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.

I would like to think that this matter is really the parties' problem and not the arbitrator's problem, and that the parties should be the ones to provide the answer. Unlike the comment of Judge Tobriner that the answer lies in the arbitrator's hands, I would prefer to feel that the answer lies in the hands of the parties. I fully recognize, of course, that at times the parties have as much difficulty in coming to some agreement in these matters as do arbitrators.

To provide some enlightenment on this score, we are fortunate today to have with us Norton Come of the NLRB, who has special expertise in the area of the *Acme Industrial* case.

Representing labor and management are Winston Livingston and Bill Saxton, both of Detroit.

Win and Bill have a lot in common. Both were born in the mid-twenties. Both are native Missourians. Both are graduates of the U. of M.—in one case the University of Missouri and in the other, the University of Michigan—and both are exceedingly competent and well respected practitioners of labor law and labor relations.

They do have one difference, and that is that Win spends most of his time representing unions and Bill spends most of his time representing managements.

In accordance with the hope that the answers to the questions posed here today can be provided by the parties and won't have to be provided by arbitrators, we are going to allow Win and Bill a few minutes to give us the benefit of their wisdom. Then we are going to have an open discussion.

Sheets of paper have been distributed for those who want to submit questions in writing. You are not required to use them. If you would prefer to state your questions orally, please feel free to do so.

Without further ado, I give you Bill Saxton.

WILLIAM M. SAXTON: This discussion arises from the provocative presentation of Robert B. Howlett entitled "The Arbitrator, the NLRB, and the Courts." Mr. Howlett's presentation is extremely well presented and evidences a tremendous amount of

most diligent and considered research, and whether or not one agrees with his position respecting the role of the arbitrator his work is deserving of the plaudits of all those attending this meeting.

I would like to suggest an addition to the title of Mr. Howlett's presentation based upon his contention that the arbitrator must free himself from the shackles of the collective bargaining agreement and determine any possible legal issues which he might find to be lurking in the shadows of a dispute between the parties to the agreement. In light of this argument for expansion of the arbitrator's authority perhaps a more complete and revealing title would be "The Arbitrator, the NLRB and the Courts and How the Arbitrator Can Perform the Functions of Each of Them."

While at times there may be some overlapping, generally speaking there is a reasonably clear division of jurisdictional authority with respect to arbitrators, courts and the NLRB. Pursuant to the terms of collective bargaining agreements and the national policy of favoring arbitration of labor disputes, as expressed in Section 301 of the LMRA and judicial decisions thereunder, the courts and the arbitrators are charged with the duty to remedy the contract breach. As noted in *Steelworkers* v. *Warrior & Gulf*: [4]

> The Congress, however, by Section 301 of the Labor Management Relations Act, assigned the courts the *duty* of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to arbitrate. [Emphasis supplied]

Thus, the role of the court is initially to determine whether the party seeking arbitration is making a claim which on its face is governed by contract.[5] The court may subsequently be called upon to lend its power to the enforcement of an arbitration award where such award is met with recalcitrance. As will be discussed more fully, the court should also deny enforcement of the arbitration award where the award is predicated upon factors extraneous to the collective bargaining agreement.

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[4] 363 U.S. 574, 582 (1960), 46 LRRM 2416.

[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960), 46 LRRM 2414.

The role of the arbitrator is and should be confined to determining whether there has been a breach of the collective bargaining agreement once the issue of arbitrability is resolved either by consent of the parties or by judicial decree. Arbitration is a creature of contract,[6] and the arbitrator has no power or authority except as it is contractually granted.

The NLRB has jurisdiction to remedy those acts which Congress has proscribed as unfair labor practices and to determine questions incident to representation claims.

The arbitrator, the NLRB, and the courts thus each play a separate and identifiable role within the sphere of management and labor relations. It is not encumbent upon the arbitrator to relieve the NLRB and the courts from any real or imagined heavy caseload by seeking to determine legal issues properly within the jurisdiction of such agencies and without the scope of jurisdiction vested in the arbitrator. The arbitrator should accommodate himself to the directions of the parties and not to the NLRB.

