CHAPTER XI

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

WORKSHOP ON NEW YORK TRIPARTITE COMMITTEE REPORT*

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CHAIRMAN STARK: Our purpose this morning is to discuss the Report of the New York Tripartite Committee. You might be interested in knowing how well balanced our team was—and I am not talking as a psychologist. One labor and one management attorney are from Harvard Law School. The other labor and management attorneys come from Columbia Law School. The two Academy members, however, are proud of their non-Ivy League backgrounds.

After reviewing our product, we wondered whether a mountain of Academy labor had not brought forth a procedural mouse. But upon reflection, it is our conviction that our labors were not in vain. Parenthetically, most committee members enjoyed the discussions. It was stimulating and useful to review, in the calm of a post-prandial session, matters which constitute the day-to-day working agenda of active arbitration practitioners. It is gratifying for an arbitrator to learn how much mutual understanding exists

* 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 New York Tripartite Committee (Chapter X). Members of the New York Tripartite Committee, with Arthur Stark 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.

between labor and management representatives who, in their appearances before him, seem constantly at odds.

Our report reflects the fact that all six committee members devote a very substantial part of their time to arbitration. Our deliberations were constantly and strongly influenced by our continuous exposure to arbitration hearings.

In case there is a thought that questions of proof and related matters are too elementary for prolonged consideration by the distinguished members and guests of this august body, a June 23 article in the New York *Times* is of interest. The headline read: "More U.S. Judges Going To School." And the lead paragraph stated—and I quote:

> "The Federal Judicial hierarchy is pushing a campaign to make its trial judges abandon their traditional role as passive umpires between opposing lawyers, and to become more masterful in controlling trials."

Additional paragraphs in this article contain a familiar ring. For example:

> "They [the judges] have been schooled by the Judicial Conference in the techniques of calling the lawyers together before trial and requiring them to disclose any surprises. The judges have also been shown how to settle disputes over admissibility of evidence, and to weed out irrelevant issues that would waste time at the trial.
>
> "The judges also encourage settlements by having the lawyers define the areas of agreement."

And with appropriate modification, is not Judge Irving Kaufman's statement also applicable to our own proceedings? This is what Judge Kaufman had to say:

> "Federal Judges should take an active part in the control of litigation from its inception, so that deception, surprise, technicalities, and delay will be obliterated and the trial will truly represent an enlightened search for the truth."

As for the content of our report, we had full agreement on most matters; as to the others, not so much disagreement as a difference in emphasis. On a couple of matters we could not reach a consensus.

As noted in the introduction, we made no effort to formulate

a general philosophy of arbitration. We dealt with specific topics. Nor did we discuss how best to implement our conclusions, should they or similar ones ultimately become part of a more general consensus. We consider our work as one small step in the direction of developing well-defined rules of evidence which can be useful for parties concerned with the arbitration process in this country.

I would now like to introduce the members of our committee: On my far left is Herbert Prashker, a management attorney from New York. Next to me on my right is Asher Schwartz, a labor attorney from New York.

On my far right is Alan Perl, labor attorney, who also represents the Puerto Rican Department of Labor. And to my left is Bob Feinberg, Arbitrator, and my fellow Academy member on this Committee.

Our missing member is Henry Clifton, management attorney from New York.

For our discussion this morning, we have selected only a few of the topics which we considered at our sessions. There is clearly not time to discuss all of them. If you wish, we will discuss any of the topics which we did not include.

Our procedure will be this: I will briefly read our conclusions, which in most cases are rather terse. Then I will ask for comments or questions and expressions of viewpoints.

The topics we will discuss today include the following: *First,* admitting evidence concerning grievance discussions; *second,* parol evidence; *third,* obtaining evidence from the other side; *fourth,* new evidence; *fifth,* the arbitrator's responsibility for policing the hearing; *sixth,* pre-trial procedures, and *seventh,* source of evidence as affecting admissibility. *Finally,* we will discuss briefly the general usefulness of what we have done.

The first topic, then, concerns evidence of grievance discussions. Our summary of this item reads as follows:

"Evidence concerning grievance discussions, other than offers of settlement or compromise, is not privileged unless the parties have explicitly agreed otherwise.

"(The Labor Members would limit such evidence to admissions and statements of position, unless the contract provides for some type of reporting of grievance discussions.)"

Does someone care to comment, ask a question, or expound a philosophy?

MR. BLOCK: Howard Block, from Southern California.

One problem in this area that troubles me, and I merely raise a question at this point, is whether discussions, for example, between an employee and a shop steward should, to some extent, be considered privileged. I had one recent discharge case where this didn't become an issue, but could have, where the employee disclosed to his shop steward some facts that turned out to be very damaging to him when the shop steward later testified against him.

An objection to his testimony wasn't raised at the hearing, but it occurred to me that it might be a difficult question to rule on, a point that I was glad that I didn't have to rule on at that moment.

I have thought about it considerably since, but I don't know what the answer is. It occurred to me that there might be some analogy between the relationship of the employee and the shop steward, in that situation, and the attorney-client privilege.

CHAIRMAN STARK: I am going to ask Mr. Feinberg to comment.

CO-CHAIRMAN FEINBERG: We did deal with the question of privileged communications. And incidentally, this question of grievance discussions, to us, came under the subject of privilege, and we followed the general principle that if something is not privileged, then it is admissible.

It seems to me, Mr. Block, that the subject you raise isn't, strictly speaking, a question of grievance discussions. Rather it comes under subdivision "e," and is a question of intra-union and intra-employer communications, that is, communications between company representatives, foremen and the vice president, for instance, or a shop steward and an employee, or a shop steward and a business representative of the union.

I would like to talk first about this question of grievance discussions as distinguished from the question of intra-union communications. I know most of you gentlemen are aware of the fact that this problem is treated differently under different employer-employee situations.

In Bethlehem Steel, for instance, in the Ship Division, where I acted as umpire for many years, it was routine, it was a matter of procedure for the parties to introduce into evidence at the beginning of each arbitration hearing a transcript or a summary, a written summary, of what took place in the previous steps of the grievance procedure. There never was any question that what was said by the parties and appeared in that summary was admissible, even including offers of settlement. On the other hand, lawyers who are familiar with trial court practices are accustomed to the idea of excluding from evidence in any hearing, or any trial, offers of compromise or settlement, such as have been made prior to trial. Moreover, in many situations, the parties do not consider grievance discussions conclusive or in any way binding.

Our Committee had quite a discussion on the question of what we should do in this latter situation, and we reached the conclusion that what took place in the grievance procedure should be admissible, except that offers of settlement should be eliminated.

In regard to your question, Mr. Block, we did not reach a conclusion that what a shop steward says to an employee is admissible, or is not admissible. We talk about intra-union communications, we mean from one official of the union to another official of the union, rather than employees to the shop steward.

Also, I would like to repeat that the question of relevance was not dealt with by us in this particular discussion; the only question was whether it is a privileged communication, and, as such, excluded.

