am sure that Saul doesn't act in both capacities indiscriminately, at least unless he is asked to.

QUESTION: I would like to direct my question to Mr. Horvitz. I think he is the gentleman who spoke on this subject. He mentioned that in the grievance procedure the parties are willing to talk with each other, but, when they get into arbitration, each side wants to win come hell or high water. I want to win. Does Mr. Horvitz go into arbitration without the desire to win? In his remarks he inferred there was something wrong with such an intention.

WAYNE HORVITZ: I am sorry if I gave that inference. I bet I am just as sore a loser as you are.

However, I think that is a fair question, and, as I anticipated the possibility of somebody catching me on this, I read over again the whole section where I made that remark. I don't think I made it clear, perhaps I didn't think it through myself. I intended to indicate a distinction, which I think management and union practitioners alike make between the terminal point, the arbitration process, and the rest of the grievance procedure. Their attitude is different. It is as if the arbitration process was not only the end of the line, but, as in a court situation, "Well, if you don't see it my way, I'll see you in court." My point is that the whole attitude changes with respect to what they are then trying to do, and that is what I think leads to formality. Perhaps "winning" was a bad word, because obviously everyone who gets into the situation, as George Kampf reminded me, believes in the justice of his cause or presumably he wouldn't end up there. I think sometimes parties get into arbitration because somebody wants to be rescued. This kind of politics ignores the process.

If there is something you can settle on the way through the grievance procedure, settle it, and if you have to go to arbitration, go in with the same kind of attitude about what you hope to achieve in the end, and not simply pulling out all the stops in order to "win."

CHAIRMAN JAFFEE: Up to about a year ago I was wearing two hats, in that I was acting as counsel also—I think I have appeared as counsel before probably 40 or 50 members of this Academy as arbitrators who were arbitrating. I don't mean by that, by any means, to say that those who are registered at this particular session did not handle the hearings properly; those who did not didn't register at this session. But it is amazing what a different feeling you get when you are acting as counsel. I suppose, like myself, you have won some cases that even today you feel you shouldn't have won, and lost some that you feel you shouldn't have lost. I got out of that situation and became an arbitrator.

HERBERT YORK: Despite all Mr. Goldstein said, I find it difficult to understand why he should assume that the parties want mediation. I am sure if the parties wanted mediation, they would have provided for it in the contract or would have agreed mutually to do it. Evidently he must have had good experience for his own clients, or he wouldn't say that.

MR. GOLDSTEIN: If I may, I would like to say that very few cases in which I have appeared as counsel have been mediated. I simply made the "pitch" I did make because I am hopeful we can restore to the arbitration process some diminution, some lessening of the adversary feeling that now characterizes it. There is too much rigidity about it. We take positions, and in effect say, "My side is right, and the only thing I'll be satisfied with is if the other side is pilloried with a decision which says it is wrong."

I see no reason for taking that attitude in the arbitration process. I think the arbitration process, when the issues are such that they cannot be accommodated, should go on to its finality, to a decision.

But I also believe that an attempt should continue at every stage of the game, even during the arbitration stage, to be flexible and to be amenable to consideration of what are the real factors involved, not dominated by the spirit of "I want to win."

Of course, I am dismayed when an arbitrator decides against me in a case in which I feel I should have prevailed, but the world really won't fall apart if I don't, so I am not concerned that an arbitrator tries to be a decent guy.

I do resent, Mr. Horvitz, an arbitrator who is simply trying to pass the buck and calls us up after a hearing, saying, "This is a devil of a case. Why don't you guys get together?" I resent that. But I see no reason for being fearful of the efforts of a decent civilized human being turning to the parties, with more or less tact, depending on how sensitive he is, and trying to get them to get together, even though they have written pre-arbitration statements, and even though they have gone through all the agonies of preparation that Sam Jaffee suggested.

CHAIRMAN JAFFEE: Unless there are some further questions, gentlemen, I think this might be an appropriate place to stop. I want to thank the panelists and I also want to thank the audience for listening.