CHAPTER V

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

WORKSHOP ON CHICAGO TRIPARTITE COMMITTEE REPORT*

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CHAIRMAN ELSON: I am Alex Elson, one of the co-chairmen of this panel.

At the outset I would like to acknowledge, on behalf of myself and president-elect Bert Luskin, our gratitude for the work done by the labor and management members of this panel. They have given long hours to the work, they have shown the utmost co-operation and interest, and both of us are grateful to them.

I would like at this point to introduce them to you. Lee Burkey is a member of the firm of Asher, Greenfield, Gubbins & Segal, one of the most distinguished firms in Chicago representing labor unions. Stuart Bernstein, of Mayer, Friedlich, Spiess, Tierney, Brown & Platt, is one of our distinguished management attorneys. Burton Foster is an International Representative of the Agricultural Implement Department of the UAW. And Phil Carter, of Seyfarth, Shaw, Fairweather & Geraldson, comes also from a firm

* This chapter is an edited version of the transcript of a workshop or informal discussion on Problems of Proof in the Arbitration Process. The basis for the discussion was the Report of the Chicago Tripartite Committee (Chapter IV). Members of the Chicago Tripartite Committee, with Alex Elson as chairman, served as panel members to lead the discussion and to act as resource personnel. This workshop was one of four that were held simultaneously. The audience consisted of Academy members and their guests.

which is distinguished in its representation of management. And, of course, you all know our President-Elect, Bert Luskin.

Our report attempts to summarize some of the discussions and conclusions reached after some 15 hours of meetings. We felt, even after we had spent this amount of time, that we had only skimmed the surface of the subject, and what we present is not intended in any way to be a definitive statement of the problems involved; it is instead, at most, a general introduction.

We achieved a considerable amount of consensus, much more, in fact, than we anticipated. There were relatively few points of disagreement. We agreed on a basic approach to this matter which I will summarize briefly. We believe, *first,* that it is unwise at this stage of the development of the arbitration process—perhaps it will be unwise at any stage—to attempt to prescribe fixed, set rules, or a Code of Evidence. *Second,* we believe that the hearing process should be maintained as flexible as possible and that the process should be adapted and molded to meet the needs of the parties. Those needs vary considerably from industry to industry and within industries from plant to plant. *Finally,* we believe that while an over-structured procedure would be a disservice, there is a need for the arbitrator to keep control of the proceedings, to focus on development of facts, to discourage diffusion, and to insure due process.

Now, as is apparent from our report, we do not, as to many of the rules of evidence, recommend strict adherence. Yet we believe that it is fundamental that the arbitrator be familiar with and understand the rules of evidence. Some of the rules frequently referred to, such as the hearsay rule, have been severely criticized. Nevertheless, we agree with the general purpose of the rules of evidence, i.e., to confine the evidence, to remove confusion, irrelevancy, and manufactured facts.

We believe also that a knowledge of the rules of evidence is necessary to cope with objections which are often raised during hearings. And I should say that such objections are made not only by lawyer advocates, but by laymen representatives as well.

Now, insofar as this workshop discussion is concerned, it is one of four workshops taking place simultaneously. The Academy, the

arbitrators here, conceive it our responsibility to work together with the creators of arbitration, labor and management, to identify and attempt to find solutions for problems which do concern the parties, and to do everything in our power to strengthen the institution of arbitration. This is particularly necessary at this time, for even though arbitration has become an important, established institution, criticism of the process is increasing, there is pressure for formalization as a result of Supreme Court decisions, and demand for legislation is developing. I refer to the enactment of legislation in some states such as California, where the Code of Evidence has been recently revised.

Of necessity, our discussion today, as was also true of our report, will have to skim the surface. Time will not permit any explanation of any problem in depth. Our primary objective today is to get your opinions on whether there are problems of proof, to identify those problems, and to probe the areas of agreement and disagreement on the conduct of arbitration hearings.

We have approximately two hours this morning. We have tried to work out a procedure which will give those present the maximum amount of participation.

We assume that there may be some members of this audience who have not read the report. We don't intend to read it now. What we have done is to divide the report into five parts. We have asked each of the panel members to assume responsibility for summarizing briefly certain positions taken by the panel and the reasons for them. At the conclusion of each summary we will invite discussion.

We have attempted to organize the material in such a way that the rules which are relevant and which belong together will be discussed together. I am going to have to be a martinet in running this program because I want to be certain that we cover sufficient ground so that we can really find out what the problems are. In addition, I want to be certain that everyone here gets the opportunity to participate and that no one monopolizes the discussion.

I am going first to call upon Philip Carter to discuss the portions of the report having to do with the exclusionary rules—

hearsay rule, rules on relevance and materiality, the best evidence rule, the question of opinion evidence, and circumstantial evidence. That's quite a lot of ground to cover, and I have suggested to Phil that if he feels at any point he wants to stop and open up the matter for discussion, he can do so. Mr. Carter?

MR. CARTER: Let me say first of all that, as Mr. Elson indicated, there was considerable consensus arrived at in the preparation of this report. On reflection, however, and upon reading the report, it is a little more liberal than I anticipated it might be at the outset, and I think this is somewhat attributable to the makeup of the panel.

The two arbitrators on the panel are arbitrators with whom the other panel members have worked over a number of years, and in whom we have a certain degree of confidence. The arbitrators, I believe, feel the same way about the advocates of both labor and management that met with them. As a result of this, some of the things that you may find in the report should be tempered by this background information; that is, we had a group of people working together who had worked together before, and who had confidence in each other. As a result, some of the statements may, to certain management representatives, appear very liberal. I believe that in every instance we must consider the arbitrator we are dealing with, the particular client we are representing, and the relationship which exists between the company and the union involved before we determine exactly what our posture might be with respect to a certain rule of evidence and how we would like to proceed in a particular arbitration case.

With respect to the so-called exclusionary rules, we recognized the fact that these rules have been built up over many hundreds of years of trial testing, and that they are intended to provide reliable evidence with respect to matters in dispute. Nevertheless, it was the Committee's position, in discussing these rules, that in some instances the technical adherence to the rule tended to obstruct getting to the truth with respect to the facts in dispute, and in those instances where it might have that effect, we were of the opinion that it might be better to err in the direction of allowing the evidence to come into the record and then cautioning with respect to the weight to be given to it. It seems to us, therefore,

that under these circumstances, it may be best not to take the position that merely because certain evidence falls within one of the exclusionary rules, that it should, *per se,* be inadmissible.

One of the exceptions to the hearsay rule that we were asked to consider was the so-called *res gestae* rule, and we find no reason why things that form a part, a verbal part of a contract, should not be admitted in arbitration, just as they would be in any legal proceeding. We had no difficulty with respect to this exception to the exclusionary rules. If such exceptions are valid exceptions with respect to any type of litigation, they certainly ought to be valid in the field of arbitration.

When we get to the question of relevancy and materiality—and you will find that there is a rather broad statement in our report as to the degree to which things should be admitted—I think we come into conflict between the idea of the full hearing, and the idea of allowing so much to come into the record that the arbitrator may be misled, or that he may find himself inadvertently relying upon something which was entirely irrelevant or immaterial to the issue. Because the irrelevant or immaterial material was admitted, the real issue may become clouded. I think that in each case the question of giving the parties a full hearing must be weighed against the dangers that may be inherent in allowing too much to come into the record.

With respect to the best evidence rule, our experience as panel members has been that the only real question that arises deals with the authenticity of documents. In our experience, we have found that photostatic copies have been readily accepted by both sides, and that there rarely exists a question with respect to the authenticity of a document that is being presented. There are, as you know, certain exceptions to the best evidence rule, and, of course, those exceptions should also be applicable in labor arbitration.