MR. ALEXANDER: Gabriel Alexander, Detroit. Has a question been raised about the bona fide confidential management communication or the bona fide union communication?

CHAIRMAN STARK: No.

MR. ALEXANDER: Then I would like to touch on it. A confidential management memorandum that was initiated as such

from one department to another, or conversely, a genuine confidential union memorandum, which has come into the possession of the other party in some fashion, if offered up in a grievance arbitration, I believe should be excluded. It should be excluded not by reference to any common law or statutory rule of evidence, but because the labor relations context demands that this be done; otherwise the parties' relationship may suffer.

The parties have confirmed this view. I have been told that the parties would rather lose a case sometimes than disrupt the means of communication or disrupt the relationship by the use of a genuinely confidential memorandum.

CHAIRMAN STARK: I think Mr. Perl has a question for you.

MR. PERL: I will get to that in just a second. I want to first ask a question concerning Mr. Block's remarks.

Mr. Block, could you tell us a bit more about how this particular issue arose, and why it presented the problem that it did?

MR. BLOCK: Yes. In the case that I referred to, an employee was discharged and related the circumstances to the shop steward, and only to the shop steward. Later, the shop steward was promoted to a foreman.

The company called him as a witness. Although there were many witnesses at this hearing, it turned out that the case hung pretty much on the shop steward's testimony, which was adverse to the grievant.

It seemed to me that the union advocate, who was a layman, missed the boat by not raising an objection on the grounds that it was privileged testimony.

I raise the question here as to whether or not it should be. I am not certain what the answer should be; it didn't arise at the hearing, but it concerned me at the time and since.

MR. PERL: If I can turn now to my other question, I think we can combine the two. The question that I want to ask of Mr. Alexander is, what is your definition of—I think your term was—"a genuine confidential" memo?

MR. ALEXANDER: Well, Mr. Block's illustration raises almost

the same problem. The claim is not made at the hearing that the memo is still confidential, but that it was intended to be confidential at the time it was written. For example, a personnel director circulates a memo concerning a matter of policy which he intends to be genuinely confidential. This is indicated either on its face, or by other evidence. But it is important that it was meant to be confidential; I want actual proof of this.

MR. PERL: That is what I found troubling me in both questions. In yours, for example, suppose you have a document headed "Confidential Memo," but the content of it, let's say, is equivalent to an unfair labor practice under the National Labor Relations Act. So that if it did come into anyone's hands, no matter how, it would clearly be an admission against interest.

And in the case that Mr. Block presented, the same type of thing appears.

The Committee considered this question, and in trying to establish the basis for the application of rules of evidence, we felt that there are few, very few specialized situations in which the treatment of the general rules of evidence in labor relations differed from that in the search for truth in litigation. And I am having trouble, and I don't know what the reaction of the rest of the audience is, to see why, in the specific cases both of you mentioned, you prefer a rule of exclusion.

It would seem to me, and I speak from a labor point of view, that this can bite both ways. I would say that admissions against interest are admissions against interest. They are going to come up, and no matter where they arise, you can't cloak them with a super-confidentiality which we find nowhere else in the law. This, I think, was the view of the Committee.

MR. ALEXANDER: Well, if I were to argue it—and I don't know that I could analyze all the factual circumstances and draw a line —I would say that there are some situations in which it should be done. The classic one—and this actually happened—was the union representative who at a Friday afternoon session of either contract negotiation or grievance handling sat on the union side of the table. Over the week-end, he was hired by management, and on the following Monday morning sat on the management

side of the table, as a personnel representative, to continue in the same negotiations.

I have had other circumstances, which, not as a rule of law but because of the labor relations posture of the parties, demanded a respect for the confidential aspects of their relationship, and therefore excluded, on these grounds, the proposed evidence.

MR. PERL: I just want to ask you a question, Gabe. Would you apply the same rule to a foreman who was demoted into the bargaining unit? Would he be precluded from testifying as to what took place within management ranks when he was a foreman?

MR. ALEXANDER: I believe it cuts both ways. The question is whether the super, overriding value is important enough so that in labor grievance arbitration we establish a rule of exclusion that suits our purpose irrespective of what the law might do with it.

CHAIRMAN STARK: All right. Mr. Anderson.

MR. ANDERSON: Frederic Anderson, Indianapolis. It seems to me that the distinction which underlies what has been said so far is the distinction between whether or not the material was obtained properly and whether or not it should be excluded from evidence on some basis.

If you take the fellow who sits on the union side of the table on Friday, and moves to the company side on Monday, he stands in a kind of confidential relationship, a kind of fiduciary relationship, to the people with whom he sat on Friday. With respect to those parties, he has an independent equitable duty not to reveal or to use for the benefit of someone else, the information which he obtained in that capacity. He is just like a lawyer who sits on the plaintiff's side on Friday, and after the week-end recess, sits on the other side of the table. If it happens in an arbitration, the arbitrator shouldn't permit it anymore than a judge should permit it, because the man can't wipe his mind clean of the knowledge he has obtained.

It seems to me that this is information that is improperly obtained by the management side when they bring him over to their table. And the purloined letter is different from the letter honestly acquired. The purloined letter is in another category of evidence. The person who is the proponent of the evidence

should not be permitted to obtain the benefit of his own misconduct in obtaining it. There are Labor Board decisions, for example, that make this distinction.

But when you get into information honestly obtained and originating with the other side, I don't see any reason for excluding it. The suggestion has been made that the parties themselves don't want it admitted because it destroys the relationship. The question comes up in a context in which one of the parties does want it admitted, and I think that the arbitrator who excludes it because he thinks it is for the good of the relationship is volunteering a service he hasn't been asked for. An arbitrator derives his powers from the consent of the parties, and he doesn't have the consent of one of the parties for that exercise of power.

CHAIRMAN STARK: I might say that we have inadvertently, but interestingly, wandered from the topic. The topic we are supposed to be discussing—and this I think is typical of all such discussions, because one topic leads into another—is whether what happens during the grievance procedure should be excluded.

During the grievance procedure, as we all know, there are discussions between the employer and union representatives, often with participation by the grievant or other associated employees or supervisors. Do you believe that the things which are said, the admissions which may be made, that happened in the steps prior to arbitration, should be admissible if one of the parties requests it?

Some arbitrators rule out these things automatically on the grounds that, "Let's start now with the arbitration; never mind what happened before." Others have taken a different approach.

Mr. Carlstrom, do you have something on this question?

MR. CARLSTROM: Lawrence Carlstrom, U.A.W., Detroit. I suggest, Mr. Chairman that there are two problems involved: the first is contract negotiations, which involve cases of contract construction, and the second is disciplinary cases.

As to the latter, a written report of a plant guard to his superior officers outlining an incident that he saw I believe should be admissible into the hearing. It was a part of the consideration of the parties. Or if the union knows there is such a document,

and if we are trying to get the ultimate truth out of the hearing, it should be made a part of the proceedings.

