know that the employee is protected, and it is not interested particularly in the union or the employer. So, in both cases, Mr. Hill, on both questions, I say that you can't have it the way we would like it or you would like it. I cannot guarantee to you that he will not walk across the street and file if he is dissatisfied. However, you take many submissions as you find them, and I am sure they are less than satisfying in most instances.

CHAIRMAN ELSON: Gentlemen, I am going to bring this meeting to a close. We started with a conviction that we wouldn't reach a consensus, and it is quite clear that we have not.

I think the discussion this afternoon of the papers presented, including Professor Meltzer's fine paper, all go to the basic question, and that is: What is our conception of the arbitration process? Many arbitrators, including myself, have been lulled into a sense of false security by a series of "truisms," or clichés, if you will. For example, how private is the world of arbitration? How private is the private law of the collective agreement? These are questions that I think should continue to engage us, and I hope that some of our researchers in the Academy, or among our guests, will devote more time to them.

Let me conclude by thanking the members of the panel for their very fine contributions.

WORKSHOP C*

EDGAR A. JONES, JR., CHAIRMAN
HARVEY LETTER, CO-CHAIRMAN
CHARLES G. BAKALY
STEPHEN REINHARDT

CHAIRMAN JONES: This is a workshop, as you know, devoted to probing the relationship of the arbitrator to the Board and the courts. The purpose of the workshop is to get you people talking, and to get the gentlemen on the platform talking. It is not to

* Edgar A. Jones, Jr., Professor of Law, University of California at Los Angeles, and Member, National Academy of Arbitrators, served as Chairman of Workshop C. Other panel members were: Harvey Letter, Regional Attorney, National Labor Relations Board, San Francisco, Co-Chairman; Charles G. Bakaly, Attorney, O'Melveny and Myers, Los Angeles, representing management; and Stephen Reinhardt, Attorney, Bodle, Fogel, Julber and Reinhardt, Los Angeles, representing labor.

engage in speeches. It is not to engage in five-minute questions which contain their own responses. It is, however, to try and get you to pepper Mr. Letter, the Regional Attorney of the Board in San Francisco; Mr. Reinhardt, from the firm of Bodle, Fogel, Julber and Reinhardt; and Mr. Bakaly of O'Melveny and Myers, of Los Angeles, with questions. I think the best thing to do is to hurl ourselves into the fray. But that is a little difficult to do without some kind of basic position. I suppose the thing to do is open up our discussion with an attempt to obtain some indication of how many people heard Mr. Howlett's talk?

(Showing of hands.)

CHAIRMAN JONES: All right. How many of you would take the position that Bob Howlett is proposing, that is, that arbitrators should affirmatively take into account and rule on legal questions which may be contained in the fact situations coming as grievances before them?

CHARLES G. BAKALY: Ted, do you mean without these questions having been raised? In other words, to take judicial notice?

CHAIRMAN JONES: Taking judicial notice of it, right. How many of you would say "Yes" to that?

(Showing of hands.)

CHAIRMAN JONES: How many of you would say "No"?

(Showing of hands.)

CHAIRMAN JONES: It seems that of the people who were in the larger room earlier today to hear Bob Howlett and Mr. Ordman, something like 75 or 80 percent feel very strongly that arbitrators should not do so.

Perhaps we should start out with a fact situation, and perhaps a good fact situation to get us launched is the *Acme Industrial* case. I'm thinking of the discovery situation which once existed and which now has been returned, presumably, to oblivion. I doubt that it is a very big discovery problem any more.

But here was the situation, to refresh your memories. Some machinery was moved out of the plant over a period of time, and some 11 grievances were filed fairly rapidly in sequence by the

union people protesting this action. The matter was brought before the National Labor Relations Board rather than before an arbitration tribunal when the union filed a Section 8 (a) (5) charge. The case consumed something like four years, and had the unique distinction of having the Supreme Court involved in it. Had the Supreme Court not been involved, it would still have had a history, as I recall, running just short of three years.

The question that we might start out with, then, focusing upon the 8 (a) (5) refusal to bargain in good faith, is: Should the Board defer to arbitrators since the Board has been told by the Supreme Court that it can do as it darn well pleases in refusal-to-disclose cases? Should the Board now on its own motion say, "In discovery situations we will defer to arbitrators"? How about that, Steve?

STEPHEN REINHARDT: I have some basic general views which apply to that. It is difficult to discuss that specific question without saying a few words about my general feelings concerning the conflicts between arbitrators and the Board.

Basically, I am one who would favor an arbitrator's deciding every issue in the dispute before him, if he's going to render a useful decision. If the arbitrator does not resolve all these issues, including the legal issues—and I don't believe you can base a distinction on whether somebody raises them or not—the arbitrator's decision does not end the problem. But starting out with the assumption that an arbitrator should resolve everything, including the unfair labor practice aspects, in order to do an effective or meaningful job, then the next question is to what extent will the Board give weight to what the arbitrator says when he resolves unfair labor practice issues?

I am not particularly impressed by the *Spielberg* doctrine. I am more impressed by the way the Board has avoided it ever since it was enunciated.

It seems to me the Board cannot delegate its final responsibility for resolving questions of federal law to an arbitrator. On the other hand, unless we are going to take the arbitrators out of these cases, the arbitrators have to make initial decisions. Nevertheless, if the party which feels its rights are being violated is not satisfied with the arbitrator's decision, I believe that party is entitled to a

thorough review of the question by the Board, and I think the Board should not just say, "Is the arbitrator's decision offensive?" but should say, "Is it correct?"

Again we can't really answer that question without giving some consideration—I don't want to go into it in detail now—to when you should be entitled as a party to go directly to the Board; when you have to go through two procedures; and if you elect to use an arbitrator, the extent to which you should be limited to that election. There are also other important procedural matters involved.

These are all questions that would have to be discussed to answer the question you ask, Ted.

But basically, as I say, I am more concerned with getting arbitrators to recognize that where an unfair labor practice is involved, or where any legal issue is involved, a decision which ignores the law and does not consider either the state or the Federal Constitution is not a very helpful decision. At best, it is an exercise in answering a theoretical question that a party has asked.

I realize also that you are to some extent inhibited by the authority that the basic collective bargaining agreement gives an arbitrator, and by the submission agreement. These factors have to be taken into consideration.