As noted earlier, the arbitration process is a creature of contract and the authority of the arbitrator is confined to the determination of those issues which the parties have expressly entrusted to his decision. The collective bargaining agreement generally provides that the arbitrator is to determine matters relative to the application, interpretation, or claimed violation of the terms and provisions of the collective bargaining agreement.

Bob Howlett, however, issues a call to the arbitrators to unite and throw off their chains and determine not merely issues of contract construction, but legal issues "with the broad brush placed in their hands by the *Steelworkers* trilogy." In *Warrior & Gulf Co.*,[7] the Supreme Court did indeed flatter the arbitrator by placing him in a secret cult whose members possessed some unique wisdom with respect to their ability to probe the meaning of collective bargaining agreements. The only problem is that some arbitrators are taking it seriously and are beginning to believe they actually do have some occult powers. (I wish to acknowledge that none of the arbitrators in the National Academy has become so intoxicated from the heady wine of flattery.)

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[6] *Id.* at 570.
[7] 363 U.S. 574, 582 (1960), 46 LRRM 2416.

An examination of the Supreme Court's statements in the *Steelworkers* trilogy does not, in my opinion, warrant any conclusion that the arbitrator has been given a broad brush to determine issues other than those pertaining to issues of contract construction. In *Enterprise Wheel & Car Co.*,[8] the Court noted as follows:

> Nevertheless an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

In discussing the principles established by the *Steelworkers* trilogy Professors Russell A. Smith and Dallas L. Jones concluded that if the arbitrator's award is based not on the contract but on an obligation found to have been imposed by law, the award should be set aside, unless the parties have expressly authorized the arbitrator to dispose of this as well as any contract issue.[9] The Labor Law Section of the American Bar Association likewise concluded that the *Steelworkers* trilogy established the proposition that the arbitrator may not properly base his award upon matters outside the contract he is charged with interpreting and applying.[10]

The authority of the arbitrator derives solely from the agreement of the parties, and he is commissioned to determine only those issues which emanate from the collective bargaining agreement. This fundamental precept was quite clearly recognized by the Supreme Court in the 1960 trilogy, and any conclusion that the Court invited the arbitrator to extend his authority beyond the perimeter of the contract is erroneous.

Historically, the judiciary viewed arbitration as a substitute for litigation, and, accordingly, commercial arbitration was not encouraged or highly regarded by the courts. Because the arbitration process in the labor relations field is confined to the interpretation of the collective bargaining agreement, the courts have regarded the arbitrator as a chancellor of industrial equity whose

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8 363 U.S. 593, 597 (1960), 46 LRRM 2423.
9 "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," *Michigan Law Review*, Vol. 63, No. 5, March 1965.
10 1963 Proceedings of the ABA Section of Labor Relations Law, pp. 196-197.

jurisdiction is limited and who possesses a type of expertise not generally found among the judiciary. The Court in *Steelworkers* v. *Warrior & Gulf Navigation Co.*[11] thus noted as follows:

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here.

If the arbitrator extends his domain to the determination of such issues as whether one of the parties has violated the LMRA or some other federal, state, or local law, the judicial function heretofore bestowed upon the industrial arbitrator may well be rescinded. Unless the parties have clearly called upon the arbitrator to determine such legal issues, it must be presumed that they would prefer a judicial determination of such questions.

Many persons now feel that the finality which attaches to the arbitrator's decision should be tempered by some appellate procedure. If the arbitrator does not confine his role to ruling on questions of contract interpretation, the courts will have no choice but to make judicial review available. This would result in issues remaining in doubt pending judicial determination, and the celerity which the parties seek from the arbitration process would be unattainable. The Court of Appeals for the Eighth Circuit has said that the authority for the arbitrator's award must be found within the four corners of the collective bargaining agreement.[12] If the arbitration of labor disputes is to continue to receive the favor of the parties and the courts, this admonition must be heeded.

Many arbitrators, and indeed some of the most prominent ones, are not lawyers and do not have the requisite training or experience to resolve legal issues generally. To expect that these arbitrators will keep abreast of the decisions of the NLRB and the courts in order to be in a position to rule on legal issues is foolish. The time involved in such pursuit, if compensated for, would, moreover, substantially increase the cost of arbitration, and this, too, would work to the detriment of the arbitration process.