As to the matter of contract construction, it would appear to me that these purely intra-corporation or intra-union documents, whether or not they are clearly confidential documents and fall in the category of a purloined document, should not be admitted.

I know that immediately after the enactment of a new contract, the parties will frequently draft a series of memos to their own constituents outlining their views as to the import and the meaning of the new document. I hesitate to think that these memos should be used in a proceeding before an arbitrator.

CHAIRMAN STARK: Mr. Florey.

MR. FLOREY: Peter Florey, from Pittsburgh.

On the question of grievance discussions, I think you should distinguish the purpose for which they are introduced. In our steel setup, we receive the complete set of minutes of the fourth step, and we treat it mainly as background so we can prepare for the hearing—to look at past decisions and to see what evidence we should look for at the hearing.

But our experience has been that there is very little resemblance, frequently, between what is reflected in the grievance minutes and what comes out at the hearing. We would not hold the parties to what they stated during the grievance procedure if, at the hearing, their position has changed.

It is my own personal feeling that grievance procedure discussions are helpful in abbreviating the hearing, because frequently in these minutes you have many facts stated which don't have to be stated again. However, as to the crucial facts on which the case turns, I think the parties should review them again.

On contract interpretation, I think the parties should not be bound by what is said during the grievance procedure, because there is frequently a great deal of give and take, and it is a give and take between people who are not necessarily best prepared to do it. Frequently, when the case finally hits the staff representative of the union, and he looks at the contract and looks at his experience in the industry, he will advise his people that they

should use a completely different approach to this particular problem. The same is frequently true of the company. Once the problem reaches a higher level, the higher level considerations may be different from that taken by a contract administrator.

It seems to me that it hasn't been quite defined in your paper as to the purpose for which these discussions are introduced. The general comment I have to make is, reading your paper and having heard by hearsay the nature of arbitration in New York City, that it appears to me there is a much greater stress on technicality than has been my experience in the Philadelphia and Pittsburgh areas. These are problems which rarely, if ever, come up in the provinces, so to speak. I would be interested to hear some comments from the New York members.

CHAIRMAN STARK: All right. I think Mr. Schwartz has a comment, and he has practiced all over the country.

ASHER SCHWARTZ: I first want to say that I think we ought to address ourselves in this connection only to documents which are obtained properly and legally, and forget for the moment about documents which might be obtained illegally. That's covered in another part of this report. In the second place, I want to exclude for the moment a discussion of comments made in the course of a negotiation that affect the interpretation of a contract. That, too, is covered somewhere else.

I want to confine myself to a discussion concerning grievances, which is the only thing that this particular section of our report is concerned with. Both points "e" and "f," "Union and Employer Communications" and "Grievance Discussions," are basically the same thing. The arbitration process is designed to obtain the truth, and one of the reasons why, up to now—and I am sure for many years to come—we have not abided by the strict rules of evidence is that arbitration is not as much an adversary proceeding as is a court proceeding; arbitration is a fact-finding proceeding. Therefore, the emphasis of our Committee was on disclosure or getting as much information as we can.

If the information is unreliable, we want rules for screening it out, but insofar as obtaining information, our emphasis should be on obtaining as much as we possibly can.

There may be reasons of policy why certain information, even though helpful in determining the truth, ought not be disclosed. But there should be some reason other than because the information is labeled "confidential."

The fact that two parties go off into a corner and say something because they don't want anybody else to hear it doesn't mean that it is confidential, even though they themselves seem to be treating it as confidential. I don't believe that there is any magic about that. I think that such information ought to be available in the arbitration process as much as any other information, if it is going to help.

On the other hand, we recognize in this report certain policy questions. We have, for example, labeled witness and attorney communications as privileged. I personally don't know why we have to accept that; we have done it only because it is traditional to do so, and I suppose it would upset a lot of people if we didn't. But as far as I am concerned, there are many communications between a witness and an attorney which are no different from a communication between a witness and a union or a management official. But traditionally, the client-attorney privilege has been so built into the law that we have recognized it here.

There may well be some policy consideration for excluding evidence, and we might call it privilege. In my judgment, however, if we are going to get disposition of disputes in the grievance procedure, it is necessary that people be permitted to speak freely and not feel inhibited for fear that what they say may be used against them if the matter goes before an arbitrator.

It is for that reason you will notice, in paragraph "f," that the labor members limited the evidence concerning grievance discussions that may be offered to admissions and statements of position. We felt that admissions clearly essential to the proof of the case ought to be admitted; also, a statement of position ought to be admitted.

Many of the things that are said by the parties, either in the grievance discussion between management and labor, or within the union ranks or the management ranks, are not of that cate-

gory and ought not to be available for policy reasons. They ought to be free to speak, but not because they labeled their remarks "confidential."

CHAIRMAN STARK: Sid, do you want to make a short comment? After that we will move on to parol evidence.

MR. BRAUFMAN: Sid Braufman, with the UNIVAC Division of Sperry Rand. I want to make two or three very short comments, then pose a question to the group that drafted this report, because I am somewhat confused as to the real meaning and intent of "e."

First of all, I think this entire discussion presupposes a real benefit to be derived from some formal rules of evidence, and I was really quite surprised when I came here to find that we had this kind of discussion on the agenda. I am not personally convinced that it would be to the advantage of the process to have formal rules of evidence, but I have an open mind on the matter.

My second comment is that I agree with the proposed rule on grievance discussions. I really don't see too much difference between the rule as stated and the suggested rule of the labor members.

I would like to make another comment on what Mr. Block said, because this is something that we are having problems with all the time. In our company we take the position that a shop steward is not an attorney for the grievant; he is there as a witness more than as an attorney. We don't expect him to be in a position to tell the employee, "Mr. Employee, you don't have to say anything, I will speak for you." We expect the employee to answer any questions we put to him, and we do not look upon the shop steward as his attorney.

Now, the question I have, going to item "e," is this: we have a policy, which I think many companies follow, of doing a very thorough investigation of any grievance going to arbitration. The particular man who is going to handle the case investigates the grievance and does what we call a Prehearing Case Analysis. The union knows we do this.

The case analysis is supposedly an objective document; it sets forth the grievance, the position of both sides, case precedent, if

any, and sometimes it concludes with a recommended position, even to the effect, "We are not too strong in this case, perhaps we ought to settle it."

Now, does this statement under "e," mean that the union in an arbitration case could insist that we produce for the arbitrator our Prehearing Case Analysis?

CHAIRMAN STARK: That's a good question. I am going to ask Herb Prashker to answer it.

MR. PRASHKER: Sid, I think the straight answer is that we didn't address ourselves to that particular question. I can only give you my own view, which I don't think will surprise you. I regard that kind of prehearing preparation as something like an attorney's work sheet prepared for purposes of, if you will, litigation; therefore, it is privileged.

The kinds of communications that we were talking about were not those which relate specifically to the preparation for the hearing, the attorney's work, or, if not an attorney, some other trial advocate, but to matters that relate to the evolution of the dispute itself.