In general, however, for an arbitration to be a worthwhile endeavor, there's no way to avoid resolving legal issues. This leads you into a question of what happens if your arbitrator is not a lawyer—how is he going to resolve those issues? But perhaps I had better not raise that question here.

CHAIRMAN JONES: I take it that in advising union clients—an impossible generalization, I suppose, but in any event I will make it—you would be inclined to tell them not to file 8 (a) (5) charges in discovery situations, but to seek to get the discovery from the arbitrator. Is that what you are saying?

STEPHEN REINHARDT: Yes. I would first go to the arbitrator. Again, it depends on how these doctrines develop.

CHARLES G. BAKALY: I am basically in favor of the Board's deferring to the private procedure of arbitration which the parties

have developed. I think that once the parties have accepted collective bargaining and have entered into an agreement, the Labor Board's function, basically, should end. The parties should solve any dispute or grievance in the manner provided by the agreement.

I am in favor of certain kinds of discovery in arbitration cases. In fact, I am in favor of certain kinds of discovery in cases before the Board, but the Board has adopted a rigid policy directed against the General Counsel on the subject of discovery, and this policy is one that is opposed to most means of such discovery.

In California at the present time a fact situation like the one involved in the *Acme Industrial* case would not have to arise because a party could ask the arbitrator to issue a subpoena for the desired documents and, upon service, would have the right to obtain such documents. That, I think, would be a more appropriate way to handle the matter than to hold that the refusal to give such information constitutes an unfair labor practice.

CHAIRMAN JONES: Is there any dissent before I go to Mr. Letter? None, apparently. Do you want to express any views on this, Mr. Letter?

HARVEY LETTER: I don't know that I will be expressing any views other than as a Board employee. I am all in favor of the parties going to an arbitrator.

I believe General Counsel Ordman takes this view, and it goes on down the line throughout the entire agency. We say, in effect, "Please go to the arbitrator with any discovery problems you may have, or any others for that matter, and please resolve the problems. Do it in a way, however, which will make it unnecessary for us at the Board to see the case."

I was interested in one of the suggestions made by Mr. Reinhardt. He would like to have two alternatives, apparently. He wants to go to the arbitrator initially and have him resolve the entire problem. If the result is in his favor, that's the end of it. But apparently he wants to have a second forum in the event the arbitrator decides against him. He then wants to have the Board available.

It would be very nice to have two forums that could be used continually and regularly. But I don't agree with him. I think I

speak for arbitrators in this regard, and I know I speak for Board people. We would like, for many reasons, the first forum to resolve the entire problem.

One reason is very basic to the purpose of the statute which the people working for the Board have the obligation to administer. That is the concept of promoting labor peace and collective bargaining. If there are more forums for the parties to go to, there will be less labor peace, less collective bargaining, and more litigation.

We at the Labor Board are not in the business of litigation. We try to see to it that the parties engage in collective bargaining and have a peaceable, amicable relationship.

I understood Mr. Reinhardt to complain about the fact that the Board is not following the *Spielberg* doctrine. I submit that the small number of cases that have come out of the Board—and I'm talking about the five-man Board in Washington—shows that we are following *Spielberg.*

How many cases are there on the books, Board and court, where a party complained that *Spielberg* ought to have been followed, or has not been followed? The *Spielberg* cases, as Arnold Ordman pointed out, don't get to the Board. Very few of them get to court. *Acme* and *C & C* prove the point. If you go through the Board's books you will see there are not many *Spielberg* cases. The reason is that they are handled before complaints issue. This situation is an indication that *Spielberg* is being honored, not the contrary.

On the question of waiting until an arbitrator has completed a proceeding, I mention as a caveat the possibility of a labor union practitioner's waiting too long before checking with the Board. I know that arbitrators act much more quickly than we at the Board do. Yet in some situations I suspect there may be a Section 10 (b) statute-of-limitations problem. It is a six-month period.

One more point, slightly off this subject, I believe Chuck Bakaly raised with regard to discovery before the Board. Here again I think the position of the Board may have been misstated. I think Chuck was suggesting that the Board is against discovery. As of now there are no discovery procedures available under the Board's rules. There may be some changes in the Administrative Pro-

cedures Act within the next couple of years. In any event, there is proposed legislation for discovery in administrative procedures.

I assure you that some of us at the Board would be very happy to have discovery procedures. We believe—possibly wrongly—that there would be far fewer cases litigated if there were discovery. We have the notion that we are going to find out a lot more about the other fellow's case than he is going to find out about our case through discovery procedures, and settlements will follow.

STEPHEN REINHARDT: Since I seem to be outnumbered, let me make it clear that I believe in a right of review. I don't think it is an un-American principle to ask for a review if you receive what you believe is an erroneous determination, particularly since there may be an important federal legal question involved, and the decision may well have been made by a nonlawyer.

I don't find this such an offensive concept. A federal agency which has a responsibility not just of seeing that everybody is happy and peaceful, but of enforcing basic governmental policies, should be required to do a little work and review a nonlawyer's determination of federal legal issues. I don't know of any other type of legal problem where you wouldn't, at a minimum, get that type of review.

I am not asking for a complete double forum in all cases. In the first place, as has been pointed out, most cases that arbitrators have do not contain these issues. But in the few where these problems are raised, I think the NLRB has to make a decision.

Where the issue is primarily one of contract interpretation and the arbitrator has made his ruling on that issue, I think his opinion should be given either substantial or conclusive weight. If he is saying what has been the history of the parties, fine. But when he's deciding a question of federal law, then I do not think that his opinion should be final. A party deprived of a federal right by an arbitrator's incorrect legal interpretation is entitled to have the Board take action.

I would like to comment briefly on *Spielberg*. We heard a discussion a little while ago where it turned out, before the NLRB, that some testimony had not been given. That is not an application of *Spielberg*. That's a reversal. The Board decided that the arbi-

trator hadn't heard an important witness and had not determined an important issue; therefore, the Board heard it again and reversed.

One of the reasons why perhaps you don't find many reversals under *Spielberg* is the difficulty faced by attorneys in trying to find out just what the Board is doing with this bouncing back and forth between arbitrators and the Board as well as in being discouraged by the regional director's office. When someone files a complaint or a charge, the regional director attempts to persuade him gently, and then not so gently, that he ought to go to arbitration.