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11 363 U.S. 574, 578 (1960), 46 LRRM 2416.
12 *Truck Drivers Local 784* v. *Ulry-Talbert Co.*, 330 F.2d 562, 563, 55 LRRM 2979 (1964).

Bob Howlett notes that some members of the NLRB have not been lawyers and yet this has not prevented them from participating in the decision of legal questions. Perhaps it should have. This is not a very weighty argument for the proposition that arbitrators should determine legal issues generally in any event. The members of the NLRB determine legal issues arising under the statute which they are charged with enforcing and with respect to which they are regarded as possessing a high degree of expertise. Moreover, they have a substantial and highly qualified legal staff to advise them on legal matters. The decisions of the NLRB are further subject to judicial review in the courts of appeals.

Mr. Howlett would have the arbitrator "probe" to determine whether statutory issues are involved and resolve issues which might involve the interpretation of federal and state civil rights statutes, the Fair Labor Standards Act, the federal and state constitutions, other statutory law, and even the common law. Few arbitrators would wish to assume such a burden, and very few are in fact sufficiently conversant with the broad area of applicable law to undertake such a task. I further doubt that any labor organization or employer intends to commit the determination of such questions to the arbitration process. Indeed, the chief fallacy in Bob Howlett's argument is his assumption that the arbitrator has a broad range of implied powers which stem from the arbitrator himself. This completely ignores the salient fact that the arbitrator has only such authority as the parties prescribe. The arbitrator is the servant of the parties, and he should not assume the role of master.

The contention that Section 203 (d) of the LMRA suggests that the determination of legal questions is for arbitral determination is, in my opinion, completely erroneous. Section 203 of the statute deals solely with the functions of the Federal Mediation and Conciliation Service and clearly does not expressly or impliedly create any arbitral jurisdiction. Section 203 (d) reads as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of *grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.* The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. [Emphasis supplied]

This is a declaration of policy favoring the resolution of contractual grievance disputes, and the above italicized words suggest that the determination of legal issues, as opposed to contractual disputes, is excluded from the arbitrator's role.

The suggestion that the arbitrator should, if he feels it necessary, communicate directly with a grievant in furtherance of assuring that the union is not violating a duty of fair representation will certainly not endear the arbitrator to any labor organization. The arbitration process was not intended to be and should not be used as a vehicle for superintending the administration of union affairs. As a matter of fact I think it safe to say that the arbitrator who assumes such a role will be subjected to involuntary retirement without regard to reputation or longevity.

Violations of statutes such as the LMRA, the Fair Labor Standards Act, the Civil Rights Act, etc., can best be handled by the administrative agencies charged with the responsibility for enforcing such laws. Since these agencies have broad investigative and subpoena powers, they are in a much better position to assure that all relevant evidence is considered in reaching a determination. The decision of such administrative agencies is much more certain to be consonant with the intent of the law than is the decision of an arbitrator who may not have even a casual acquaintance with the statute.

Take a typical discharge case allegedly involving a violation of the LMRA. The NLRB has its investigators secure statements from all possible witnesses, and if they meet with contumacy, subpoenas can be issued to insure the appearance of witnesses at the time of hearing. The Board furnishes skilled legal counsel to prosecute the charge. Then there is the predisposition of the trial examiners and the Board to resolve credibility issues against the employer. There is of course no charge for the services rendered by the NLRB. Considering the foregoing factors there is very little, if any, likelihood that a union or an employee would choose to have such a matter submitted to arbitration.

Should arbitrators indulge in probing for and basing awards upon possible violations of the LMRA, the employer is placed at a serious disadvantage. An employee who is dissatisfied with the arbitrator's decision can still file an unfair labor practice charge

with the NLRB and by so doing obtain a review of the arbitrator's decision. The employer, however, cannot file a charge with the NLRB. So, in the event that the arbitrator finds a statutory violation, in light of judicial declination to review the merits of arbitral decisions, review from the employer's standpoint is effectively foreclosed. Thus, the employee would have two bites out of the apple while the employer would be denied judicial review as expressly provided for in the LMRA because of the arbitrator's usurpation of jurisdiction.