Occasionally, documents such as you refer to, as I am sure we are all aware, are generated after the dispute has matured. But if they are generated for the purpose of preparing for a hearing, it would seem to me that they would not be admissible, that they would be privileged.

MR. BRAUFMAN: Would you agree, then, that this language is much too broadly written?

MR. PRASHKER: I would say in general defense of our language, as our introduction states, it is rather laconic. All the members of this group should understand that it is the view of the Committee that it is not possible to develop a systematic and complete body of rules of evidence by having six people devote 13 or 14 meetings to the matter over the course of a year. There are 13 volumes of *Wigmore on Evidence* which doesn't cover all the rulings; we didn't try to do so, either.

CHAIRMAN STARK: Let's turn to the next subject, parol evidence. Some of you have already alluded to it.

Would you turn to Item III, "When is Parol Evidence Admissible?"

> "Parol evidence, for purposes of this analysis, consists of testimony concerning discussions in the negotiation or drafting of an agreement which is offered to explain the meaning of a provision of that agreement."
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> "A. Parol evidence is not admissible if the language of the contract provision in question is plain and unambiguous. It is admissible if the language in question is ambiguous. It is for the arbitrator to determine, in the last analysis, whether or not the disputed words are ambiguous, and he may receive evidence on that question.
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> "B. Parol evidence is admissible in testimony concerning reformation of the agreement if the arbitrator has jurisdiction of the issue involving reformation. [We hedged on that one, as you can see.]
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> "C. In the absence of a requirement in the written agreement that it can be modified only in writing, evidence of an alleged subsequent oral agreement which was intended to change or modify the contract is admissible.
>
> "D. Evidence of an alleged oral agreement made contemporaneously with a written agreement and which modifies or varies that written agreement with respect to a subject intended to be covered by the agreement's terms is not admissible."

There are four divisions to this. You can address your comments to any one or more of them.

MR. AARON: Benjamin Aaron, from Southern California. I am a little confused as to the relationship between A and B. I have in mind a case in which I participated many years ago, which admittedly is rather unusual, but very briefly the facts are these:

The parties were negotiating a new agreement. It took many, many weeks, and toward the end they worked around the clock. By this time they were all in a state of complete physical and, presumably, mental exhaustion. At about 3:00 o'clock in the morning of the final day, they reached what they thought was an agreement. The agreement, in effect, was that there would be a general reclassification of rates, and that no reclassification would amount to less than five cents an hour.

The industrial relations director and chief negotiator for the company then sat down, and in the presence of the union wrote

out in longhand this agreement, except that he inadvertently, as I subsequently found from a good deal of testimony which I did receive, wrote that there should be a reclassification, no man receiving less than five cents an hour, and that there should be on top of that a general increase of five cents an hour. So that the difference in the pay increase was something like $2 million a year.

After the parties typed up the document and signed it, the union and the company noticed what had occurred. The company said, "Well, of course you know we didn't mean this." And the union said, "Oh, we know you didn't mean it, but that's what it says, and that is the plain and unambiguous meaning of the contract." This, by the way, was discovered after the signatures had been applied.

The question seems to raise a conflict in your proposed rules between A and B, but perhaps I missed the point. On the one hand you do have, I assume, partly a reformation problem and partly it is the plain and unambiguous meaning problem. I myself didn't have much difficulty with it; I did receive the evidence, and I thought it was quite clear there had been a mistake and that one side was simply trying to take unconscionable advantage.

But with these proposed rules, it seems to me there is, at least theoretically, a conflict.

CHAIRMAN STARK: Herb?

MR. PRASHKER: I think that the case that you put illustrates quite clearly the difference we were trying to draw. An arbitrator either has jurisdiction to correct a mistake in an agreement under the terms of the submission, or he doesn't. Sometimes an arbitration clause will read that the arbitrator is under no circumstances to vary or modify the terms of the agreement.

If a mistake has been made and the arbitrator was hearing the case under such a limiting submission, it seemed to us quite clear that he was without jurisdiction to correct the error, that the parties would have to go to court to have the error corrected in an ordinary reformation action, and that if the arbitrator was sitting under a limited submission, he would have to say, as the union said in your case, "Look, the words of this contract are clear

and unambiguous. I have no jurisdiction to vary or modify clear and unambiguous terms, and if you want reformation, go somewhere else, go to court."

That was our view of this problem. And of course A, which appears to give you difficulty in light of B, is directed to a case where the language, at least in the view of one side, is not clear and unambiguous, and the arbitrator is asked to take oral testimony which will explain what that party thinks is unclear. At that point the arbitrator has to make up his mind whether he thinks the contract is ambiguous enough to warrant parol evidence to explain it.

CHAIRMAN STARK: Thank you. Joe has something on parol evidence, I believe.

MR. BRANDSCHAIN: This is a seemingly innocent and innocuous enough statement of the well-known parol evidence rule. But I submit that if we accept it in its entirety, we are creating a most dangerous situation in arbitration.

Just as Ben Aaron has pointed out, there are many situations where an agreement is consummated and written up in the wee small hours, after days and days of negotiation. It seems to me most dangerous and most unreasonable to permit witnesses from either side, who are after all proponents of a particular position, to testify as to what was intended by a certain contract clause. This is especially so when we allow them to testify on the basis of memory, which, although completely honest on their part, cannot help but be distorted by the passage of time and after the complete blur of many days and many hours of negotiation. I think that in many cases such testimony is a result of confusion. They have convinced themselves of the correctness of their position, and in many cases they will perhaps accurately testify as to what someone on the other side said was the meaning of the particular clause, but in doing so will take the statement out of context. The statement may have been made in connection with some other clause in the contract.

Let me give you an illustration. A grievance was submitted in which a certain group of employees had been loading cars at the conclusion of their shift. The particular operation was not com-

pleted. They wanted to continue the operation on an overtime basis. They offered testimony that the company had said that when overtime was to be worked, the overtime would be assigned not on the basis of seniority, but on the functional basis; those employees who were performing a particular job at the time would continue on overtime instead of having the overtime distributed on the basis of seniority.

The company had said that. But, subsequent to the negotiations, a second shift was introduced, and when the work was not completed at the conclusion of the first shift, the work was given to the employees on the second shift. The employees on the first shift grieved for that work and claimed, on the basis of the statements in the negotiations, that they were entitled to the work.

CHAIRMAN STARK: Joe, is it your point that parol evidence should not be admitted?

MR. BRANDSCHAIN: I think it is very dangerous. It should be admitted, very sparingly, if at all, and arbitrators should know that parol evidence is an unreliable and dangerous type of testimony.

CHAIRMAN STARK: Anyone else?

MR. BRESSLER: Bob Bressler, a management representative, Doehler-Jarvis, National Lead Company. I am in general agreement with the remarks of Mr. Braufman. As laymen and practitioners, we are basically concerned with getting a resolution of a problem that is processed through the grievance procedure, and most companies today have formalized grievance procedures and grievance records.