And you don't know, because the rules change so constantly, where you ought to go and where you are better off and what weight the Board will give to arbitration.

When we build up more definite rules, our problem will be substantially eased. Personally, I believe that if a person is complaining about a violation of federal law he should have an option. If he wants to go to the Board and not to arbitration, I think he should have the right to do so. This agency is designed to administer federal law, to protect the rights given by Congress.

If he chooses arbitration, then there may be different consequences. Concrete rules have to be worked out, and they have to be known by everybody. But I certainly don't believe that, because you insert an arbitration clause in a contract, anyone should be held to have waived his right, which he would otherwise have, to go to the appropriate federal agency and receive a determination of what the federal law is. There is no intent when you enter into an arbitration agreement to waive your rights under federal law and to be stuck with whatever an arbitrator decides, or doesn't decide, on the issues of federal law.

CHAIRMAN JONES: I'm going to ask Mr. Letter to respond to that because he has been madly scribbling some notes.

HARVEY LETTER: I submit that the Board's going along with the arbitrator in a *Spielberg*-type case does not mean that it has failed to fulfil its obligation under the statute. I suggest that what the Board is doing is determining that awaiting the outcome of the particular case before the arbitrator is in fact what the

statute contemplates and requires in terms of the resolution of that particular problem and that particular dispute.

Those situations in which the statute and the purposes and policies of the statute have not been met are the other side of the *Spielberg* coin. That is exactly where the Board does come into the picture. In those situations, when an arbitrator's award is repugnant to the purposes and policies of the statute, the Board has stated that it is going to look at such a case *de novo*.

I do not agree with Mr. Reinhardt on this because, as I see it, the Board is effectuating the purposes and the policies of the Act in both instances. No one is being deprived of any rights under the statute, because, if the Board goes along with the arbitrator, that is what the Board believes the statute requires.

It may be that the Board is doing a poor job in looking at particular *Spielberg* cases, but the essence of the statute is there, and the purpose of the statute is being pursued by the Board by virtue of the *Spielberg* doctrine. There can be criticisms about the way the Board and personnel in their regional offices are effectuating or administering the statute, but the concept is one which is intended to effectuate the statute.

CHAIRMAN JONES: Let me ask you a factual question. Is there much indication in your region of what might be called an informal discovery procedure, that is, a procedure of advising and persuading people to move toward arbitration and away from Board procedures? Do you have an informal discovery procedure, or is there a large enough sample of cases to tell?

HARVEY LETTER: The General Counsel spoke earlier about general policies as far as the agency is concerned. I think all of you who practice in various regional offices are aware that there are slight differences, if that's the way to put it, in the operation of the different regional offices. That is, however, a fact of life. It is not something I'm suggesting is desirable, but I think there are differences between the operations of, let's say, Region X and those of Region Y.

Some of the regions do make an effort—and this depends upon the personnel in the region—in the direction of a discovery type of procedure. It is pursued in order to persuade—I believe this

was the word Mr. Reinhardt used a little while ago—people to go to the arbitration proceeding.

I can tell you specifically about the San Francisco operation because that's the one I know firsthand.

In a case where the arbitral award has issued and a charge is then filed with the Board—particularly the San Francisco office, and I believe this is true in all offices—there is an investigation of the facts of the case. This investigation may disclose the case Mr. Reinhardt was talking about. For example, in one case there was an award in which the arbitrator did not make a complete determination because he did not have all the facts. The Board, by virtue of its investigation after the award, came up with additional facts. In such a case, the regional office takes the position that, under the statute, it is necessary to issue a complaint and pursue what the statute requires. If the award comports with the statute, the charge is dismissed after the investigation.

The second situation is one where an arbitration procedure is available to the parties and the parties are moving to arbitration, or they are already in arbitration. They not only have contemplated but have actually started along the road to arbitration. In such a case the San Francisco office holds the charge to see what will happen in the arbitration proceeding. I believe most regional offices react in this way. In the great bulk of those cases the charge is withdrawn after the arbitration proceeding has been completed. I don't know the actual statistics, but in the San Francisco office withdrawal of the charge occurs regularly.

The third situation is the one in the discovery area. It is where the parties have not reached the point of going to arbitration. In cases of this sort we try to help the parties find out whatever they require and work toward an arbitration proceeding.

I hope that our operation in the San Francisco office is not such that people think we are persuading too hard. But we definitely try to get the parties to go the arbitration route and get whatever information they need through that procedure rather than get involved with our investigative procedures. In this third type of case, if parties refuse to go to arbitration, we will issue a complaint.

CHAIRMAN JONES: I had an employer comment to me several weeks ago that he would react very violently at the prospect of having a discovery problem submitted to arbitration rather than to the Board. I think that Chuck has already indicated his view would be to the contrary.

Are there other views here? We will take discovery first, moving into the stage of arbitration.

WILLIAM MCCOLLUM: It seems to me that our panel thus far has presupposed some preliminary hearing stipulation and/or prior briefs on the matter. They are also presupposing that the arbitrator is willing to consider the statute.

Another troublesome aspect in the discussion is the possibility that an arbitrator may not get the necessary information to decide whether there has been a violation of law, whereas the Board very definitely could do this through its various powers.

And finally, does all of this preclude action by the courts?

CHAIRMAN JONES: Chuck, do you want to comment on that?

CHARLES G. BAKALY: It is my belief that it is in the best interests of any client to avoid a multiplicity of litigation concerning the same subject. This is the reason for my basic belief that, once a particular tribunal has been selected to settle and has settled a dispute, other tribunals should not be able to reopen and again litigate such dispute.

I believe that voluntary arbitration, where the party has the right to select the person who is going to hear the matter, is the best and most complete way to resolve the dispute.

In California I believe that there is, through the use of the subpoena power, some discovery that can be obtained in an arbitration proceeding. If the law is not complete enough in that regard, we should consider changing the law and perhaps permitting more discovery in arbitration proceedings.

In the labor field we should adopt the same rules that have been in existence for years in connection with proceedings in courts. Courts have rules of res judicata and collateral estoppel which prohibit continued litigation of the same dispute. There is no

reason why these rules cannot be applied to the labor arbitration proceeding and let the grieving party have its choice of whether to proceed to arbitration or to file an unfair labor practice charge. But once that choice has been exercised, if the issues are fully litigated in that proceeding, let that be the end of the litigation.