Insofar as opinion evidence is concerned, it seemed to us that the same rules ought to be applicable in labor arbitration as are normally applicable in any court proceeding with respect to the admissibility of opinion evidence. I am speaking first of all with respect to opinion evidence other than the so-called expert opinion evidence. An example of this kind of opinion evidence is where a

man's experience, his long period of operation of a machine tool, might place him in a position where he is capable of rendering an opinion as to how that machine tool would react with respect to certain types of material to be worked. It seemed to us that under those circumstances, that type of opinion evidence certainly ought to be admitted, particularly when it could be rebutted if his experience did not include work upon such material.

Now, I think that some of these things are certainly matters that people who are in the field of arbitration ought to be seriously considering and upon which they should be exchanging views. Thank you.

CHAIRMAN ELSON: We are now ready for discussion on this part of the report. Let me caution you in two respects. *First,* I would like to confine the discussion to the material covered by Mr. Carter. *Second,* it is important that you identify yourself when you rise to speak and, because this discussion is being recorded, you will have to use the microphone.

MR. PLONE: Albert Plone, Camden, New Jersey. I read with some interest an observation made in the report, and I am wondering if there is not an error. I would hate to leave the room with an understanding that "obviously an expert who testifies on the basis of what someone else told him, in other words on the basis of hearsay and not personal knowledge, is not entitled to have as much weight given to his testimony."

That flies in the face of one of our well known standards, that is, if you pose a hypothetical question which embodies all the facts, the expert's testimony is to be given as much weight as the fellow who happened to be on the scene.

CHAIRMAN ELSON: I don't think that was the intent of the language quoted. I think it really goes to whether or not we are talking about a real expert who has made an inquiry of his own and who has really taken into consideration all the evidence.

MR. PLONE: Assume, to follow up my point, that you have an incentive pay grievance that is going to arbitration. The employer's industrial engineer comes forth with his carefully evaluated study made on the shop floor, and the company refuses to permit your industrial engineer to make a similar study on behalf

of the union. How are you going to handle the relative worth of the conclusions of two experts where one is prohibited from becoming equally as well qualified? All he has is a hypothetical question at best from material supplied to him which is, in effect, hearsay.

CHAIRMAN ELSON: We will let Mr. Carter take that question.

MR. PLONE: May I pose the possible answer? Should the grievance, under the circumstances stated, not be allowed to move forward until the union's industrial engineer or his counterpart is permitted to go on the shop floor and make the examination?

MR. CARTER: I would, of course, say "no" to that question. I think the statement that is being discussed here has to do with a situation not where a person was supplied with factual information, not where he was supplied with statistics and data that could be analyzed by any expert, but has to do with a situation where the expert has been told that certain things existed, and he was relating an opinion based upon some information that had been supplied to him that was not factual, was not statistical, and could not be tested and tried.

I believe in the situation that you have posed, with respect to an incentive question, that if the man is supplied with all of the information, that two experts in the field of industrial engineering, working with the same figures and the same data, irrespective of whether they have ever viewed the operation, should come up with the same answer.

MR. PLONE: Unfortunately, as we all know, industrial engineering is about as uncertain as any of the so-called professions. I doubt whether you could get a sincere opinion from the union's engineer, unless he were in a position to evaluate for himself all of the factors which the industrial engineer employed by the company utilized.

CHAIRMAN ELSON: I think we are ready for another comment or question.

MR. ROBERTS: Ben Roberts, New York. I would like to go back to Mr. Carter's earlier comments on the liberality of the admission of evidence in arbitration proceedings, and specifically to subdivi-

sion "1.b" (Chapter IV, p. 91) in which he talked about the matter of relevancy and materiality. It appears to me that the Committee's Report is rather liberal; in fact, it seems to me that it is over generous to the point of permitting the content of the arbitration proceeding to almost equal in its breadth a grievance discussion in which there is admitted anything and everything, including the kitchen sink. We also find that there is a bit of bowing to the problem raised by talking about "discouraging evidence."

Aren't we being a little inconsistent here? On the one hand, we talk about letting in irrelevant and immaterial evidence because we want to have what you referred to as the full hearing—which I compare with a pertinent record—and, on the other hand, we talk about discouraging evidence. I think we ought to look very carefully at whether or not the word *discourage* doesn't really mean the same as ruling on materiality and relevancy. Except for words—semantics—isn't the arbitrator doing the same thing when, instead of ruling formally on a motion objecting, and saying "granted" or "denied," he says, "Now, Joe, you know you are going too far afield."

To me, it doesn't make any difference. It is a matter, as pointed out earlier, of the relationship between the parties and the manner in which they conduct their hearing, rather than in the substance of what you are doing.

This leads me to the real problem involved here, and that is the "for what it is worth" type of ruling, which I think is one of the major reasons for extended hearings and which in turn discourages arbitration. I realize the importance, for example, in a discharge case, of letting the grievant himself go into a good deal, because it is cathartic, as you refer to it. But in other matters, to permit irrelevant material to go into the record can cause great problems. Although the evidence is irrelevant in your mind, it may not be to the adversary who must meet it. He has no way of knowing what weight, if any, you are putting on it.

Secondly, in regard to the merit of the arguments for giving a full hearing, I often wonder whether or not arbitration gains more respect from the rank and file and from supervision if it doesn't resemble the grievance procedure. If the arbitrator doesn't make the parties stick to the facts, to material, relevant things, so that

it makes the parties think twice before going to arbitration, it will be impossible to discourage cases that have no merit and that may merely be based upon a good deal of heat and no facts.

CHAIRMAN ELSON: Mr. Roberts has raised a very important, very broad question, and one which I would like to have more comment on from the audience before I call upon the panel.

MR. LEVY: Bert Levy, Philadelphia. One comment in regard to Mr. Roberts' last remark on the question of materiality and relevancy. It seems to me that the difficulty in an arbitration hearing, one of the main difficulties in an arbitration hearing, is that when a piece of testimony or evidence is about to be introduced and an objection is made with regard to its materiality or its relevancy, there having been no formal pleadings filed, it is extremely difficult for an arbitrator in most cases to determine whether the testimony or evidence is relevant, or might be relevant and material.

Therefore, if the arbitrator denies the admission of certain evidence, the arbitrator and the parties are placed in a situation where a ruling has been made when—since the whole process is more informal than a court proceeding—it is difficult to be certain that the ruling is correct; but having been made, the ruling stands. In a court proceeding, if an incorrect ruling with regard to the admissibility or the exclusion of evidence is made, there are appellate procedures open to the parties where this error of the trial court can be remedied. There are no such procedures in arbitration.

CHAIRMAN ELSON: Any further comment along the same line? I am interested at this point in getting full discussion from you, because I think this is one of the basic questions in this area.

MR. MCGURY: John McGury, Chicago. I think a good point has been made, and I would imagine that the parties would prefer that a formal ruling be given on offered testimony rather than informal discouragement. I would appreciate hearing from some of the parties on that point.

MR. MOORE: G. J. Moore, Johns-Manville. I am going to take the management side, and I want to comment on Mr. Carter's remarks.

This report scares me a little. I would much prefer to have a technical ruling than to take the evidence for what it is worth. I say this because plant managers and superintendents are wary of arbitration; they are concerned because their decisions are at stake. Suppose the arbitrator accepts a piece of evidence—let's say it is opinion or it is hearsay—and later gives it no weight at all in reaching his decision. But then the case goes against the company —and this is the point of my concern—management officials don't know upon what evidence the arbitrator based his ruling or whether he considered the opinion or hearsay evidence.

I would say that we, as management, would much prefer to have a ruling that the evidence is either inadmissible or admissible, rather than "take it for what it is worth." This scares me, because I don't know what weight you are going to give it. I may have to belabor the point and try to discredit the evidence; this lengthens the hearings and breeds uncertainty. From my standpoint, at least, I would much rather see a ruling made at the time as to whether it is admissible.

CHAIRMAN ELSON: Let me say I don't believe the members of this panel endorse the idea of taking evidence "for what it is worth." I think what we had in mind is that the arbitrator should indicate what he thinks the weakness of the material is at the time it is received, so that there would be some indication to the parties why less weight would be attached to it.