In *Acme Industrial Company* v. *National Labor Relations Board,*[13] and *NLRB* v. *C & C Plywood Corporation,*[14] the Court recognized that while it is not the function of the NLRB to resolve contractual disputes it may seek to determine the meaning of the contractual language incident to the determination of an alleged statutory violation. Where the contract arguably presents a question as to whether the union has waived its right to bargain on a particular subject, the NLRB must ascertain the intent of the parties in order to determine whether a refusal to bargain has contractual sanction. The Court emphasized, however, that the NLRB does not have unlimited jurisdiction to interpret collective bargaining agreements, as follows:

> When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts, it was acting upon a principle which this Court had already recognized . . .[15]

In the 1960 trilogy the Court similarly recognized the principle that the arbitrator does not have general jurisdiction to resolve issues which do not derive their essence from the collective bargaining agreement. Where an agreement is couched in terms of some statute the arbitrator will most certainly indulge in statutory interpretation in order to apply the contract accurately. Where the contractual issue does not itself involve a question of statutory interpretation the arbitrator should leave such issue to the courts or appropriate administrative agencies. In *Torrington Co.* v. *Metal*

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[13] 385 U.S. 432 (1967), 64 LRRM 2069.
[14] 385 U.S. 421 (1967), 64 LRRM 2065.
[15] *Id.* at 2067.

Products Workers Local 1645,[16] the Second Circuit Court of Appeals set aside the award of an arbitrator based upon a past practice, unilaterally terminated by the employer, and in so doing clearly expressed the limited scope of the arbitrator's authority.

> Therefore, we hold that the *question of an arbitrator's authority* is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue. [Emphasis supplied]

Admittedly, every agreement is subject to all applicable law. This does not, however, warrant the conclusion that the arbitrator should seek to interpret and apply all the applicable law.

Bob Howlett states that if the arbitrator "is to be useful in reducing the NLRB caseload" he must probe to determine whether statutory issues under the LMRA are involved. This misconceives the role of the arbitrator. The arbitration process was intended to provide a means of resolving contractual disputes, and the arbitrator should concern himself with accommodating the parties who employ him and let the NLRB take care of its own caseload. The arbitrator can best serve labor and management by curbing any messianic urge to resolve all possible issues and confining his inquiry and determination to the issues which the parties have asked him to resolve. In *Torrington Co.*, the court stated that the exercise of judicial review to keep the arbitrator within the ambit of his contractually granted authority will serve the salutary purpose of encouraging arbitration:

> . . . we think the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated.[17]

The arbitrator can obviate the need for such judicial review, however, by the simple expedient of resolving only those disputes within the framework of the agreement. Should he feel that legal or statutory issues cry out for resolution, he can adopt the

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[16] 362 F.2d 677, 680, 62 LRRM 2495 (1966).
[17] *Id.* at 682.

sagacious procedure of noting the possible existence of such issue and pointing out that such issue should be mutually resolved or submitted to the proper forum.

CHAIRMAN COLE: Win, you have not been adequately introduced, but you have had all the introduction you are going to get.

WINSTON L. LIVINGSTON: Thank you. I suppose everyone here knows by now that it was I who attended the University of Missouri. That's why I ended up representing unions, I suppose.

Normally, Bill Saxton and I spend the first morning of our arbitration hearings arguing over who shall proceed first. Fortunately, we were able to get together today through the persuasion of both the National Labor Relations Board and the arbitrators.

I will try to be brief because this is a workshop and we would like to hear, of course, from the members who were fortunate enough to have been chosen, by luck, to attend our workshop.

At the expense of losing the cases involving public employers which I have presently pending before the Michigan Labor Mediation Board of which Bob Howlett is chairman, I announce right now that I am four-square against his position. I would hasten to add, however, that if all arbitrators were as conscientious and as diligent and as knowledgeable as Bob Howlett, my attitude might change some with respect to this position. I speak for the labor organizations I represent when I state that it reflects not only my own personal feelings but their feelings that arbitrators should not go beyond the bounds of the contract. And I will try to set out the reasons for you.