And, consistent with that position, I would be in favor of arbitrators deciding the legal questions. I would not be concerned too much about the fact that arbitrators may not be lawyers because I have the right to select them. In a case in which there are legal issues, I would assume that both parties would be selecting an arbitrator with legal experience and background in such issues.

HERBERT L. MARX, JR.: I'm not a lawyer, so perhaps that explains this question. It seems to me the basic question is not whether an arbitrator should be empowered or encouraged to interpret the law, but whether he can. I understand and have had experience with cases where employees have gone to the Board with a matter which obviously belonged in the grievance procedure. And the Board in effect has suggested that that's where it belonged. That makes sense.

But surely there are cases in which the contract is not involved. Isn't the arbitrator limited in such cases both by his competence and by the authority extended to him by the collective bargaining agreement?

By contrast, the Board, a court, or another legal agency not only is interpreting the law but, as we hear every minute, is constantly fashioning the law. But how can we give an arbitrator power to join with the National Labor Relations Board and the courts and everyone else in deciding whether there has been a violation of the law? Where is the competence that makes it possible for the arbitrator, even if he is a professor of law, to decide whether there has been an unfair labor practice?

Let me cite one example to emphasize my point—the matter of subcontracting or plant removal which we all deal with in one way or another. There is a possibility for arbitration in almost every collective bargaining agreement on this matter. And we are willing to allow an arbitrator to make a ruling based on contractual language, history, and so on. But how can an arbitrator

keep up with what may be corollary, or even contradictory, rulings on this matter by the Board? The arbitrator and the Board might reach entirely different conclusions.

STEPHEN REINHARDT: I am 50 percent sympathetic with what you say.

CHARLES G. BAKALY: Watch out. Watch out for that other 50 percent!

CHAIRMAN JONES: That's an opener.

STEPHEN REINHARDT: I'm thinking, in answer to your question, of what Chuck said earlier—that he is not bothered that arbitrators are not lawyers.

There are two reasons why I am in some cases. Even if some of the members of the NLRB are not lawyers, they are certainly specialists in this field. Moreover, they have, I hope, a competent legal staff to assist them in reaching decisions. Most arbitrators I know do not have legal staffs to provide such assistance.

Secondly, there is the matter of choosing an arbitrator. Perhaps if I were in an arbitration with Chuck we could agree on a lawyer, but in most contracts you get a list and you have enough problems with three out of the seven on the list anyway even though they are not lawyers. So, no matter what you might like, you may well get someone who isn't a lawyer even though the basic issue is legal.

However, I also agree with Chuck that it is nice for private parties to settle their disputes, and it would be wonderful if labor and management didn't need any regulation at all. And it would be fine, at least for Chuck, if we could repeal the Taft-Hartley Act and the Wagner Act and leave the parties to their own devices.

CHARLES G. BAKALY: Just Section 8(a)(5), that's all I'm after.

STEPHEN REINHARDT: I am in favor of a voluntary procedure under which the parties attempt through private action to resolve all the issues, including the federal issues and the legal issues.

But you point out some of the difficulties, some of the reasons why in a number of cases you might not get the proper resolution. It is for these reasons that I believe—even though we are willing

to use this private procedure to try to solve our problem—that where it doesn't work in a particular case, where the problem hasn't been adequately and lawfully solved, one should not forfeit his federally established rights.

The private system is fine as long as you can have a remedy if it doesn't work. I am all in favor of private procedures as long as you have the check of governmental review, when, for the reasons you mentioned, an arbitrator may not properly apply federal law. I am willing to give him a chance to do it, but I am saying that if he's wrong that should not be the end of it.

Now as to my difference with the Board. Mr. Letter read from *Spielberg* that if it is *repugnant* to the purposes and policies of the law, the Board will correct it. To me, that's not the same as saying that if it is *illegal* the Board will correct it. Or that if a man has been denied his rights the Board will correct it. If what the Board is saying is that whenever a man has been denied his rights—if he's been discharged for union activity—the Board will put him back, then that is fine.

But I wouldn't say "if it is repugnant to our policies and purposes" because to me that means you have to meet a much higher standard to get the Board to put the man back on the job. In a subsequent case what the Board really said was, "It doesn't have to be repugnant to our policies and standards if there's an error, and if it is an obvious error we'll say it's repugnant to our policies."

One way or another, if you are going to deprive people of the right to a review by the government, or by attorneys, then you will find that you are harming the arbitration process. The arbitration process is going to be much less appealing and much less desirable if there's no check and no balance and no way to correct the errors.

CHAIRMAN JONES: Mr. Letter.

HARVEY LETTER: I'm concerned that we may be degenerating into semantic differences. I have a notion that I have been agreeing with what Mr. Reinhardt just said.

We are concerned about a denial of employee's rights. If that's what Mr. Reinhardt is talking about, and he just doesn't like the

term "repugnant to the purposes and policies of the Act," I'm with him all the way. That is what we are concerned about, the denial of employees' rights. Whoever wrote the *Spielberg* decision for the Board saw fit to use the word "repugnant." In my view, and I believe in the view of the Board, the basic concern after an arbitrator's award has been issued is whether there has been a denial of employee's rights. If we are going to have difficulty with words, let's just use Mr. Reinhardt's words. It is the employees' rights that we talk about at the Board. We investigate a case. We want to know whether an individual, under an arbitrator's determination, has been deprived of something that he's entitled to under the statute. As for the word "repugnant," there's no magic in that as far as we are concerned.

In response to Mr. Marx's question, I would like to underscore something that Arnold Ordman said. If the law has not been construed properly by an arbitrator, or if he has withheld passing upon a statutory question, we may discover it in a full investigation of the matter. If we determine that the arbitrator has misconstrued the law or has refrained from passing upon the statutory rights of an individual, we go to the Board.

CHAIRMAN JONES: Perhaps it would help if, at this point, we took a specific case.

Suppose we have in a collective bargaining agreement a collection of words which could be said to be a violation of Section 8 (e) by a lawyer who had read a recent decision by the NLRB. It is a forbidden hot-cargo provision.

At that point in time, and before anything else has happened, we have a grievance filed by a union complaining of the violation of the contractual clause by the employer, compelling work which violates it.

At the time the grievance is filed, what should the Board's attitude be, in terms of receptivity, to any kind of move on the part of the employer? Chuck?