Is that not correct? I am going to ask Bert to respond to this point because of his experience.

PRESIDENT-ELECT LUSKIN: I think all of us on this panel recognize the fears expressed by Ben Roberts and Mr. Moore. I don't see anything different in the expressions offered by Ben, Mr. Moore, or Bert Levy. I think they are all correct.

I think Bert Levy hit the nail right on the head when he said that at the outset of the hearing it is extremely difficult for the arbitrator to determine relevancy and materiality since he may not know what the issue is.

We don't know what the case is all about. The parties have lived with the case for months and possibly years. It takes from a few minutes to a half an hour or more for the arbitrator to ac-

quaint himself with what he has before him. Once he knows what the issue is, I think all of us on the panel would agree that at this point the arbitrator should rule on objections. He should not let the "kitchen sink" come in; he should not permit the issue to be widened and broadened to a point where the adversaries find themselves defending ghosts or bringing in side issues or ancillary issues that shouldn't properly be before him.

I think we are all unanimous on this panel that, having discovered the issue, having reached a point of understanding as to what the grievance is all about, we believe that the arbitrator should rule firmly on the admissibility of evidence. He should indicate to the parties very quickly on an objection whether it is hearsay, whether evidence offered is outside the scope of the issue, and whether the parties are attempting to broaden the issue. I think the secret, gentlemen, is in the question of timing. At what point does the arbitrator begin to assert his authority? And if the arbitrator doesn't assert authority, we are liable to wind up with a hearing that borders on anarchy.

I have no quarrel with Mr. Roberts, I have no quarrel with Mr. Moore, and I certainly agree with Bert Levy's view. So I don't think we are that far apart. I think what is happening here is that we are taking parts of specific problems and not relating them to the whole. But if you put it into one package, I think the greatest criticism I have heard of the arbitration process is that the arbitrator has refused to rule on objections and has allowed everything to come in.

I would completely agree with the expressions advanced by all three of the gentlemen who have spoken! This may sound like compromise, but it really isn't. I don't think you are that far apart.

CHAIRMAN ELSON: I believe at this point we will go to the next subject matter area. That doesn't mean we can't come back to this later, because we may want to do so if we have time for it.

I am now going to ask Burton Foster if he will discuss the portion of the report dealing with admissions and the issue of compromise.

MR. FOSTER: I have been asked to speak this morning about

an issue that certainly is not the complicated, legalistic one in the sense that some of the other issues are, but I feel that it is a very important one, and I will tell you why.

First of all—and I can say this without contradiction I am sure, because Bert Luskin, whom we use as an arbitrator in the agricultural implement industry, is well aware of it—for a number of years, we were using arbitration as a way of life. We arbitrated from 50 to 75 grievances a year, and we were constantly going to the referee. I believe this was due to the fact that we were not, in the pre-arbitration steps of the grievance procedure, really putting the facts on the table.

I am sure you have all heard the steward say, "I know what the issues are, but I ain't going to tell you." And the company, who says, "Well, let's not talk about it any further because we are giving our case away."

We were inspired, I think, by the "new look" in Harvester, which has had a lot of publicity, and because we in the Agricultural Implement Department of the UAW have always felt that any time we arbitrate a grievance, it is an exercise in failure; someone has failed, either the company, the union, or both sides. If we had done the job, we should have done; it would not have been necessary for us to call in a third party.

So we went to work at Allis-Chalmers—and I am sure that everyone knows that the relationship between Allis-Chalmers and the UAW has not been good—and in six of the locations we have not had to arbitrate a grievance for 19 months. Much the same result has been obtained at J. I. Case, again where relations between the union and management have not been good. We negotiated an arbitration provision into the contract, covering six local unions spread throughout the Middle West, for the first time two years ago. I am proud to say we have not had to arbitrate a case. We settle a few on the eve of arbitration, one just last week. I called Burt and said, "Mr. Luskin, we are going to have to go ahead with this case." After he had squeezed in a date for the hearing, I had to call him and say, "Forget about it; we settled it."

I think that we are able to do this, and certainly we have not reached a stage of perfection because the parties finally sat down and went to work. And it is more difficult to say to each other,

"Let's have a complete exchange of information," than to take the arbitration route.

We have adopted what we call a "dry-run procedure." Actually, what we do is arbitrate the case ourselves without an arbitrator. Often, as a result, the committee says, "Look, we don't have a good case," and we bail out. Or the company says, "There are a lot of facts on their side. Let's take another look at this thing and see if we can settle it."

So you then begin, of course, to compromise, and I think that it is generally agreed—I don't think we have any problem on this—that when you settle a grievance or make an offer of settlement without prejudice, certainly it should not be used against you if the matter does go to arbitration.

I am certain that the direct conflict in statements of fact that occur at times cause some problems for the referee. These conflicts in testimony can sometimes be explained away because of misunderstandings or certain things that may have taken place since the grievance was first processed. But some conflict is inevitable, and the referee must decide, to the best of his ability, which of these statements is correct.

Finally, there is the matter of the use of minutes. Unilateral minutes presented by either of the parties are certainly not as good as minutes that are accepted by both of the parties, or where a practice of correcting minutes made by the other party is followed.

Let me conclude by again saying that although this subject is not complicated, it is important. I don't believe there is any danger of putting the arbitrators out of business—I am sure we will have enough business for them—but I believe we have to take a new look at our relationships, to be frank with each other and sit down and discuss matters ahead of time, or else arbitration is going to become a way of life, and that certainly is not a good for the parties.

CHAIRMAN ELSON: Are there any comments or questions on the issue of how admissions or offers of compromise are to be handled? I think this is an area in which there is generally consensus. Perhaps we can move ahead to the next subject.

I now ask Stuart Bernstein if he will discuss some of the other parts of the report, including admissibility of parol evidence and the sources affecting the admissibility of evidence.

MR. BERNSTEIN: I am certain you gentlemen are aware that all committees worked from common agenda items, so that there is supposed to be some similarity, at least, to the items covered in the various reports. I am going to cover items 2 (Chapter IV, p. 95) and 9 (Chapter IV, p. 107) of the agenda.

I take it my function this morning is to summarize for you what we have said, and like Mr. Carter, or perhaps like Mr. Burkey who will follow me, in rereading this, I find some areas in which I disagree with the way we have expressed ourselves in the report. During the course of my few comments, I will indicate the areas where my doubts have now crept in. Nothing too serious, Alex, so be not alarmed.

We have defined parol evidence to be anything in the conduct of the parties or in their statements which will illuminate the contract which they have written, and we have divided this into two general categories: (a) reformation, and (b) interpretation or construction.

With respect to reformation, the immediate problem that presents itself is whether the arbitrator under any circumstances has the authority to reform the contract, since by definition he is then changing the document which has been submitted to him.

It was our conclusion that absent any specific statement in the contract to the effect that the contract contains everything, express or implied, and there can be no modification of it, there would be no reason why, at least as to the matter of mutual mistake in the preparation of a document, evidence could not be received and the arbitrator act upon it.

For example, suppose by a typographical error the wrong date had been placed in the contract as the termination date. The parties did not become aware of it until they approached the date they believed the contract was to expire. It was then discovered that on its face the contract had another year to run. We felt that an arbitration raising the issue of the duration of the contract

would be appropriate, and evidence as to the original intent and how the error occurred would be admissible.

The problem we saw, however, was what would occur if the mutual mistake had caused certain conduct by one of the parties, and the conduct had been carried on over a period of time? We concluded, in our report, that if the conduct had been carried on over a long period of time, justice could be done by the arbitrator in admitting the evidence and perhaps arriving at a decision which had prospective effect only, so that one who had acted in reliance on what was the apparent meaning of the contract would not be placed in a position of jeopardy because of his reliance on something in good faith.