I was amused by the statement of General Counsel Ordman and other speakers which referred to the happy marriage, or some sort of a love affair going on, between arbitrators and the NLRB. I couldn't help but think that it is really more in the nature of an illicit affair or an extramarital relationship, and I personally would like to see both sides get back to their respective spouses.

The first point which came to my mind in considering this entire matter is who is going to pay for the education of the arbitrators in this very complicated, highly technical, and increasingly comprehensive area of labor relations? We are not confined to just

one statute. There are numerous federal statutes. There are more enacted almost every time Congress convenes. And there are numerous state statutes. Is an arbitrator going to be required to become versed in the laws of all the different states in which he may be called upon to arbitrate disputes?

I would like to run briefly down the list of the more important laws. In addition to the National Labor Relations Act and the Railway Labor Act, we have the Landrum-Griffin Act, the Fair Labor Standards Act, the Bacon-Davis Act, the Walsh-Healy Act, the Service Contracts Act of 1964, and, of course, the Civil Rights Act of 1964. We have numerous other statutes that bear on employer-employee relationships, not to mention many governmental regulations and Presidential orders relating to the construction industry and government contracts. Are we to be bound also by all these different regulations and Presidential orders in arbitrating disputes?

Using my own State of Michigan as an example, we have recently enacted minimum wage laws; we have laws regulating the employment of minors and the employment of females; and we have statutes regulating safety and industrial health practices. We also have a recently enacted labor relations act which governs public employers and private employers who are not subject to the jurisdiction of the National Labor Relations Act. There are also numerous miscellaneous regulations which provide for the regularity and the method of payment of wages, and penalties for failing to make contributions to pension and welfare funds. This is just a partial listing of all the statutes which might have a bearing with respect to any given case.

Those of us who actively practice labor law, or who specialize in any other field of law, realize that we must spend four or five hours each week doing nothing more than reading the advance sheets and current decisions in order to keep abreast of the latest developments. The U.S. Supreme Court decisions must be read. The state supreme court decisions must be read. If we are staff members of a public employer, a private employer, or a government employee, this is considered a part of our working time. If we represent private business and private unions, we must pass this cost on to the clients in our per diem fees.

How is the arbitrator to make up the time that he must spend in this way?

In addition, if he is going to go out probing on his own with respect to a particular case in order to determine whether or not there may be a violation of another statute, it is going to add tremendously to the cost of the arbitration process. Thus, one of the very practical considerations is the increased cost involved in the arbitration process of allowing arbitrators to go beyond the confines of the contract.

I prefer, however, to approach this problem on the very fundamental theory of arbitration. Arbitration, as we all agree—and as General Counsel Ordman stated in his speech this afternoon—is nothing more than an extension of the collective bargaining process.

What is the collective bargaining process? It is nothing more than bargaining between the company and the union. They are the only two parties. The individuals are not part of this collective bargaining process. Neither the company nor the union is concerned solely with individual rights. They are concerned primarily with the collective good and the collective welfare of all the individuals.

Prior to the time that unions came into existence, individuals had no rights. It was only after unions began to organize in the mass production industries—and, of course, after the passage of the National Labor Relations Act—that employees began to acquire rights. But as far as arbitrators are concerned, there was really no arbitration prior to the time that unions won collective bargaining contracts.

As arbitrators, you represent management and unions. It is not your function to represent individual employees. The government takes care of that under the National Labor Relations Act.

The *Miranda Fuel Co.* case established the duty of fair representation by which an individual's right may be vindicated. And there are the provisions of the Landrum-Griffin Act by which an individual may vindicate wrongs which have been inflicted upon him.

I mentioned earlier the practical matter of keeping abreast and informed on the status of all the laws. As Bill pointed out, in the

field of labor relations, the laws change sometimes daily. A good decision today may not be a good decision tomorrow. Unless there is an up-to-the-minute research at all times, there is a strong possibility of obtaining an adverse decision through lack of adequate or timely knowledge.