What we are looking for when we come to the arbitrator is an answer. Quite frankly, I don't think that we will find the answers we are looking for by trying to set down "formal rules," because at best they are generalizations and don't fit every case.

I think that this is shown in the discussion here by the arbitrators themselves. We can see that they are honestly disturbed by the possible application of some general rule to a situation where it may not fit.

For example, it was pointed out that there may be many cases where the only way you will find the answer is to allow everything

to be placed before the arbitrator. The parties have tried to find a solution to their problem, but they haven't found it. Now they are before the arbitrator. I know we feel that, with very few limitations, everything should come before the arbitrator. We want him to use his good judgment; he should not be found by any firm and fast rules, but should try to find some reasonable way to use the evidence that he has before him in the specific case.

CHAIRMAN STARK: We would probably all agree with you. No one here has advocated compulsory adherence to firm and fast rules. I think we are looking for some helpful guide lines.

Asher wants to say something. Then let's go on to the next topic.

MR. SCHWARTZ: Aside from the purpose of the Academy in asking us to give arbitrators some help, I want to address myself as an advocate, as someone who appears before arbitrators, to what I consider one of the basic problems confronting us.

One of the major problems we find is that we never know how much of the other side's proof we have to meet. You have all heard the phrase, "I will take it for what it's worth," and it may well be that an arbitrator will ignore testimony for one reason or another, because it is privileged, or irrelevant, or hearsay, or whatever. But the fellow on the other side of the table doesn't know whether it is going to be ignored or not at that point. He has to meet that proof.

You may well get off, and often do, into wild, irrelevant, and time-consuming discussions, which are completely unnecessary. It is for this reason that we are considering whether arbitrators ought to follow some rules.

That isn't to say that we should place upon the arbitrator the same kinds of restrictions that a judge has in applying the rules of evidence. We are not aiming at that. We are searching for some rules or some guide lines to aid the parties in presenting their proof.

We all ought to know what those rules are. It isn't fair to the parties to say, "Let the arbitrator make the rules." Some of the arbitrators we get to know, and we know what rules they follow.

But often we meet arbitrators who are strangers. We don't know what rulings they will make. Consequently, the establishment of some rules is necessary—whether they are good or bad isn't as important as that we have them. Of course, if we are going to have rules, they ought to be as good as we can make them.

CHAIRMAN STARK: I think we had better go on to the next subject: Obtaining evidence from the other side, which is Item V:

> "A. In the absence of a privilege or other bar, an adverse party or third party should, if requested, be required to produce relevant evidence or to testify.
>
> "B. It is permissible for a party to call witnesses from the opposing side. The witness may be treated as a hostile witness, but it is incumbent on the arbitrator to insure that the direct examination is proper and that the witness is protected against unfair tactics. [Some of our members do not consider an adverse witness, *per se,* to be hostile.]
>
> "C. The existence of the power of subpoena varies from jurisdiction to jurisdiction. It should be available to the fullest extent legally permissible, with appropriate safeguards related to questions of specificity, relevance, undue burden, and the like."

In reading a report of one of the other committees, I noticed that they made much of an item which falls under B—that is whether the employer should be allowed to call the grievant as his first witness in a discipline or discharge case. We discussed this point, and you will note that we reached a different consclusion.

Do you have any comments or questions on this matter?

Yes, Mr. Carlstrom.

MR. CARLSTROM: I totally disagree with the majority of the panel. It is our view that the employer should not have the right to require an employee to appear at an arbitration proceeding. It is our view that the employer's shop rules govern his conduct in the plant, and under specific exceptions may cover the employee outside of the plant and outside of working hours. The exceptions are not relevant to the point at hand.

But we have never believed that the employer has the right to subpoena or compel an employee to come to a proceeding and testify against a fellow worker. Moreover, I think we have in at least one system of some size, General Motors and UAW, umpire decisions that support this view.

Candidly, I am surprised, although I know the AAA rule on subpoena power, at the concept that either the union or the company may require the presence of a witness from the other side of the table to speak or to be allowed to be questioned at a hearing.

CHAIRMAN STARK: Any opposing views?

MR. CASEY: Riley Casey, management attorney, Washington, D.C.

I take issue with my learned friend from the Autoworkers on this concept of unavailability of witnesses. I assume he is talking only about witnesses, not about the grievant. The company can require the grievant to be present, even under your concept; is that right?

MR. CARLSTROM: Well, we would want the grievant to be present in my frame of reference.

MR. CASEY: Okay. If the company is prevented from calling witnesses it feels would be helpful to present the total case, the arbitrator will be completely hamstrung in finding out what the facts in the case are.

I am sure most management people know that any time they call an employee to testify against a fellow employee they run the risk that the man will be placed in an awkward position. The company may doubt whether they will get the full story out of him.

But at the same time, the company has the problem of getting all the facts before the arbitrator. The only way they can do it is to call in and question other employees. This problem frequently arises, as I am sure you are all aware, in the middle of an arbitration case. Something has developed from one of the witnesses, and the only answer to it lies out in the shop with another man. You send for him right away. Then you run into the problem that my Autoworker friend raises. The union says, "Oh, no, no; we object to having any other company employees testify against this grievant."

Fortunately, in each instance, it has been my experience that the arbitrator has ruled that the employee could be required to appear and to testify, and I have never found that the mere fact that the man did testify creates this horrible morale problem to

which the union always refers. I think the same analogy lies in a court proceeding when you have to subpoena neighbors and friends of a particular witness and they don't want to come. But they do some and testify, and they realize that they are doing it under coercion of a subpoena.

If the subpoena power is necessary to reach an employee who is perhaps 500 yards away from the hearing room, you reach a point of ridiculousness in a proceeding of this nature; you would be better back in a courtroom than before an arbitrator. Thank you.

CHAIRMAN STARK: Yes.

MR. DONALDSON: Glen Donaldson, Arbitrator, Denver. I think, in connection with this statement, there should be some distinction drawn between a discipline case—suspension or discharge—and an ordinary grievance. I think most arbitrators in a discipline case would require the company to proceed with its case first. If the grievant could be called, I think you upset that order of procedure. And second, from experience, considerable embarrassment and hectoring can occur over the question of whether or not the person is being called to testify against himself.

I think whether a grievant should be allowed to be called in a discharge depends upon whether the state statute permits cross examination. But only in case of an express statute should it be permitted.

CHAIRMAN STARK: You are next.

MR. ALEXANDER: I have had experience in both spheres. I think the difference in point of view goes back to the remarks I made before—the question is one of labor relations context.

Mr. Carlstrom is expressing a point of view with which I am fully familiar, and I would say probably prevails in the Michigan area and in metals manufacturing and automotive. It does not mean the employer is handicapped. In the first place, grievances are usually prepared so well in advance that there is almost never any surprise, and if there is sufficient surprise that it needs additional extraction of facts, the hearing will be adjourned or it will be sent back to the parties for that purpose. If the employer is

faced with the uncomfortable position of having to rely on information derived from other employees to prove his case, it is not merely that he can't produce the information, it is how he produces it and when. In the context of the automotive industry—I think Mr. Carlstrom probably will agree—there may be certain factual situations which may cause some problem. Generally, the employer will be permitted to go ahead and produce through his own witnesses or through secondhand information, reports of investigations, or conversations with witnesses, the information he has derived. He will not call the employees as witnesses to get it out of their mouths at the hearing.