I have raised two questions which I now throw out to you. If the practice has been of long standing and has bridged at least one new negotiation, can one ever change the contract by reformation, if there has been conduct inconsistent with what you want to reform it to? Hasn't the act of negotiating a new contract without change frozen the parties into their mistake? We didn't discuss this matter, but I throw it out to you for your consideration.

The second question is, does an arbitrator have any authority to issue a prospective award? Isn't this approaching something like declaratory relief? And whence does he get this power to act beyond an immediate grievance? Must he not say "yea" or "nay" only to a particular grievance? May he go beyond that and say, "Well, we will forget this one, but from now on, fellows, you had better watch your step?" Unless the contract does allow declaratory decisions, I doubt that the arbitrator has the authority to render one.

I move on now to our section on interpretation or explanation. Of course, we all know the general dogma that where a document is clear and unambiguous on its face, there can be no external evidence offered or admitted to explain its meaning. But we also know that there is no document that is clear and unambiguous on its face to both parties. The problem arises when somebody says there is an ambiguity. We then have the same order of problem that we referred to in the discussion after Phil's remarks—how does the arbitrator know it is relevant or material until he has heard it?

Another problem is the use of parol evidence to interpret or to explain a contractual provision. We think, and in our report we state, that evidence of this character should be admitted, and it is up to the arbitrator to decide the weight of it. Now, the problem we point out—and I don't know whether we have discussed it in sufficient depth—is the problem which arises in negotiating history, when one of the parties to the dispute was not a party to the negotiations.

This happens in industry-wide or pattern bargaining where there is committee bargaining. Another instance is where a union proffers to a newly organized employer a form contract, and the employer has no way of knowing what the source of the various clauses of the contract may have been. They may have arisen in negotiations that had occurred many years past. What we say is that where the negotiators can be considered reasonably to be the agents of the parties, as in industry-wide bargaining, even though they weren't direct parties to the negotiation, they must be bound by the negotiating history. When you cannot fairly make this conclusion, that is, that the agency relationship does not exist in this broad sense, then you ought not to admit evidence of negotiating history.

An example of this, the only example as a matter of fact, is where a form contract is presented and agreed to, the employer acts in accordance with its apparent meaning and is told a year later, "Well, that isn't what the fellows meant when they negotiated it ten years ago with company Y." We think this is quite an unreasonable burden to place on the employer, and we would exclude such evidence.

So we come to the first instance in our report where we do exclude something.

The item posed in the agenda with respect to past practice is: "Does proof of past practice require satisfying special standards?" Recall that we are talking in the context of parol evidence.

It was our conclusion that this posed not a procedural but a substantive question, because the posing of the question assumes that the arbitrator has accepted the evidence, and now he has to decide, have the standards been met that constitute a "past practice?" This question was explored in depth at a number of

Academy meetings in the past, and for that reason we present no discussion on it.

The last point we have under parol evidence is parol evidence to establish a collateral contract. This we define as an oral or written agreement which modifies or amplifies the basic collective bargaining agreement. We concluded that evidence of this character, going to the collateral agreement, should be admitted, and that its significance should be determined in light of the other contract provisions; that is, can you reasonably conclude a modification in light of the kind of language you find in the basic contract? However, such evidence would have to be excluded if there is anything in the contract which prohibits the arbitrator from making any modification on this basis.

CHAIRMAN ELSON: I have asked Stu to break his comments into two parts, because I think at this point we ought to have a discussion of what he has said for he has dealt with an important area in the field of problems of proof.

We are ready for comments or questions from you. This is a workshop, and you are supposed to be doing some work.

MR. MCGURY: I don't believe the prospective effect of a decision is a problem; every arbitration decision has a strong potential for the future. The parties conceivably could relitigate the same case over again, the losing party trying his luck with a different arbitrator, but that is unlikely. So that when we say a reformation may be made on the basis of mutual mistake and that it may have prospective effect, I don't think we are creating any problems. In all arbitration awards, the parties will normally abide by a decision made by an arbitrator construing a particular clause.

MR. BERNSTEIN: The problem I pose—and I agree with you that it may not be a problem—is this: suppose in a particular grievance, the employee is grieving because something has happened, and the mutual mistake then appears. There is some difficulty in my mind in the arbitrator saying, "I deny this grievance; however, the next one I will grant."

I can see that if you grant a grievance and the award affects a matter which is of general application, the award is certainly going to have prospective effect the next time out. The parties will abide

by it as *res judicata,* if not officially, then sub rosa in the proceedings. My concern is that the arbitrator says no to you because of the way it has been going on, "but don't do it the next time."

MR. MCGURY: I assumed the situation where the arbitrator was saying yes, and it is prospective from the date of the grievance. In other words, if the same fact situation had occurred before the date of the grievance, that individual would not be given relief.

MR. BERNSTEIN: Okay, then we have a meeting of the minds.

MR. PLONE: Albert Plone, Camden, New Jersey. Mr. Bernstein, I listened with some interest to your comment about the reformation of a contract where people inadvertently might have used a wrong date. I recently read an NLRB decision where that same point was raised, and it was unqualifiedly clear testimony that the date should have been '65 instead of '64, but the NLRB said, "You are stuck with it."

Now, I don't say that from the standpoint of showing the difference between your approach and that of the NLRB; there is a lot of difference between arbitrators' opinions on the same facts and the NLRB's conclusions. But it would be rare to conceive of an arbitrator involved in a date-back question, unless it was some specific effective date as to a condition, such as an increase in health and welfare. But on the general proposition that the parties are stuck with a date that they have both apparently permitted to get into the contract and remain a period of time, a matter of about two years in the NLRB case, aren't we rather hard pressed to try to reconcile these two expressed opposite views by two agencies with whom we have a great deal to do in this field? I raise that as a point of comment rather than as a challenging question.

CHAIRMAN ELSON: Mr. Levy?

MR. LEVY: I rise to answer Al Plone, but before I do so, let me say I don't think we ought to spend a lot of time on the issue of whether the contract says 1966 and means 1967, because if there is a mutual mistake, a true mutual mistake, it is very unlikely that the parties will get into arbitration on it at all.

As far as any other business between agencies, or apparently inconsistent decisions on apparently identical statements of fact,

as between an arbitration, NLRB proceedings, workmen's compensation proceedings, unemployment compensation proceedings, or what have you, I don't think we ought to get ourselves too involved in that either. Each of these agencies has its own issue to decide. I have not read the NLRB case which Al mentions, but it seems to me it might well have come up on the question of whether or not the contract is a bar, or something like that. We don't have that issue before us in arbitration, and it shouldn't shake us up to find that there may be, on its face, an inconsistency.

CHAIRMAN ELSON: If there are no further questions on this portion of Mr. Bernstein's statement, I am going to ask him to proceed with the next part.

MR. BERNSTEIN: I am privileged to present the only section of the report in which there is disagreement. This is the problem of the sources affecting admissibility. The agenda item poses examples, such as searching an employee's locker, closed circuit TV, stealing records, etc., then offering the fruits of this kind of an invasion of privacy in an arbitration proceeding. Stated broadly, the problem is whether the admissibility of otherwise competent evidence is affected because it was obtained in an unlawful manner, that is, by stealing, direct stealing from company files, or in a manner which would be unlawful if it had been done by a governmental agency, such as an illegal search.

The question we then pose out of this question is, is there an industrial civil right, or an employee and company right to privacy which, if invaded, should not permit the invader the fruits of the violation vis-a-vis the arbitration process? That is, you exclude from the proceeding any evidence obtained in this fashion.

Interestingly enough, we agreed unanimously that if the company records were stolen, and providing they were relevant, they should be admitted against the company. The company's remedy would be against the person that committed the theft, a criminal proceedings or discharge, and we all agreed that such a discharge would be for just cause. We didn't figure out how we would get it before the same arbitrator, but presumably that might be arranged. What we were saying, I suppose, is that the competency of the evidence is not affected by the way it was obtained.