Another aspect which concerns me is that the parties have historically controlled procedural matters. What is to happen when the union and the company stipulate as to a given set of facts? Is the arbitrator to refuse this stipulation of facts, go behind it, and communicate with individual employees to ascertain that the true facts may not be as they were so stipulated.

Take the case of a stipulation with respect to a discharge issue. The stipulated issue might well be: "Did John Doe steal a gallon of gas?" Is the arbitrator to reject this issue when he has been voluntarily chosen by the parties by saying, "No, this is not the issue. The issue is whether or not he was discharged for union activity." I am inclined to agree that if arbitrators presume to make these determinations on their own, they will not be selected again by either the company or the union to hear additional arbitration cases.

And, of course, this is a very practical consideration as far as we all are concerned.

I can just imagine the consternation of the company and union representatives if an arbitrator questioned an individual on his own to determine whether there might be some hidden political factor involved that led to his discharge or his demotion or his failure to receive certain wages.

Another aspect of the procedural problem involved is, if you are going to vindicate individual rights, if you are going to give an individual due process in arbitration proceedings, what procedures are going to be adopted? Does the individual have a right to counsel? This is certainly a requirement of due process. Are the individual and his attorney going to have a say-so as to the hearing date or whether briefs are to be filed? Are they going to be required to pay part of the arbitration costs?

Suppose we have a problem where the decision may affect, in different ways, several groups of employees. Will each group be

entitled to intervene, to participate fully, and thereby make the process much more expensive and burdensome? This is the problem. And it has been given a lot of consideration over the years by arbitrators, managements, and unions.

Another practical consideration is this: There is no limit to the extent to which an arbitrator may be required to go in making a decision based upon law outside the contract. One issue that comes to mind is a closed-shop situation. Suppose you have a closed-shop contract with a private employer. There are many of these in Michigan, particularly in the hotel-restaurant industry where the NLRB jurisdictional standard is $500,000. Suppose an arbitrator is arbitrating under such a contract and is being requested to uphold the discharge of an employee for failure to maintain his membership in the union pursuant to the closed-shop contract. The closed shop is perfectly legal under state law but illegal under the federal law if NLRB jurisdictional standards are met. Is he to pry into the company's business records in order to ascertain whether the individual employer actually did in excess of $500,000 worth of business the previous year and thereby met the jurisdictional standards of the National Labor Relations Board? This is just one example; we all can think of many others. But it is because of the reasons I have enumerated that I do not believe we have reached the point where we should go beyond the confines of the contract in deciding disputes which the union and the company have voluntarily submitted to an arbitrator to be decided.

CHAIRMAN COLE: I asked Norton Come yesterday if he would like to make a few comments before receiving questions from the audience, and he said, "No." About midway through Win's remarks I asked him if he had changed his mind, and he said, "Yes."

NORTON J. COME: The reason for the change of mind is that I thought I was going to get some support, but I find both labor and management unanimous on this issue; therefore, I would like to express the middle position, if I may, before we get into the discussion.

I don't think we are going to get very far in solving what is, I think, fundamentally a problem of accommodation—and that premise may be wrong, but for the moment I am assuming that

is the problem—by stating general propositions or begging the fundamental question.

I believe you can start with the assumption that the arbitrator's authority may well be limited to the agreement. But the question we have to focus upon is whether or not the agreement should be deemed to incorporate at least some of the applicable law. And I want to put to one side some of the very complicated legal issues which I recognize may give us a lot of difficulty. Let's see if we cannot proceed a little way in this accommodation without necessarily going the full distance.

I said that this is a problem of accommodation because, at least as we at the Board view it—and I think that the Supreme Court and the courts of appeals have agreed with us thus far—there are two parts of the Labor Management Relations Act which come into play. You have Title I, which sets up the National Labor Relations Board, and Section 10 (a), which says that the Board has the power to remedy unfair labor practices and the Board's authority shall not be affected by any other means of adjustment. Then, you have Title II of the Labor Management Relations Act which expresses the judgment of Congress that a private resolution of disputes by the means adopted by the parties is the desirable way of resolving disputes. These two provisions have to be accommodated. They come into sharpest focus in the typical discharge case, which is staple for the arbitrator and which is also staple for the Board. The very practical problem is this: There cannot be any accommodation in that area, or, to use the leading case, the *Spielberg* principle cannot operate in the way in which it was intended unless the arbitrator in a discharge case considers all of the factors that went into the discharge and does not put on blinders when it comes to the question of union activity.