CHARLES G. BAKALY: You have a grievance filed, it hasn't been resolved, and it is not pending in arbitration at this point?

CHAIRMAN JONES: Right. No arbitrator has been selected.

CHARLES G. BAKALY: At that point in time the matter is not pending in any forum. The company could file an unfair labor practice charge with the Board, and if the Board issues a complaint prior to the matter's being submitted to arbitration, the arbitration should be deferred pending decision by the Board on the complaint and that decision should dispose of the arbitration.

It is not unlike what happens in court when one party brings an action to settle a dispute in one jurisdiction and the other party brings an action to settle the same dispute in another jurisdiction. The courts follow certain rules of comity, and normally the jurisdiction in which the action was first filed proceeds and disposes of the dispute. As far as my personal views are concerned, I would like to see the Board decide Section 8 (e) cases. That does not mean that an arbitrator would not be as competent to try a Section 8 (e) issue as the Board.

CHAIRMAN JONES: Would you feel that you ought to be foreclosed?

CHARLES G. BAKALY: Having had my day in court, should I be foreclosed? I agree with that. I would not be opposed to some review. I'm not entirely opposed to review.

A better way to do it, in my judgment, would be to expand the grounds for review of arbitrators' decisions. Then you are staying within one system, and you are getting a conclusion from that system. You are not then going to an entirely different system and getting another hearing at the same time. That's what I'm basically opposed to.

MEL SALBERG: May I get a clarification between the positions stated by Mr. Letter and Mr. Reinhardt? Mr. Letter stated what the Board's attitude should be in his last statement. But following up on what Mr. Ordman had to say, let us assume the arbitrator considered the statute and all of the relevant facts. He then based his ruling on the facts and the applicable statute and decided against the union. What would the Board's position be?

I understand Mr. Reinhardt's position to be that if the arbitrator reached such a conclusion, the Board should once again pass on the application of the law. I understand Mr. Ordman to say that he would consider the matter closed.

CHAIRMAN JONES: Let's get Mr. Letter first.

HARVEY LETTER: I think the General Counsel was indicating that in a situation where an arbitrator does pass upon a statutory issue and issues an award, this award will be investigated if a charge is filed in a regional office. If it boils down to what I think he called the "second-guess" type of situation, the determination will be to leave it alone.

Look at the problem this way. Triers of fact are going to differ. Yet two different positions on the same facts may both be reasonable. The notion is that reasonable people will differ. This sort of situation, as I understood Arnold, poses the kind of case where the Board is not going to act further. On the other hand, if an arbitrator comes up with a result which clearly is contrary to the statute and not within the realm of reason as far as the NLRB is concerned, the Board will pass on the merits.

Let me pose a situation by way of example. An arbitrator rules that a man was lawfully fired from his job after he had been on the job only 10 days even though he was fired for failure to comply with a request that he become a member of the union. This sort of thing is easy. It is an obvious rejection of one of the fundamentals of the National Labor Relations Act. The mere fact that an arbitrator somehow concludes that there's no violation in such a case does not mean that we will not second-guess him.

But there are also some very difficult cases. What they boil down to is a question of whether the award is a reasonable determination even though we at the Board might not have decided the case in the same way.

To an extent this question touches upon what Mr. Bakaly has been talking about in referring to a review type of operation. In this respect, the Board is in the nature of a review forum for an arbitrator's determination.

STEPHEN REINHARDT: My basic problem is that I view arbitration as does Chuck—as a private operation. It is the end of the grievance procedure. I would hope that 90 percent, or 95 percent, or 99 percent of the problems would be resolved there.

We all recognize, I am certain, that an arbitrator may misinterpret federal law or may misapply the facts. An individual has a

federal right not to be discharged for union activity, but an arbitrator who hears the case may think that the federal right was not violated, that union activity was not the reason he was discharged. Maybe an arbitrator would reach one decision and the Board would reach another. But the fact that in the private process one decision has been reached does not, in my opinion, affect the obligation of the government to protect the man's federal right. And when you get into the governmental process, the government should make that decision.

What happens in a grievance procedure does not seem to me to justify the forfeiture by anyone of any of the protections which an individual is guaranteed by law. Again, for example, the guarantee that an employee will not be discharged because he is a union member includes government enforcement and government determination.

But what bothers me even more about this problem is Chuck's suggestion that which forum you go to is a question of time. If you take your step one week, you will get the government; if you do it another week, you will get an arbitrator. If the person you are cooperating with agrees to select an arbitrator, then your rights change also. I think we must have a better system for deciding which forum to be in.

Basically, I think that anyone who claims a federal violation has the right to go to the NLRB. If the parties are willing to go to arbitration, that's fine also. I would then have the claim reviewed by the NLRB, where necessary, in the manner I have suggested.

I think there are cases where the Board might want certain issues or all issues to be heard by an arbitrator first. But I don't think that the rights of individuals should be dependent on the maneuvering of the parties to get into the forum that seems more appealing because certain Board agents are present on a particular day, or because of the list of arbitrators the parties happen to draw. To me, that's the worst possible system.

I also want to make it clear again that I'm not talking about two bites, because I don't think we are talking about two trials. We are talking about two totally different types of problems. One is a voluntary effort to settle something. The other is, if the problem still

isn't resolved, the basic right to be protected by the government when you are given a right by the government.

CHARLES G. BAKALY: The system that we have operated under for many years permits a person who claims a right has been violated to have a choice of forums. I don't find that system particularly startling. We have been living with it in court litigation. I would think that the Board should, however, in many more cases than it presently does, defer to the arbitration forum.

I would like now to discuss with Mr. Letter an area which really causes me concern and which arises out of the Supreme Court's decisions in *C & C Plywood* and *Acme Industrial.* Let me pose a hypothetical situation. There is a contract which has been in existence for many years between the company and the union which was agreed to on the premise that if the contract were silent with respect to certain terms of employment, the employer had the absolute right to set such terms. This contract was silent with respect to establishing or changing shifts. In addition, the practice over the years has been for the employer to establish and change the shifts.

A few weeks ago the employer changed the starting time of the shifts after discussing the proposed changes with the union but without obtaining the agreement of the union. The union has filed an unfair labor practice charge.