But when we got to the other issue or the other foot—I don't know how you wish to put it—we were not in agreement. The labor members of the committee were of the view that the arbitrator should not accept evidence obtained by the company in violation of an employee's industrial civil rights. Thus, if there were illegal search, that is a search without consent is the way we would have to phrase it here, such as a search of an employee's locker, his property or his person, or if he were spied upon by closed circuit TV of which he was either aware or unaware, or by movie camera, that such evidence simply should not be admitted. We stated in our report that it so offended the dignity of the person that it should be kept out.

But there was disagreement. Mr. Carter and I disagree with this conclusion. I don't know what his motive was, but my motive was that if it works one way, it ought to work the other way. If we are going to let in stolen records, then we ought to let in the other; and if the search was a tort against the person who was searched, then that person has a civil remedy against the company or the company's agents.

I am personally offended by this, but I think I have to pursue it to its ultimate conclusion. I think the real questions that are posed here are of a philosophical order and not of an evidentiary order. First, you have the problem of analogizing the employer and the company in its relation to the employee—not in its relation to the union, but to the employee—and then you analogize the same relationship in regard to the state, that is the relationship between the government and the citizen, so that you can impose a constitutional obligation upon the employer and the correlative right on the employee.

This leads to the second point. If this is so, perhaps there isn't mutuality in this situation, and you are imposing a different standard upon the company than you are upon the employee or the employee's representatives. You can justify this only by saying the king may not steal, but it is something else if done by others.

These matters we are considering have a far reaching effect, and perhaps we might have to view them in a different light. With the broadening concept of civil rights as being operative not only

against the government but as against individuals in certain situations, it might well be that some of our current legislation might come out that way, that the employer himself has an obligation to the employee in this area. This was the most provocative area of our pursuit. I can only throw out the questions and hope that you are titillated a little bit by them.

CHAIRMAN ELSON: Who wants to start? Perhaps we ought to give Mr. Burkey an opportunity to state his position as one who represents unions on the panel, and then open it up to discussion. Just a moment or two, Mr. Burkey.

MR. BURKEY: It will be difficult for me to confine myself to just a moment or two to such a titillating subject as has been raised by Stu Bernstein and the panel this morning, but let me try to state my position briefly.

I am opposed to the admission in evidence of items of information picked out of wastebaskets, out of employees' lockers, disclosed by TV circuit, by wire tap, by moving pictures, or by lie detector tests. To obtain such information by subterfuge or by force seems to me to violate certain rights to privacy and to human dignity which are of greater value to the industrial community than even the protection of private property.

I believe that the employer should not be permitted by an arbitrator to introduce into evidence facts—but in this area only because we are pretty generous otherwise—which could not be adduced in a criminal proceedings. If the police cannot use certain methods to obtain evidence, it follows, at least to me, with greater force that a private employer cannot do so.

I do not believe the private employer is above the power of the police and above the state. Our whole life is of the same piece, and a worker who spends a third of his life in a factory should carry into that factory every civil right which he possesses as he walks along the street, or as he sits in his home. And no employer, under the developing common law of the shop—which arbitrators, incidentally, are fashioning daily—should have the right of breaking into an employee's locker, any more than a landlord has the right to break into a tenant's apartment on some suspicion that the tenant is not obeying the building rules.

Likewise, an employer should not be permitted by an arbitrator to introduce into evidence facts extorted by confessions, when the employee is not apprised of his right to counsel and representation by his union steward, because, as a matter of fact, this comes close to the investigation that the police are required to handle.

No employer, by use of closed circuit TV, should be permitted by an arbitrator to introduce evidence or information so obtained. To do so is to join those who would thoughtlessly push us into "1984," and at least in the labor point of view, we think we are too close to 1984 right now for comfort.

I have a great deal more on this—another 40 minutes or so—but I will restrain myself. Thank you.

CHAIRMAN ELSON: Well, you have a good statement of the issue now by two members of the panel, and I would like now to throw the matter open to the floor. Joseph Murphy, American Arbitration Association.

MR. MURPHY: In reading the report of the panel on this subject, I am curious as to whether the panel considered the evidence that can be obtained by TV or movies off company premises, on picket lines and the like, that would or would not be known to the employee? One way or another, can they use it?

And secondly, if the panel says this can't be done, how about public newsreels, which are unknown to the employee, concerning alleged violence on the picket line?

And then finally, how about newsreels made at specific times unknown to the people, but prompted by a company looking for evidence. That is, telling a newspaper, "At 6:00 o'clock in the morning we understand there is going to be some hot stuff outside, please show up then."

Does the panel look at this kind of TV activity in the same way in which they would look at the closed circuit for purposes of catching somebody taking a pack of matches, or whatever it may be?

CHAIRMAN ELSON: Stu, do you want to respond to that?

MR. BERNSTEIN: I think we all recognize that it is impossible under the circumstances here to engage in prolonged debate. I

think what we do is throw out questions and make sure we at least look at the possibilities, or some of the possibilities involved. All of them can be pretty serious.

We did not do what you suggest; we did not focus on that particular problem. Our primary concern was with the disciplinary case in the grievance arbitration arising out of theft. We weren't concerned with movies of picket line violence or things of that kind which might be used in connection with an NLRB proceedings or with the discharge of an employee for his conduct on the picket line. We did not, in our report or in our deliberations, focus on that. I myself respond by saying that there is a difference; I think there is a difference between the two areas.

CHAIRMAN ELSON: Lee, did you want to say something?

MR. BURKEY: Yes, I would. I agree with Mr. Bernstein that there is a difference.

It is one thing to have a closed circuit TV watching people in the plant when they don't know they are being watched, and quite another thing for a public photographer or for a TV news cameraman on the street to take pictures of a picket line.

I think that we all are subject at one time or another to observation when we don't know it is occurring, and it would seem to me that if the TV camera were on the street, and someone were acting up even though he may not be aware of the camera, I don't believe that that is the kind of thing that we would try to resist very vigorously here. At least I wouldn't. I wouldn't go that far.

But putting it in the plant and using it day after day as a surveillance technique, no. We all take our chances when we are on the street. I am not, personally at least, offended by that.

I wonder, though, how my colleague Burt Foster feels about this? I am just a lawyer, but he is a business representative, and sometimes we don't quite see eye to eye.

MR. FOSTER: Again we are in an area where we did not get too definitive. I am sure that this transcends a lot of different areas.

We are concerned as labor representatives that the civil rights of the employee follow him into the plant. We do not believe that the company should have a right to unreasonable search and

seizure, for example, of lockers and so forth, in order to get evidence. We believe that an employee should be afforded the same protection in the shop that you would be afforded in your hotel room or that you would be afforded in your home. That's what we are concerned about.

CHAIRMAN ELSON: Well, we are anxious to get your views on this matter. I think we have been taking up a good deal of time on it. Some of the people in the last four or five rows haven't been given an opportunity to participate. Feel free to do so. I know the microphone is a long way away.

MR. PORTER: My name is Alexander Porter, from Washington, D.C. I want to ask the management people whether they, as I gather from the report, carry this search and seizure to the point of a search of the individual's person, forcibly, by plant policemen who think he has something in his possession.

CHAIRMAN ELSON: I think our report says specifically that anything obtained by forcible seizure could be excluded.

MR. PORTER: All right, but I am assuming that they don't have to rough him up necessarily; they come up and say, "Okay, hand it over." This is one possibility.

At the other end, the closed-circuit-TV matter seems to me not too different from the situation in which supervision has reason to suspect that someone is engaging in theft, so they assign the plant police to keep the individual under surveillance. He sees it, and thereupon approaches the individual, with or without a warrant.

I am wondering whether or not the labor representatives would object to planned surveillance of this kind.