I do not believe an arbitrator would be going outside of the agreement if he were to look at the factor of union motivation. In that situation, at least—leaving aside complicated wage and hour questions, civil rights, and hot cargo provisions—there's nothing more called for than looking at all of the factors that bear upon the motivation for the discharge in concluding whether or not it was for just cause. It is on this issue that we ought to focus, because it does not have the emotional overtones or the complexi-

ties that some of the other legal issues have. And I submit that unless the arbitrator is willing to look at the total picture—and I think many of them are—we can't make much headway in accommodating the Board processes to arbitration.

Perhaps my premise is wrong. From what I have heard from my colleagues on the panel, it seems that it is because the logic of their position is that each goes his separate way. That is, the Board goes its way and the arbitrator goes his way and ne'er the twain shall meet.

That is not the assumption that the Board has been operating under; it's not the assumption—at least as I read the Supreme Court and court of appeals cases—that the courts have been operating under. So I submit that we can work out the discharge problem without reaching the more difficult problem of going outside of the agreement and getting into complicated issues of law.

CHAIRMAN COLE: Here is a question that has been submitted:

> What happens if, after an arbitration award is handed down sustaining a discharge, the employee wakes up to the fact that he might have an unfair labor practice charge, which he did not make, although he could have made it, in the arbitration?

Norton, do you want to comment on that?

NORTON J. COME: I think that fellow is probably out of luck, unless there is some procedure—and I am not too familiar with the way the arbitration procedure works—for reopening the case. I should think that in order to protect himself against something like that, he should file a charge with the Board to keep the six-months' Statute of Limitations from running, and the Board would probably hold that case pending the outcome of the arbitration proceeding. Then, if there is an omission, the Board proceeding can pick it up.

B. LEE MCMAHON [Downey, Calif.]: I am not concerned about the omission; I am concerned about the trial *de novo* on two occasions. It reminds me of when I was in El Paso working for the Board. I would tell those Mexican people that I was sorry, but they didn't have a case. I would also tell them the reasons why they didn't have a case but, of course, there was a language barrier. The next morning they would come back and say, "Seen-yor, I am

so-o-o- sor-r-ree, I forgot to tell you last night . . ." So, we have an arbitration. But I am concerned that after there is a finding by the arbitrator, someone will think of a new set of facts and we will have a trial *de novo* with the Board.

I am not at all concerned about omissions. But let's face the facts. What we are flirting with is double jeopardy.

I heard what was said today by the General Counsel and what we are really talking about in this situation is double jeopardy. The Board is going to try it on one theory. The arbitrator tries it on another. And what we are faced with is somebody that "just forgot." Once he learns what the facts are, he will come back tomorrow morning and say, "Senn-yor, I forgot to tell you last night . . ." And so he goes to the Board the next day with a different set of facts, and suddenly we have double jeopardy.

NORTON J. COME: I submit, Lee, that under the approach of my colleagues here, if I understand them correctly, you would be faced with the risk of double jeopardy much more than under the approach that I have been suggesting. If the arbitrator will make a conscious attempt to get to all of the circumstances that motivated the discharge or the discipline, there are going to be fewer cases where there will be a ground which wasn't covered and which would have to be relitigated before the Board. I suspect that you will never completely avoid the problem, but I submit that the middle position I am taking would minimize it.

CHAIRMAN COLE: I want to remind you that this is not the David Susskind Show, and you people in the audience are not confined to asking questions. We are anxious to get everybody's views.

SIDNEY A. WOLFF [New York City]: I submitted the question that was just discussed. What I had in mind was the situation, just mentioned, where after the award has come down, someone awakens to the fact that maybe he can find a witness who will testify that he was fired because he was a union steward. It seems to me, and I suggest to the Board, with all humility, that if the grieving party in the arbitration proceeding had the opportunity but did not bring up that issue, for any reason whatsoever, then he should be barred from pursuing the case before the NLRB.