The burden then shifts to the union; they may want to call these people to refute it. And the union carries a fairly heavy burden which it recognizes; if they don't produce the witness who can best give the facts, the arbitrator will proceed on the assumption that if they did testify, they would not contradict it.

So you may wind up giving more value to protecting the union-management relationship. This is where my remarks come back to those made before; you have a relationship to protect, as well as to try an arbitration case. At least, you are not left in the unhappy circumstance that the arbitrator goes away with no feel or no proof upon which he can base a decision. It is not as much of a black-and-white alternative as the discussion here might otherwise seem to indicate.

CHAIRMAN STARK: Is that Pat? Yes.

MR. FISHER: Pat Fisher, Arbitrator. In section "C" you make reference to the fact that the existence of the power of subpoena varies from jurisdiction to jurisdiction. Are you implying that where that power does not exist, either by contract or by statute, the arbitrator is prohibited from compelling one party or the other to produce information which may be peculiarly within its knowledge?

CHAIRMAN STARK: That is not what we intended. We were asked to discuss the use of subpoenas. We agreed that the arbitrator certainly should and does always ask both sides for whatever information he feels he needs. Whether he is able to compel a reluctant party to produce that information depends upon the

subpoena power of the jurisdiction in which he is working. If the information is withheld, he can draw his own conclusion.

Bob wants to say something.

MR. FEINBERG: The question that we were presented with is: how best do you ascertain and uncover the truth? It may very well be that in some particular company-union relationships, they may want to adopt their own policy concerning the calling of witnesses. Certainly, if they want to make their own rules, any arbitrator should comply.

Bethlehem Steel never calls a member of the bargaining unit as a witness. It would rather lose the case, at least in my experience, then call a member of the bargaining unit as a witness for itself. This is a question of policy for the parties to determine for themselves.

If there is no policy, and if the best source of the evidence to be presented is an individual who may be on one side or the other, we didn't feel that there was any reason why that witness should not be called. I had a case recently, for example, which had gone to court. Three years had elapsed between the time of the arbitration hearing and the filing of the grievance; as a consequence, the witnesses were all over the country and unavailable. The company called as its principal witness the president of the local union, and the union called as its principal witness the vice president in charge of industrial relations of the company. There was no controversy about it, they were the only individuals available who knew the facts that each side felt it had to present.

We might also point out that this may be a tempest in a teapot. If a union puts on the grievant, he is eventually subject to cross examination, and the company can ask him anything it wants. So what's wrong with the company putting the grievant on to start with? And the same goes for company witnesses.

MR. KORNBLUM: Daniel Kornblum from New York, Arbitrator.

I would like to make an observation on Mr. Alexander's statement in connection with the power of the arbitrator to indulge in inferences as to what a witness within the control of the other side would testify had he been called and he was not called. It

seems to me that if we are applying judicial concepts, it would depend entirely upon the subpoena power. The federal rule, as I understand it, is that judges or jurors are not entitled to indulge in any inference that a witness within the power of the other side, who has not been called by the other side, would testify adversely to the adversary.

The reason for that, of course, depends upon the subpoena power. It is within the competence and the purview of the adversary to have a subpoena issued and call in this witness if he thinks the testimony will be damaging to the other side.

Now, that probably leads to the question of whether an arbitrator, in jurisdictions which do not confer upon him subpoena power, has any authority to indulge in such inference if he asks the other side to produce a witness whom he believes will make a real contribution to the facts in controversy, and the witness is not produced. I think that in those situations the arbitrator should indulge in no such inferences.

CHAIRMAN STARK: All right. We go on to the next subject, which is "New Evidence," Item VIII.

> "When is the use of 'new' evidence at arbitration hearings permissible?"
>
> "In theory at least, one of the prime functions of the grievance procedure is to permit each party to re-evaluate its position in light of facts and arguments presented by the other, and thus to resolve disputes where possible. Full disclosure, therefore, is in the interest of the parties. To the extent that contracts specifically require such disclosure, new evidence offered at the arbitration hearing, though otherwise relevant, should be rejected."
>
> "In some situations, however, it is the practice of the parties not to present all the evidence during the grievance procedure. In other situations the parties may recognize from the outset that a particular grievance must be arbitrated and pass quickly through the steps of grievance procedure. In cases like these, evidence not disclosed prior to the hearing should be admitted. In general, evidence discovered after the grievance was processed should also be admitted. The arbitrator, however, shall grant adjournments or take other measures to insure a fair hearing and to protect a party taken by surprise as to evidence concerning a material issue.
>
> " (The labor members would revise the next to the last sentence as follows: In general, evidence discovered after the grievance was

processed, which tends to establish the validity of positions, facts, or statements made before the grievance, should also be admitted.)"

This is a difference, as I noted before, of emphasis. Do any of the Panel members wish to comment?

MR. SCHWARTZ: I want to clarify Art's statement; it is not merely a matter of emphasis. We were discussing a situation in which a grievance comes before the arbitrator and the union meets the proof. It then finds that the management has discovered, before coming to the arbitrator but after the last session in the plant, that this individual was guilty of some other conduct or misconduct which is also basis for discharge.

It was our feeling that in that situation we should not permit the arbitrator to use that evidence to justify the discharge. I just wanted to clarify the position of the labor members.

CHAIRMAN STARK: Anyone from the floor?

MR. AARON: Benjamin Aaron. I don't know whether my question is out of order or not. I wonder if this is limited entirely to evidence; did you intend to deal with argument?

CHAIRMAN STARK: We were not talking about argument.

MR. AARON: So you did not intend to cover the problem of the new argument advanced for the first time in the briefs, for example?

CHAIRMAN STARK: We didn't discuss that, so I don't think we can say we covered it.

MR. AARON: Very well, then, I desist.

CHAIRMAN STARK: Was there a hand over here? All right, go ahead.

UNIDENTIFIED PARTICIPANT: It seems to me that this section doesn't deal with a very vexatious aspect of new evidence, new evidence which arises after the close of the hearing and before the arbitrator becomes *functus officio;* in other words, in the *ad hoc* situation before the arbitrator has rendered his award.

There have been sporadic cases on this subject. I have encountered the problem myself and found that very rigid rules

were applied in preventing the introduction of this new evidence, which was in good faith only revealed after the conclusion of the hearing, but as I say, before the award was rendered.

I think some thought might be given to this problem, not because we shouldn't put an end to grievances once and for all under the arbitration process, but because there are occasional cases where very important new evidence does arise in this fashion. It seems to me that the rulings with which I am familiar take a much more rigid position than the courts normally do, as I think of the lawyers here are well aware. In the courts, generally, if this new evidence is disclosed or comes to light within one year of the judgment, application can be made for reopening a proceeding for the purposes of presentation of this new evidence.