CHAIRMAN ELSON: We have a concensus that as to TV, where the employees know about it and where it is a fact that's understood in the plant, that such evidence should be received. It is where the employees are unaware of the fact they are being observed that we disagree.

MR. PORTER: Would this cover surveillance by the plant police? Employees don't know about it. Should this be ruled out?

CHAIRMAN ELSON: I think that would be the labor position.

Phil, do you want to respond to the first question?

MR. CARTER: At the risk of seeming not to believe in civil rights, I think there is a distinct difference between the citizen in his relationship with his government and the employee in his activity and conduct on the premises of his employer. But when you get to the question of a forcible search of the person, I am a little less inclined to go along with that than I am to go along with the forcible entry into the locker. I believe that a locker is the property of the company. The employee is only permitted to use it for certain periods of time.

In addition to that, if you want to relate this to the police power, I think you have to recognize that in many jurisdictions it is not an illegal search and seizure if the search and seizure is made under circumstances where it is reasonable to believe that some misconduct has taken place, and where it is not possible under the circumstances to obtain a search warrant.

There are many similar situations that develop in the day-to-day activities within a plant. It certainly seems to me that it should be permissible to open a man's locker where you have reason to believe that he has used it for the keeping of stolen property. Under these circumstances I can see no reason why a man should be entitled to any protection that might be afforded him as a citizen in his relationship with his government.

It seems to me that this is an area that is going to undergo some change, and it is going to have to be given a lot of thought in days to come. But the thing that has always concerned me, and I suppose it has always concerned all law enforcement people, is the fact that you so often bend over backwards to protect the man who has done a wrong. As I understand the basic theory, we do this in order to protect those people who don't do the wrongs. But it seems to me that evidence which is obtained which is indicative of the fact that the man has committed the offense with which he is charged, if it is obtained on company property, and if it is obtained even though we may have to force open the man's locker, should be admissible in a labor arbitration.

CHAIRMAN ELSON: Any further discussion of this? Let's get the microphone to this gentleman. Please identify yourself when you begin.

MR. HILL: My name is Hill, from Chicago. I am very interested in Mr. Burkey's comments. I wonder if he would equate the evidence that is required to support a criminal conviction with that necessary to support a discharge in arbitration?

Let me give you a specific example I have in mind. An employee is sent from point A to point B within the plant, and he is given $500 to deliver to point B. He gets to point B, but he doesn't have the money. You ask him, "Where were you since you left A? What did you do and when did you do it?" He replies, "I am not talking."

Now, can the employer say to him, "It is indeed true that you do not have to talk, but neither do you have a right to continue working here unless you are willing to explain what you did, when you did it, and where, while you were on the company premises and on the company payroll."

Obviously in this situation—or I am assuming it is obvious—there is not enough evidence for the prosecuting attorney to indict this man, but do we have enough evidence to discharge him? I have the impression from Lee Burkey that since the prosecutor doesn't have enough evidence, the employer should not take action against him either.

CHAIRMAN ELSON: Let me point out that the question you are posing is a substantive question: is there reason for discharge? The question we are concerned with is what is admissible evidence.

So far as the hearing is concerned, wouldn't you agree that the arbitrator should be required to observe the privilege against self-incrimination?

MR. HILL: I think so. But I also believe the arbitrator should be required to take evidence from the employer that the employee refused to answer pertinent questions when asked, and it was for that reason that he was discharged.

I am not talking about whether there is grounds for discharge; perhaps the case would fail. But should the arbitrator take into consideration the fact that he did refuse to answer questions?

I think this raises a corollary question: is the same degree of

proof required in an arbitration case, as far as theft is concerned, as is required by a prosecuting attorney?

CHAIRMAN ELSON: Mr. Burkey?

MR. BURKEY: I believe that under those circumstances the arbitrator would have the right to consider all the facts; the fact that the man did go from A to B, that he did have $500, and that he did refuse to talk.

Now I don't know what conclusions an arbitrator might or should draw from those facts, but I believe the facts are properly offered, and the arbitrator should receive them.

You see, I draw the line at that point because I fear that the company, not having any further facts upon which to take action, is going to try to use extra methods, such as, "We think you took the money; will you go down and take a lie detector test?" At this point the answer is, "No."

I recognize, and I think most of you will agree, that under these circumstances if an employee said, "I don't want to talk because I might incriminate myself; I want to talk to my steward first, and then I think I had better have a lawyer," the employer should stop pursuing the question. He may say at this point, "It appears that you may be involved in theft, and we may have to call the police." And, very frankly, I prefer the police in such situations to the less expert investigations that most employers conduct, including those things that sometimes appear to me on the part of employers and employees as compounding felonies. Bring the police in at this juncture. I don't think one should go any further.

But, John, I do agree that all these facts—mind you, I don't agree you should discharge him, I won't go on the record as saying that —could properly be introduced into evidence. And I think they could be properly entertained. If I were an arbitrator—God forbid!—I think I would listen.

CHAIRMAN ELSON: Yes, Mr. Roberts?

MR. ROBERTS: Ben Roberts, New York. I think that the question might be posed in another way, because it appears to me that what has happened is that arbitrators have been boxed into a corner on this problem, perhaps by their own doing. Although all

other proceedings are determined on the basis of civil action criteria, when it comes to questions of moral turpitude, we have more or less developed a theory that we apply the criminal criteria in a discharge case. As a result, we begin to a ask for evidence beyond a reasonable doubt.

What I pose, though, is having shoved ourselves into the corner of requiring evidence beyond a reasonable doubt and having adopted a criminal type of proceedings for purposes of proof and conviction of a person for discharge, are we now compelling ourselves in a sense to use the same standards for the admission of proof?

CHAIRMAN ELSON: Anybody else? Yes, just a second. Mr. Bernstein wants to respond.

MR. BERNSTEIN: I don't want to respond; I want to add a footnote.

I would throw this out: does it also mean that the company, now being equated to the prosecuting state, should have instrumentalities of investigation at its disposal to use in connection with preparing for the proceedings?

Mr. Burkey would say no, that you can't do so. He would cut that off completely. This is part of our inability to agree on this matter.

CHAIRMAN ELSON: I don't expect to arrive at any consensus on this issue. I do think we ought to get any further comments that anyone wishes to make.

MR. PLONE: I don't believe that my worthy associate said what you said, that the employer vis-a-vis the prosecutor would be less limited in his investigation. All we say is that you, as the employer, have no more right than a prosecuting attorney. You have the right to interrogate all witnesses that might shed light on the subject, but the prosecuting attorney couldn't call the defendant into his office and ask him to make a disclosure against interest or anything of the sort. And I do not believe the employer should have the right either.

MR. BERNSTEIN: Can he engage in surveillance?

MR. PLONE: An employer may engage in surveillance, but after

he engages in it, we deal with that subject separately, just as a prosecuting attorney's surveillance might be the subject of serious challenge.

MR. BERNSTEIN: Mr. Burkey told Mr. Hill that he would not permit any surveillance that is not known to the person being surveyed. How, if we accept that, can an employer get the evidence against the saboteur who is doing minor damage around the plant, or who is throwing things out of the window—petty things of that kind? What does he do, how does he find the guilty parties? Call them in and say, "Boys, don't do it any more?" Or, "Who is doing it?" Or does he survey, does he put cameras up? Does he have people watching those who are under suspicion?

If the employer can't do these things, then I say you have taken the power of investigation away from him.

MR. PLONE: If the man is conducting himself in the presence of others, whether their presence is known to him or not, because the foreman is standing in the wings somewhere behind some boxes or a machine, and the employee is observed doing something that is contrary to plant rules, he is subject to: (a) criticism; (b) discipline, or (c) discharge, whatever the case may be. He is under surveillance at that time, and that evidence is admitted, and no one quarrels about it. But the kind of surveillance you are talking about, a secretly placed closed circuit TV to observe all employees in the hope of catching somebody, is invidious. Just as a little aside, we had a very serious question about a planted microphone in the men's locker room that became an issue itself for arbitration. It is things like this that are inherently bad and generate the resistance to this kind of surveillance.