I have been advised that the General Counsel may now be taking the position that such an unfair labor practice charge is meritorious because the conduct of the employer constituted a modification of the contract in violation of Section 8 (d) of the Act. An arbitrator would undoubtedly have held that in such a case as this hypothetical one the employer had the right to change the shifts.

CHAIRMAN JONES: Do you want to respond to that?

HARVEY LETTER: Actually, I was waiting with bated breath and hoping this would happen so I could show how even-handed we are at the Board.

CHARLES G. BAKALY: Now he's going to get me.

HARVEY LETTER: Now I can disagree with Mr. Bakaly and go along with Mr. Reinhardt. I appreciate this gentleman.

I note that Ted raised a question of an invalid contract provision, such as a hot-cargo clause under 8 (e). As I understood Chuck Bakaly, he takes the position that, if an arbitrator finds a hot-cargo clause means one thing or another under Section 8 (e) of the statute, that is final. I think the validity of a contract provision under the statute is for the NLRB itself to decide.

Where the question as to the effect of a contract clause comes up before an arbitrator and the Board has already made it clear that it is, or is not, a hot-cargo clause, the arbitrator's award would fit into the *Spielberg* area.

On the other hand, assume a situation where a clause has never been passed upon by the Board. For various reasons the Board might want to issue a determination of its own on such a clause. For example, there is the value the Board's determination would have as far as the public in general is concerned. Hot-cargo clauses are, generally speaking, clauses that are in contracts throughout an entire international union setup. It is unusual for a particular local to put in a contract clause which may or may not be a hot-cargo clause.

Generally, therefore, you have in issue a provision that is going to appear in a large number of contracts. In this sort of situation, with its broad impact, I think it is proper for the Board to pass upon the matter, irrespective of what an arbitrator may have done.

There is the second item that Chuck Bakaly was talking about, the one about an employer's bargaining obligation where a contract is silent with regard to a working condition. I would like to suggest that what Chuck apparently doesn't like is not something raised by *C & C Plywood.* It is something the Board has been saying right along. And I think the courts have also been saying it right along. It is a finding that an employer is guilty of an unlawful refusal to bargain when he makes a unilateral change of working conditions without discussing the decision with the union or the effect of that decision on the employees.

In *Fibreboard,* as I remember it, the contract was silent with regard to subcontracting. The employer made a unilateral change in a working condition by subcontracting work being done

by his employees. The Board stated that the employer had an obligation under the statute to discuss his decision with the union and the effect of that decision upon the employees. The Supreme Court went along with the Board.

As I understand the Board and the Court, the employer may lawfully make such a unilateral change only if it can be shown that there has been a clear and unmistakable waiver of the statutory right of the union to talk about the change in the particular working condition.

CHARLES G. BAKALY: Maybe I didn't make myself clear. I am not concerned about the *Fibreboard* kind of bargaining where all an employer has to do is bargain to an impasse and, if there is no agreement, he is then free to engage in unilateral action. I am concerned by certain recent cases, such as *Adams Dairy* and *C & S Industries,* that indicate to me that the General Counsel and the Board may be leaning toward the position that where the agreement is silent an employer violates Section 8 (d) if he unilaterally modifies an existing working condition even though he has bargained to impasse with the union prior to such unilateral action.

STEPHEN REINHARDT: It sounds like a very good rule you are announcing, Chuck.

CHARLES G. BAKALY: I thought you would like it.

STEPHEN REINHARDT: The problem in answering any of these questions is that they are all related.

I'm surprised to hear that the majority of you are opposed to arbitrators' deciding legal questions or noncontract questions. My belief that they should is based also on my belief that their decisions should be subject to review.

If you told me that the arbitrators were going to decide these questions and that the Board would not have any chance to review them, I might feel differently about an arbitrator's deciding them at all.

But I would be interested in how the decision was made. Take, for example, a simple discharge case where the contract establishes certain grounds for discharge. Let's say there is no mention of racial discrimination as a cause for discharge, and during the case the arbitrator concludes that the person was discharged because he

is a Negro. If the arbitrator can't take notice of the law, the arbitrator would have to sustain the discharge because the contract does not prohibit discharge for color.

If that's the end of the case there's something wrong, because the man has lost his rights under federal law. It can't be the end of the case. If it is not the end of the case, I think the arbitrator has just wasted the time of the parties and gone through a totally useless exercise instead of doing what obviously should be done. Again, I want to say I don't think it matters whether the issue is raised by the parties or not. That might depend upon whether the parties are represented by attorneys or upon how the case is handled.

But assuming the arbitrator recognizes the issue, he could end the case by not just relying on the contract but rather saying there is a clear violation of law and the company must reinstate the person. If he doesn't do so, you will have to go to a second forum, and that doesn't seem to me to make sense. Under those circumstances arbitration is not serving the purpose that it should.

So I find it hard to see why an arbitrator would be reluctant to decide such issues. And my answer to how you get around the power problem would be that you read every contract as incorporating the law of the land, just as you have shop practices which are an unwritten part of the contract. Federal and state law must be an inherent part of every contract.

If an arbitrator ignores that law I think he is limiting his effectiveness and limiting the usefulness of arbitration. I think that comes back somewhat to your question.

CHAIRMAN JONES: Yes.

CHARLES G. BAKALY: I think we are all almost agreed on that.

STEPHEN REINHARDT: Except that I would reverse my position if you told me no one would ever review an arbitrator's application of the law.

CHAIRMAN JONES: What would you do then?

STEPHEN REINHARDT: If you say that by going to arbitration you forfeit all legal rights, that you are the only person in the country

who is no longer covered by the Civil Rights Act because you are under a union contract, then I would be very reluctant to go to arbitration, particularly with nonlawyers.

KEITH A. REED: I would like to follow up Mr. Bakaly's point and ask Mr. Letter a direct question.

Take this hypothetical case in which you have a change in shifts question. The matter is not mentioned in the contract, but the practice has existed. Let's assume the parties have negotiated, there have been several sessions, and they have reached an impasse. The union said the shifts absolutely could not be changed. The company said it had done so in the past and wanted to do so here. After an impasse was reached, the company changed the shifts.

An arbitrator decides the question. He adopts the residual-rights position and upholds the company's action. The union then files an unfair labor practice charge. It goes to the Board. The parties have bargained on this and, according to *Fibreboard,* the company should have the right unilaterally to effectuate its idea on the shift change.