I am not suggesting that any such rule be adopted here, but I think that some more thought should be given to this very important aspect of new evidence.

CHAIRMAN STARK: Is this evidence which was not available at the time the hearing was held?

UNIDENTIFIED PARTICIPANT: Under the judicial rules, new evidence has a special meaning. It means evidence which was not available to the parties at the time the trial was held and all of the other applicable criteria.

There have been some rulings where arbitrators have permitted reopening the hearing for the presentation of new evidence, so long as they have not become *functus officio*. The question has also arisen in this context: *ad hoc* arbitrators have rendered their awards on the basis of concluded hearings, and new evidence has arisen after the award has been rendered. The question then is whether reconsidering the matter before another arbitrator is arbitrable.

These are interesting questions, and they shouldn't be neglected. I think they have been. With the possible exception of Fleming's book and a few remarks by others at different times, by and large these questions have not been canvassed very thoroughly.

CHAIRMAN STARK: I think you are right, but this kind of thing

seldom happens. I can remember only once in my experience having a request to reopen a hearing.

Are there any other comments about evidence which is sought to be introduced after the hearing is closed, but before the decision is rendered? Some of you who are impartial umpires may have had this experience more frequently than *ad hoc* arbitrators.

No?

It is interesting, but I guess it doesn't happen too often.

Shall we go on to another subject? Let's look at pretrial procedures. And this is in the area of recommendation, suggestion, hope, prayer, or whatever you may call it.

> "In judicial pretrial proceedings the parties *first* define the legal and factual issues to be tried; *second,* develop the evidence for use in the trial, and *third,* apprise each other of the evidence likely to be produced."
>
> "Prehearing procedures for carrying out the first and third of these purposes would clearly expedite the trial of arbitration cases, especially in those situations where the grievance procedure has not satisfactorily developed the issues. It would be desirable, wherever possible, for the parties, either by agreement or at the arbitrator's request, to submit and exchange in advance of the arbitration hearing statements of their claims and arguments and a summary statement of the evidence to be introduced. In appropriate cases the arbitrator, upon receipt of such statements, might ask one or the other party to submit supplementary statements further developing matters already covered or covering different matters. The arbitrator may require the parties to define the legal and factual issues to be tried prior to or at the commencement of hearings if he finds that such a definition is necessary to an orderly and fair hearing."
>
> "The arbitrator should confine the hearing to matters relevant to the real issues." [Incidentally, this seems to be a matter of some dispute, strangely enough.] "He cannot do so, however, unless the issues are clearly defined before evidence is introduced at the hearing. The clear definition of issues prior to the hearing will eliminate many of the instances in which arbitrators admit evidence 'for what it is worth' because, not knowing the issues, they cannot exclude it as irrelevant."

MR. ALEXANDER: I am inclined to agree that from the procedural standpoint, the major weakness of the arbitration process is the lack of precision with which issues are framed and parties

come to grips with them. I would hope, therefore, that we could do something to improve the situation.

The difficulty, of course, particularly in the *ad hoc* field, is that it slows up the proceedings, increases the cost—or might if the arbitrator were to call the parties together for a typical pretrial hearing, or to get them to submit statements of the kind suggested.

The greater difficulty, of course, is that it forces parties to think, and the most serious defect in the arbitration process is the failure of many parties to think in advance. They prefer to wait and see what happens at the hearing and try to win at the hearing.

I have had some experience, on the other hand, with pretrial procedures in permanent umpire relationships, and have found that such procedures can be and have been helpful. They have speeded up hearings. But these were parties, all in the same city, who could set aside a day, with a three day docket of cases, to work up the problems, to get ready for proof, and to agree and narrow the issues in a one day pre-arbitration hearing.

But it is much more difficult in the *ad hoc* situation because of numerous problems. I agree that procedurally this is a basic defect in the arbitration process compared to the litigation process.

CHAIRMAN STARK: Well, do we have anyone who disagrees?

MR. CASEY: Riley Casey again. I would like to speak against this entire subject of pretrial discovery. I have had extensive experience as a trial lawyer with the pretrial procedure in court, and am well aware of the great advantage that it works in the court arena. I have also used it in arbitration proceedings, but the same reasoning and the same bases do not apply in arbitration, particularly *ad hoc* arbitration, as in court.

Pretrial procedures might have some virtue in a permanent umpireship, where, as the last speaker just mentioned, everybody is in the same city and they are close enough to do it. But we attempted it at one time, in a situation in which we always used *ad hoc* arbitrators. We found that arbitrations were going on *ad infinitum,* five and six hours when they should have been concluded in one hour had the parties refined the issues so that each side knew what the other was going to produce. So we attempted

to work up pretrial briefs, with each side to submit its brief a minimum of one week before the hearing. The briefs were to include what each party would produce by way of evidence, what each party saw the issue to be, and citation of precedent cases which they considered to be in their favor.

We found that it did not work. We found—and I don't mean to say this critically of the union—that the union's pretrial statement would be, "Our position is the same as it was in Step 4." This didn't help us at all. On the other hand, we had completely disclosed our case and, in effect, prepared their case for them for arbitration.

We also attempted, on another level, to prepare submission statements defining the issue in an attempt to have a pretrial atmosphere so that the parties could come into the hearing prepared to do battle. Although the company would attempt to refine the issue and state it as an issue in the form of a question to be resolved by the arbitrator, we found again that the union was coming in with a vague, broad statement, trying to encompass the whole contract. We found that the reason for it was—and these were all *ad hoc* situations—that the union was represented through Step 4 by the staff representative. He was not a lawyer, although he was undoubtedly skilled in handling cases in the grievance procedure. But when it came to the arbitration, a union attorney came into the case. He was probably briefed on the case the day he arrived in town or the night before, and he did not have a chance to prepare a pretrial statement. He was supposedly locked into the pretrial statement that his staff representative had prepared and submitted for him.

So as a result, when he came to the hearing, he had to practically disown the pretrial statement that the staff representative had submitted and start his case all over again. This again placed the company at a disadvantage, because it had submitted these pretrial statements.

In summary, let me say that I have found it best to allow a matter to go through the grievance procedure and then proceed to the arbitration hearing without anything further. It has been my experience that it is the fairest way for both sides and with minimal cost to each.

CHAIRMAN STARK: Herb Prashker has had some marathon hearings, and I think he might have a useful comment here. Herb?

MR. PRASHKER: I must say I acknowledge all the difficulties that you have just adverted to, at least in some situations, in getting a reasonably precise and coherent statement of position from unions who very frequently don't have their lawyers on tap as early as do the companies.

On the other hand, I think it is worth a try. I know we have tried it many times, and in many cases with success, and, really, the message of this document is that we would like arbitrators, if you will, to recognize their responsibility to participate in the effort.