MR. BERNSTEIN: In order that we can draw common ground, let me say that I think that closed circuit TV is pretty reprehensible, and I don't think anyone is advocating that. I think that the difference we have is that now you say if the foreman accidentally catches somebody doing something, that is okay; but if something is happening and he intentionally finds the one that is doing it, then it is not okay. This is the area of our disagreement.

MR. PLONE: I didn't say that at all, sir. I said that if the foreman, carefully observing the conduct of a rank and file employee in his department from an undisclosed or even a disclosed point,

observes something, we cannot and do not exclude that kind of evidence, even though the employee is unaware that he or she is being observed.

One question I want to pose is the question of searching the packages or lunch boxes of the people leaving the plant. What right does an employer have to insist that an employee open his lunch box or package, and threaten to discharge if he doesn't do so? Do you have any more right to do this than to break into his locker?

MR. BERNSTEIN: I think if it were a diamond plant, you might have more reason.

MR. PLONE: If I may just say one more thing—this business of breaking into lockers is far more serious than it appears. Unfortunately, in some cases as I am aware, employee A might have innocently placed something in his locker that he hasn't had the opportunity to return. Employee C or D passes the word around, "If you break into A's locker, you will find a 25 cent screw driver there that I saw him pick up." Even though there might be only one innocent victim out of a thousand, you are faced with the same responsibility of giving everybody an equal chance to prove his innocence or to maintain his status of innocence.

CHAIRMAN ELSON: Well, it is obvious that we can't reach any consensus on this subject. Our main purpose today was just to pose these questions in order to get your thinking about them and to see what problems seem to be most pressing.

We do have other parts of the report I want to cover, and I am going to call on Mr. Burkey to discuss the admission of evidence from an adversary party or a third person, and the use of new evidence at arbitration hearings.

MR. BURKEY: Before we get into the next subject that I am to handle this morning, I would like to add one further fact—no further argument, but one further fact. I would like to add a footnote that you might find interesting. The 1965 report of the Arbitration Committee of the American Bar Association, which as you know met in Miami in August, has now been published. If you will examine that report, a great number of the things that

we have talked about in the last few minutes are very well treated and footnoted. You might find it of great interest.

I would also add that there is another side to the coin. Although the labor representatives have resisted certain plant security measures, there are other measures which I think can be properly worked out which will assure a maximum amount of protection for employers in safeguarding their property rights. This is not concerned with the subject today, but I would be delighted to discuss this with anybody who feels that labor people are spending too much time resisting and not enough time cooperating. There are areas of cooperation, and there are sound methods of plant protection which I do not believe violate employees' rights, and which I do believe will protect plant property adequately.

This Panel believes that it is desirable that all facts should be elicited in the arbitration hearing that will help the arbitrator in ascertaining the truth. Presumably, if an arbitrator knows the truth, the whole truth, and maybe nothing but the truth, the possibility that he will arrive at a fair and sound decision is increased.

But even in so simple a truism as this, there are problems on how and at what point in the hearing this truth can best be elicited. One party, for instance, in his zeal to help the arbitrator search for the whole truth in a discharge or disciplinary case, may seek at the very outset to call the grievant as a witness. This the panel regards as improper.

Nevertheless, but for this limitation, the panel would place no other restriction on the right of the parties to call witnesses. It does not follow, however, that just because there is broad latitude in calling witnesses, that those best acquainted with the facts can always be produced.

In some jurisdictions, the subpoena power of an arbitrator is a valuable aid. In the absence of express provisions in the collective bargaining agreement, or agreement of the parties, or in the absence of a statute permitting the arbitrator to issue subpoenas, the arbitrator has no such power. But it may be of some comfort to realize that 26 of our states do have arbitration statutes under which an arbitrator may issue subpoenas, and under the Rules of the American Arbitration Association, if they are adopted under

the contract, there is, of course, specific subpoena power under Rule 23 of those rules.

When so permitted, the arbitrator, usually as a matter of course, issues subpoenae at the request of either party. Occasionally, a request is made to an arbitrator for a subpoena that he may feel should be set down for oral argument. In some instances I have known arbitrators to request briefs on the point, particularly in cases involving the right of the arbitrator to issue a subpoena, which, of course, is bottomed on the question as to whether the information is relevant and material. It may also, of course, turn on whether there is any power on the part of the arbitrator, either under the rules or under the statutes, to issue a subpoena.

Now, this to me gives rise to some questions. Of what force is a subpoena issued by an arbitrator under the American Arbitration Association rules, or under the private contract, or under even just agreement of the parties, against an outsider who is not within the power of the parties or the American Arbitration Association?

Say an ex-employee is desired as a witness. He doesn't work for the company any more; he isn't in the union any more. It would seem to me that under the rules of the American Arbitration Association and under any private agreement, there is nothing that could be done if this person decided not to honor the subpoena, although issued. Of course, it is quite a different matter under a statute, and I think this is an argument in favor of a statute permitting the arbitrator to issue subpoenas.

Another question comes to mind as I think about this. I know that in most instances the opponent will know when a subpoena is requested, but that's not always true. And on requesting a subpoena from an arbitrator under a statute or under an agreement or under AAA rules, does fairness—and I suppose by fairness I mean due process—does fairness require that the opposing party be informed of it?

Suppose you want Joe Blow to testify. He is no longer at the plant, and under our Illinois statute, we request the arbitrator to issue a subpoena. The subpoena issues, and the company does not know that this man is going to show up. Is this proper?

Certainly, if we want books and records, the company finds out about it, because if we don't tell them when we request the subpoena, they take it to their lawyer or to their other representative in the plant and say, "What's this all about, and what should we do?"

The value of the subpoena is obvious. For even with a cooperative witness, it places the witness under the umbrella of legality, removing him from the burden of responsibility for volunteering to testify. I know of many instances, I have done it myself, in which I have called competitor employers, members of the same association, and I have done it by the subpoena process. Some of those competitor employers, I believe, would have been quite cooperative, but I wanted them under the umbrella of legality so that they didn't have to explain later to their fellow employers why they were so generous with the union.

The same thing happens with employees. I find that if one employee is going to be required to testify against another, it is a good idea, if you can, to have him there under subpoena. Then he can reply to those who later say to him, "What do you mean testifying against your fellow members?" "I had no choice; I was there under subpoena."

Now, with respect to the admissibility of decisions, opinions, and transcripts, that is, transcripts of other administrative bodies or quasi-judicial bodies, again we find our committee in full agreement. In general, the panel believes that the decisions and opinions of other administrative or quasi-judicial bodies should be admitted. The weight, however, is another matter. I am sure that, as advocates, we will urge that such evidence is of little weight, or of great weight, depending upon which side we are on.

Clearly, those investigations, records, and decisions based on non-adversary investigations should have little or no weight, where somebody goes out and makes an investigation and a report with no chance to cross examine. Transcripts of testimony in other cases which have been held before other bodies may also be introduced, but only for purposes of credibility or impeachment, or admissions against interest, and the like.

Turning lastly to new evidence, the committee believes that there should always be a full disclosure during the grievance pro-

cedure of the facts, but if this is not done, and if the new evidence is relevant, the new evidence should be admitted by the arbitrator, despite the fact it wasn't fully explored in the grievance procedure. Of course, the committee hastens to add that the other side should be given all protection against surprise, and adjournment if necessary to meet the issue injected into the case.

With respect to evidence adduced after the grievance is processed, I believe we are fully in agreement that it should come in. You may ask: how would this occur? At some points in the grievance procedure one of the parties may, for the first time, have called in a lawyer. Lawyers, being notoriously ingenious fellows, may think of some line of evidence that seems to them quite relevant but which seemed to have no value and no meaning earlier, and, therefore, generated no discussion in the grievance procedure.