Would the Board agree?

HARVEY LETTER: You asked a direct question, and I will try to give you a direct answer. The answer is, yes. The Board has held that it is not a violation once the parties have bargained to an impasse. The employer at that point has the right to put into effect what he sees as the proper means of operating his business.

I think Chuck Bakaly was referring to something that was raised in oral argument. I submit that each of us has said things in oral argument—certainly I have heard Board lawyers do so—that may overstate a Board position.

I'm inclined to go to Board decisions and court decisions for answers to check the state of the law. In oral arguments lawyers are inclined to "puff" a little bit to try and convince people. What is said in oral argument, quite frankly, even before the Supreme Court, does not change my view on this. I prefer waiting until I see what the Board says in a decision before I believe there has been any change in the law. In short, after bargaining to an impasse, the Board has stated that an employer then has the right to go forward.

PHIL MARSHALL: Can we take the facts as outlined by the last questioner and remove from them the bargaining on the question of the change of shifts. Assume that the employer changes the shifts because he is laboring under the apprehension that under the reserved-rights clause he has a right to do so. The union files a grievance. It goes to arbitration. The arbitrator upholds the company.

There has been no bargaining and no impasse. The attorney for the union files a charge with the Board. What then is your answer?

HARVEY LETTER: My answer then is that the arbitrator has come up with a determination that is contrary to the statute and that the statutory right of the union has not been satisfied.

PHIL MARSHALL: That's completely contrary to the overwhelming majority of arbitration opinions, and to the view of most industrial relations people.

HARVEY LETTER: In situations where a decision is made by an employer unilaterally, without any discussion at all with the union as the representative of the employees, there is a violation of Section 8 (a) (5). The Supreme Court has upheld the Board on this position. My answer assumes, however, that the referral to arbitration is not to resolve the dispute but only to determine whether there was unlawful employer action.

CHAIRMAN JONES: Don't we have a problem of semantics as you mentioned a little earlier? When you say that there was a unilateral decision, can it not as well be argued that it was in fact a bilateral decision?

HARVEY LETTER: By virtue—

CHAIRMAN JONES: Because of the arbitration.

HARVEY LETTER: In terms of the *Spielberg* concept, I can't think of a particular case.

CHARLES G. BAKALY: The Board would take the position that *C & C Plywood* would control in the hypothetical case you cited, Mr. Marshall. It would not agree that *C & C Plywood* was distinguished because in that case there was no arbitration clause in the contract.

It is clear that the Board would hold that an employer had to bargain at least to impasse. There is some indication in recent cases that the Board and the General Counsel may contend that even with bargaining to impasse Section 8 (d) of the Act would be violated by such a modification of a working condition.

HARVEY LETTER: Chuck, I defer to your capacity for anticipating what the Board's position is about to be.

CHARLES G. BAKALY: I hope I'm wrong.

LOREN ROTHSCHILD: It seems to me that in your 8 (e) hypothesis there was an implication that was left undeveloped; that is, there is a third party who might be injured and who has a right to file a charge. Doesn't that have a decisive effect, or at least a substantial effect, on whether the Board is going to defer temporarily or ultimately to the arbitration process?

This third party clearly doesn't have a right to participate in the arbitration, although the parties may let him in if he wants in.

There is one Board case which suggests that the employer represented the interests of a third party and, therefore, the Board wasn't going to jump in. But in the 8 (e) case, at least in the beginning, the employer is a party to the potentially illegal contract. It seems difficult to justify or support the argument that the employer is going to represent the interests of the third party.

HARVEY LETTER: Do you want to comment? This may be in your area.

CHAIRMAN JONES: No, go ahead.

HARVEY LETTER: On the question of the third party, I quite agree with what you say. You don't have the party, as it were. You are getting into the secondary boycott area when you are talking about hot cargo. It would be a rare thing where an employer, as one of the parties to the contract, is going to argue against the legality of the contract. So the third party involved, the so-called neutral in a secondary boycott situation, is unlikely to have its position presented vigorously. In such a case I believe that invariably the regional office will issue a complaint in such a situation.

STEPHEN REINHARDT: I think Mr. Rothschild's objection would go beyond the portion you agree with, since I just discussed this

with him. I think we would both disagree with the Board. And I hope that not too many arbitrators will take the Board's position. In my opinion, there is no such thing under our law as having your rights adjudicated by some other party.

In *Raley's* the Board said the parties' interests were adequately protected by some other party. I think there is no such thing. I think you have interests. You are a being or a corporation or a union. Your rights can only be determined when you are there. Whether it is an arbitration or Board proceeding it would not be a very satisfactory answer to me to say, "Well, you weren't there but there was another party there which had the same view as you did, so you were adequately represented." I would like to see that legal theory abandoned by both the Board and arbitrators.

HARVEY LETTER: I might state my personal views in this area but I shall refrain from doing so.

Raley's, for those of you who are not aware of the case, involved a representation question. There were two unions asserting the right to represent a particular group of employees. The employer disagreed with the contracting union's claim that the group of employees was covered by that union's collective bargaining agreement. An arbitrator ruled in favor of the contracting union.

The "out" union filed a representation petition with the Board. The Board, as Steve suggested, found that the position of the petitioning union was "vigorously presented" by the employer in the arbitration proceeding. In the arbitration proceeding, the employer took a view contrary to the contracting union's position, asserting that the employees in issue were not covered by the contract. The Board dismissed that petition.

I would like to note, Steve, that there are some cases that have followed *Raley's* which indicate that *Raley's* isn't quite as valid a case as it was the day after it issued. The *Raley's* case occurred in the San Francisco area, and I think the case which suggests that the Board may well be changing its position is also a San Francisco case. It involved the Hotel Employers' Association here in San Francisco. Three or four representation cases after *Raley's* indicate that the Board is moving away from the *Raley's* position.

I couldn't agree with you more, as a personal matter, that someone whose rights are involved ought to have the privilege of presenting those rights himself rather than be represented by some other party who might have an adverse interest.

KEITH A. REED: I don't like to belabor the point and I don't want to put Mr. Letter on the spot, but, getting back to my hypothetical case, I would be interested in hearing how he would reconcile Mr. Ordman's statement on residual rights which appears on the last page of his article, which reads:

> In addition, a document which is bottomed upon the theory that management has all "residual rights" is also in conflict with the Board-developed and court-approved principle that a statutory waiver must be express and clear. In short, in a unilateral-action case, a reference to an arbitrator for a decision of the contract question may well either be a futile gesture or lead to a result in conflict with the policies of the Act.