I think that even *ad hoc* arbitrators—maybe *ad hoc* arbitrators especially—have certain powers of persuasion, in view of the fact that they are going to ultimately render the decision, to induce parties in advance of a hearing to satisfy an arbitrator's craving for some dim comprehension of the nature of the case he is going to hear before the evidence starts coming in.

We have found, from experience, that it expedites the hearing if an arbitrator who has been appointed, if he is in the same town with the parties, calls them into his office or, if not, writes them a letter and requests a statement of position, of the basic evidence that is going to be introduced, and of the particular clauses of the contract that each side is going to rely on.

If the arbitrator doesn't receive in advance of the hearing the kind of response he wants, some of us would like to think that some arbitrators might be minded to make another call or to write another letter and say, "You haven't properly explained your position, and before the hearing begins, I want to learn more about it." It is true that in many cases the responses will not be satisfactory, but in many cases they will be.

We also had in mind something that isn't clearly stated in this document: we have been talking about pretrial procedures, but it might be that one of the most helpful ways of getting the issue defined would be for arbitrators to really press parties on their opening statements. The characteristic opening statement in an arbitration hearing frequently does not leave the arbitrator in a

position to rule on what evidence should be admissible. Arbitrators also have certain powers of persuasion in the hearing room in respect to getting a clear statement of issues because if they let the parties understand that rulings on evidence are going to be based on what the parties state their claims are at the beginning of the case, I think the parties will be very loath to withhold too much.

The title of this session, of course, was "Problems of Proof," and we have devoted a great deal of time to rules of evidence. In my experience, the two greatest problems of proof in arbitration hearings are the problems of perjury—as to which we can make up no rules—and problems of relevance.

I am not sure which of these is more important; I think perhaps the latter, because the introduction of irrelevant testimony not only extends the hearing, but often inordinately so. Arthur referred to the fact that I have been engaged in marathon hearings. I recently had one that took some 21 days. Approximately 80 percent of the material introduced was irrelevant and could have been ruled irrelevant if, at the opening of the hearing, we had had a clear statement of the issues and of the various contentions that were going to be made on either side.

But there is no real point in talking about relevance unless the arbitrator knows what is relevant, and unless the parties know in advance what is relevant. That's the only orderly way to conduct a hearing, and we think that arbitrators ought to assume a responsibility in getting the issues defined earlier.

CHAIRMAN STARK: It is getting rather late. Suppose we discuss Item X,—which really meshes into the last one—, the arbitrator's responsibility for taking the initiative, and then adjourn.

> "The arbitrator is responsible for conducting an orderly hearing and should exercise initiative to that end. Since the principal purpose of the hearing is to provide the arbitrator with relevant and admissible evidence necessary to resolve the issue in an expeditious manner, he should not permit personal attacks, outbursts, argumentative, loud or abusive questioning, hectoring, badgering, refusing to let the witness answer the question, or like behavior."
>
> "The arbitrator must afford each party an adequate opportunity to present its case by evidence and argument. He must determine

> in individual situations how much leeway should be given a witness or representative in testifying or presenting his case. However, he should not permit the hearing to bog down with irrelevant matter or repetitious evidence or argument."

I suppose a lot of this is rather trite and obvious, but does anybody have any comments on the question of admitting irrelevant material?

As I said, one of the other reports seems to indicate that this perhaps was not as bad as it sounds, and it has its purposes. Does anyone here care to comment on that? No.

All right, then, before we adjourn, would some of you care to tell us how you regard this workshop paper? We met together for many hours, and we enjoyed it. But we had no feeling as to what reaction it would create among practitioners and among other arbitrators, and we didn't attempt to set down a final set of rules. We attempted to map out areas in which there might be consensus and which would be helpful to everyone concerned.

Would any of you care to give us a general reaction to what we have done? Yes?

MR. CASEY: Riley Casey again. At the risk of monopolizing this microphone, let me say that I found the paper quite helpful. I would like to see it become a policy statement by the National Academy, which would set forth what the Academy believes are guide lines on rules of evidence, or proof if you don't want to call them rules of evidence. I would like to see it become an established document that the parties using Academy members as arbitrators could use as a working tool. I am thinking of something similar to the AAA booklet containing the rules of the Association which is given to the parties using its services. If there were such a document which the parties could utilize, when procedural or evidentiary questions arose during the hearings, the parties could refer back to this document and say, "It is a matter of policy for the National Academy of Arbitrators to follow this or that procedure."

Take, for example, the last point mentioned by Mr. Stark concerning the hectoring of witnesses—whatever that means. If it should develop in an arbitration case that one of the parties became argumentative or abusive of a witness, the other party could pull

out this document and say, "It is a matter of policy of the National Academy of Arbitrators that these tactics should not be allowed in a hearing." This would take the burden from the attorney or the representative of the side who is trying to quell this type of thing.

I think that this paper would be a good jumping off place to set forth a National Academy of Arbitrators procedural policy. Thank you.

CHAIRMAN STARK: Anyone else?

MR. AARON: With all deference to the excellent effort made by the members of the panel and to the statement of the last speaker, I am very troubled by his suggestion. I am also very troubled by the statement that appears early in the report, that an effort should be made to develop uniform rules of evidence in arbitration which should not vary from state to state.

There is a certain, perhaps not fully articulated, premise underlying that statement, at least I infer that there is, that bothers me a great deal, and it is the same thing that gives me trouble with Mr. Casey's proposal.

It does seem to me that while arbitrators cannot shirk their responsibility to provide a fair hearing and a reasonably brief hearing when that's indicated, as well as all the things that we all subscribe to that are set forth in the Report, the procedure does belong to the parties, and those who have arbitrated in a variety of situations, both as umpires and as *ad hoc* arbitrators, know that they range from tremendous informality, almost anarchy, to a very formal procedure.

The parties choose those procedures. Sometimes the arbitrator may be very unhappy with them and, given sufficient time may even have some small influence in getting the parties to change them. But to suggest that this Academy, or any group, ought to endorse a fixed set of rules, however general or specifically expressed, and embody them in a policy and then allow counsel, or as is very frequently the case, laymen representing one side or the other, to refer to that as if it were some super Holy Writ to determine how matters should be decided in arbitration, seems to me to be a great mistake, a step backward. It introduces an in-

flexibility into the procedure, into the whole institution, and affects that which seems to me, at least, to be one of its greatest strengths—that is, the parties pretty much choose the kind of procedure they want. And even though their practices may horrify some of us at times, if it is what they like and they get along with it, why should we attempt to change it?

I find that many of the Committee's suggestions are very helpful. I believe the parties may find that there is much in here that is useful. But I certainly hope that we don't go the route of adopting these or any other rules as *the rules* of policy which this Academy or any other group should endorse, and which the parties should then be under some sort of moral compulsion, if not legal, to follow in arbitration proceedings.

CHAIRMAN STARK: Thank you. We on the panel would like to thank you for reading the document, for studying it, and commenting on it.