This raises another question. What about new evidence after the record is closed, but before decision? Should it come in or shouldn't it?

I don't know that our committee squarely faced that question, but I cannot see that we would differ in principle from the positions we have taken on the other problems of evidence being brought in at some late point in the grievance, or even in the arbitration procedure, before the record was closed.

CHAIRMAN ELSON: Are there any comments or questions on this section of the report?

MR. T. L. TOLAN: My name is T. L. Tolan, from Milwaukee. I am a lawyer. Just a comment on the subpoena power. I am interested in the unanimous agreement that, without a statute and without use of the AAA rules, that you cannot have the arbitrator issue a subpoena.

I think that quite an argument can be made that under the Federal procedure—I don't mean the Federal Rules of Civil Procedure—but the idea that because the arbitration process is now federal, the arbitrator must have all of the weapons which he needs in order to bring out the truth. It seems to me that quite an argument can be made—and I know, because I have made it—that even in a state in which there is no power to issue a subpoena, an argu-

ment can be made that, under the federal process, the general penumbra, or whatever you want to call it, an arbitrator may issue a subpoena. Trying to draw such a subpoena is an interesting process, but it can be done.

Of course, sometimes the witnesses just go along. And trying to figure out what witness fees to give them is an interesting question, too. You have no guide whatever.

But it seems to me that a great deal can be said in favor of such a power in an arbitrator generally, under federal law, to issue a subpoena.

CHAIRMAN ELSON: Let me say I think it is important to have this as a part of our record as something worth further investigating.

Lee, did you want to say something?

MR. BURKEY: Just a comment. I think that point is very well taken, and we would not have completely done our job unless somebody made that comment. I am very pleased to hear it.

I won't ask you now on the record, but I would be delighted to know how you came out in the argument, because I think it is most important. If you want to answer now, please do.

MR. TOLAN: The witness came voluntarily after being subpoenaed!

CHAIRMAN ELSON: Phil Carter wants to make a comment.

MR. CARTER: I would like to make a comment concerning the calling of witnesses from the other side because our Report indicated there was unanimity on this point. The first draft of this report read, "There is no dissent to the proposition that an arbitrator should rule that the grievant may not be called as a witness at the outset of the case in a discharge or disciplinary matter."

I wrote this to our Co-chairman: "I dissent. It was my position that I personally had never utilized this procedure and felt it was not the preferred way to proceed. However, as a matter of practice, many advocates believe calling the grievant as an adverse witness at the outset has value. This is particularly true in those somewhat unusual cases where the grievant knows best what oc-

curred and the circumstances surrounding the occurrence. If the grievant is called at the outset in a discharge or disciplinary case, I have my doubts as to the propriety of the arbitrator ruling that the grievant may not be so called."

CHAIRMAN ELSON: Well, I should point out that that correction was incorporated in the Report. It reads: "Except for unusual cases such as the situation where the grievant knows best what occurred and the circumstances surrounding the occurrence, an arbitrator should rule that the grievant may not be called as a witness at the outset of the case in a discharge or disciplinary matter."

MR. CARTER: I don't think he has that power even in the not unusual case.

CHAIRMAN ELSON: Now, I think we might complete the presentation of the report. The last part of our report, which deals with the subject of the conduct of the hearing, will be presented by our distinguished member and president-elect, Bert Luskin.

PRESIDENT-ELECT LUSKIN: Those of you who have your reports will note that this portion of the report is couched in generalities, and necessarily so. I think it goes back a little bit to what we talked about at the outset of this session.

Under Item VI, we discuss the subject of applicable standards for examination and cross examination of witnesses under two headings: "Leading the Witness," and the "Scope and Tactics of Cross Examination—the Arbitrator's Responsibility to Protect Witness from Improper Tactics."

I don't believe this will be an area of great disagreement. We felt that we ought to cover this area because it is important for all of us to get an idea of what a tripartite panel of this type might feel about the role of the arbitrator in the conduct of the hearing, generally what should be admitted, what should be excluded, and whether it is the arbitrator's responsibility to conduct a hearing in an orderly fashion to prevent the hearing from degenerating into a shouting match, into a debating session, or into cross-table conversation.

We feel very strongly that the arbitrator should control the hearing. We also feel very strongly that the arbitrator should not

inject himself into the proceedings to the point where he becomes an adversary or an advocate.

We feel that the arbitrator should permit the parties great latitude in the presentation of their case. They have spent months in preparing their case. We feel that the arbitrator owes the parties the courtesy of letting them proceed without interruption, without interjection, without breaking the trend of thought that the advocate may have.

We feel that improper questions posed by the arbitrator at the wrong time make it difficult for the advocate to proceed. I point to the type of situation where the company intends to establish a certain fact using a witness which, in the opinion of the company or the union, is best qualified to establish that fact. If an earlier witness is testifying and the arbitrator interjects to ask that witness a question, the witness may not be totally or fully competent to answer that question and it does a disservice to the process. I think it is an imposition on the part of the arbitrator.

In short, we believe that the arbitrator ought to hold a tight reign on the hearings, he ought to give the parties ample opportunity to present their cases, in the manner which they want to present them, but at all times to let the parties know that he is going to insist on decorum, that he will not permit an advocate to harass or to intimidate a witness, that he will not permit redundency, that he will rule on objections as to relevancy and materiality firmly after he has become acquainted with the issue, and in short, to conduct a hearing that any able advocate would like to be party to.

I don't think the time will permit us to go into the specifics of the conclusions we drew. They are general in nature. You will note, gentlemen, that we have listed certain guides that we believe an arbitrator might follow in determining fact from fiction. How does an abitrator determine who is telling the truth? Where does the truth lie? These are only just a few guides, but, in general, you can probably list a hundred or two hundred different tests or guides that an arbitrator might rely upon in order to determine whether a witness is telling the truth. That's not a difficult task for any experienced advocate, and certainly not for any experienced arbitrator.

I would commend the later portion of the report to you for your own reading. I know that time is running short, we want to adjourn for a few minutes in order to start the general discussion, but if there are any questions covering the area that I have just been talking about, we will be happy to open it up for a short discussion.

MR. NICHOLS: Maurice Nichols, from Cleveland. I am not an attorney.

This statement disturbs me a little: "We do not, in general, believe that the scope of cross examination should be restricted to the scope of direct."

I think I understand it in a general way. I wonder if you would care to comment just a little more specifically on it. This has been a very disturbing question to me, a non-attorney, in arbitration hearings.

PRESIDENT-ELECT LUSKIN: Well, I don't think you ought to be disturbed, Mr. Nichols. It is a statement that is general in nature. We know that the application of the basic rules of evidence might place an undue limitation or restriction in the area of cross examination. We believe that there should be some latitude to permit an advocate on cross examination to go beyond a very narrow limit, but we also believe that unless the advocate on cross examination indicates to the arbitrator, or over an objection, the purpose of this line of questioning, then there is a point of no return and you must stop the advocate.

We don't believe that if a man is testifying to a limited fact, an industrial engineer, for example, who testified that on a given day he went in and made a 30-minute study of a particular operation, that broad questions of qualifications should be permitted. You may ask him whether he had made any other studies. You may ask him what his posture in the plant might be. But let's assume now that you want to go into the question of whether or not he had made studies in other departments, asking him for facts and figures of studies in other departments that would be totally unrelated to the issue presented. I think at that point an objection to that line of cross examination would be well taken; I think it ought to be stopped.

We don't feel that in cross examination you can go all over the lot; we don't think that you can enter into a fishing expedition. I think that cross examination ought to be limited to the issue, but we don't think that it ought to be so narrow that the only area of cross examination should be the specific questions that were directed to the witness on direct.

And I don't think it ought to be disturbing.

MR. NICHOLS: That answers it fully, thank you.

CHAIRMAN ELSON: We have come to the end of our period. I want to thank the members of the Panel, and I also want to thank the members of this audience for their interest and participation.