HARVEY LETTER: I was hoping I was saying something along those lines; that is, that the Board does not accept the residual-rights concept. I hoped I made that clear. In a situation where a mandatory subject of bargaining has not been "clearly and unmistakably waived," the Board does not buy the residual-rights doctrine. And I think that's what Arnold Ordman said.

I hope I said before that the Board would not find a violation in your case. It would not go along with what Phil Marshall was suggesting.

PHIL MARSHALL: Yes, but what if the parties have bargained and are in conflict. This is the only situation under which an arbitrator would come up with a decision. A labor agreement does not reflect all of the law of the shop. Past practices are accepted and bargaining takes place in the context of past behavior.

If the Board, with one sweep, is going to say, "You can't bargain that way, we won't permit it," I believe your action will have a dire effect upon the voluntary concept of collective bargaining.

HARVEY LETTER: Mr. Marshall, I see it the same way you do but what you are doing is disagreeing with the Board's postion. All I have attempted to do—

PHIL MARSHALL: I hope I made that clear.

HARVEY LETTER: (Continuing) All I'm trying to do is make the Board's position clear.

PHIL MARSHALL: In effect, then, you are equating the express statutory waiver to the bargaining to impasse. In our situation we bargained to impasse and you said, "Fine."

HARVEY LETTER: You are talking to a lawyer, talking about this business of equating; there's always a certain amount of hedging in an answer. I think of equating in the sense that the Board is going to come out and say, "No violation in the case." Fine, if that's what you mean when you say "equating."

PHIL MARSHALL: That's what I mean.

HARVEY LETTER: But there are varying legal concepts involved in terms of how they reach that point.

Where there's a clear and unmistakable waiver, where there's bargaining to impasse, in such situations the Board has held specifically that there is no violation of an employer's obligation to bargain in good faith.

MEL LENNARD: I would like to direct this to Steve Reinhardt. I'm a little surprised to find myself—and I am not certain that I am—in disagreement with Steve on a matter of civil rights.

I would like to discuss very briefly a case that I recently heard. It involved a secretary who was given maternity leave. She had the baby and wanted to return to work. The employer refused. She and the union took the matter to arbitration. They both appeared and the case went on for several hours.

It became clear during a recess that neither the union nor the grievant cared particularly how the arbitration came out. Both the union representative and the grievant said, "If we lose here we are going to go all the way to enforce my right, my mother's right to get my job back. We are going to go to the federal agency that has to do with enforcing this law." Two bites at the apple, very clearly.

Review of the arbitrator's award? Both sides appeared to concede that there would be no review of the award. It would simply be ignored. It would be a *de novo* proceeding before the federal

agency which would determine whether the grievant's rights under the federal law had been violated. They spent the rest of the day discussing that matter.

It seems wrong to me that two bites of the apple should be permitted. If the grievant wished to choose the federal agency for the enforcement of her rights, she should have chosen it. If she and the union decided to take a chance on arbitration, they should be either gratified or stuck with the arbitrator's award.

I don't know if you disagree. I think perhaps you do.

STEPHEN REINHARDT: Entirely, and for several reasons. I start with Chuck's premise that we ought to have free enterprise and that labor and management should resolve their own problems. What you are providing is the final step of management and labor's attempt to resolve their problem, to arrive at the right decision, and to avoid having to go to the federal government.

If you cannot do that, you end up with a violation of the federal law. I don't think the person has forfeited his right, his federally established right, by participating in the arbitration proceeding.

Instead of bothering the federal government with a case, whether it is race or sex or union activity, if the parties can work it out themselves through the ultimate step of arbitration we are better off than if we are forced to go to a federal agency to establish that right. But if the parties botch it through an arbitrator, I don't think that the individual who's been deprived of a federal right has to forfeit that right.

The second reason, Mel, is that I just had one very much like that, only it was with a state agency and a safety violation. I found there were a number of factual questions of which an arbitrator might not be aware. He might or might not. In fact, he didn't rely upon them, but he could have. Had the arbitrator resolved all of the factual issues the other way, we might have had to go back to a state agency.

But there are a number of things that can come up in these cases, a number of other grounds that make it unnecessary to reach that legal question. You can't tell in advance. But you are still within this voluntary private grievance procedure and if, either through

the determining of the legal question or through resolving related factual issues or other issues, the arbitrator can dispose of it so that you don't have to go to a federal or state agency, you are better off.

But I don't think it is two bites of the same apple. I think you have merely exhausted your private efforts and, in doing so, you may have eliminated a lot of issues. But if the person's legal rights have been violated, that person doesn't have to forfeit those rights because he's had the privilege of an arbitration.

CHAIRMAN JONES: Let me interpolate. It is 5:00 o'clock and class is out, but if you wish to ask more questions, we will continue for a time.

WORKSHOP D*

Howard Cole, Chairman
Norton J. Come, Co-Chairman
Winston L. Livingston
William M. Saxton

CHAIRMAN COLE: The first order of business is for me to assure everyone here that I am not Boaz Siegel, who was originally scheduled to be the chairman of this workshop. I would not want you to think that this marvelous San Francisco climate has had that kind of effect upon my appearance. I looked this way when I arrived. I also would not want you to think that my grasp of the subject under discussion here is the same as Boaz', which is considerable.

I would like to believe that the problem under discussion is really not my problem. Perhaps I'm in the position of the girl with the next-door neighbor who was prone to looking in her windows at night at rather awkward times. The girl was quite concerned about it and voiced this concern to one of her friends. Her friend suggested that she should report the man to the police. She responded, "Well, why should I? It's his problem."

* Howard Cole, Member, National Academy of Arbitrators, Ann Arbor, Mich., served as Chairman of Workshop D. Other panel members were: Norton J. Come, Assistant General Counsel, Supreme Court Branch, National Labor Relations Board, Washington, D. C., Co-Chairman; Winston L. Livingston, Attorney, Livingston, Gregory, Van Lopik & Cranefield, Detroit, representing labor; and William M. Saxton, Attorney, Butzel, Eaman, Long, Gust & Kennedy, Detroit, representing management.