As I understood the discussion this afternoon, if the Board finds that this precise issue was not brought up in the hearing, then it will go ahead with the charge. I think that's contrary to the law, the general law. If you bring a case, and a decision has been rendered, you are stuck with that decision even though you did not present in that proceeding all the arguments that you are now, subsequently, presenting.

But may I ask a question? I didn't intend to discuss my first question.

I believe that arbitrators should be confined to the contract, that they shouldn't go scurrying around on their own, in the privacy of their libraries, to find a statute that might have been violated. But this is the problem I would like to pose, and I think it is one with which most of us are concerned: A contract provides that the wage rate shall be, let's say, $1.00 an hour. We know that's in violation of the minimum wage laws. A grievance is filed by an employee who claims that he hasn't been paid the proper rate. The company presents the contract and says, "One dollar an hour, it says $1.00 an hour." The company shows it has paid $1.00 an hour. Does the arbitrator dismiss the grievance or does he award the minimum wage?

CHAIRMAN COLE: Do you want to take a crack at that, Bill?

WILLIAM M. SAXTON: I don't think this is really such a big problem. The arbitrator should point out that as a matter of contractual agreement the parties have established a wage rate of $1.00 an hour. He may then note that since such rate is below the minimum wage law, the continued payment thereof could subject the company to action by the Wage and Hour Division of the Department of Labor, but since the arbitrator is without authority to deal with such problems, the parties should resolve the same by mutual agreement or submit the matter to the appropriate administrative agency.

Your question is somewhat akin to the *Chase Company* case referred to in Bob Howlett's presentation. There the arbitrator rendered an award which apparently cannot be enforced because of the Michigan law relating to women lifting heavy objects.

CHAIRMAN COLE: Win?

WINSTON L. LIVINGSTON: Yes, I agree that should be the approach because there is a method of enforcing the minimum wage by the individual through the Department of Labor. Just the mere statement that this is in compliance with the contract rate, although it may be in violation of the federal minimum wage, should be sufficient.

BENJAMIN H. WOLF [Tarrytown, N.Y.]: Would you consider an award final and binding, and to what extent, which said "as permitted by law"?

WILLIAM M. SAXTON: The court will refuse to enforce the arbitrator's award. I think the arbitrator in that case would have been better off simply to determine what the parties had agreed to, and if he questioned the legality of their intent, he should have so noted, reserving the resolution of such question for the proper authority. For example, he could issue an award based on the determination that the parties had agreed upon a particular course of action but note that such award could be enforced only if permitted by law.

BENJAMIN H. WOLF: You are not answering the question. You are declining jurisdiction when you say, "This is the wrong forum. I am not going to answer your question."

WILLIAM M. SAXTON: Yes, I think I am. In his presentation Bob Howlett notes that all agreements are subject to all applicable laws. Now, it is not necessary to point out in every case that the award should be carried out to the extent permitted by law, but where the arbitrator realizes that the award might be tempered by some extraneous legal issue I think he should point out that the arbitration procedure is not the proper forum for determination of such issue. Incidentally, this sometimes happens in dealing with administrative agencies. Recently, I raised a constitutional issue before the state labor board in Michigan. The board noted the issue and pointed out that it could not determine the matter since it was a question that must be determined by the courts.

CHAIRMAN COLE: Bill, let's say that the grievance contends that the employee is entitled to $1.25 an hour, if that's the minimum wage, and also asks backpay based upon the minimum wage. The

submission before you as the arbitrator is: "Shall the grievance be granted or denied?" What is your award?

WILLIAM M. SAXTON: Well, my award is that under the terms of the contract I would not issue a backpay award contrary to the express terms of the contract. But let me say this, I think we are making a mountain out of a molehill with all this, because what employee or union is going to pay an arbitrator's fee to get a question decided that he can get decided for nothing by walking over to the Wage and Hour Department and filing a charge? Arbitration is really not that popular. There are other ways to spend your money. And the same thing, I think, is true in the discharge cases. If the union and the employee truly and honestly feel that this discharge involves a statutory violation, they are not going to go to arbitration with it. That costs money. They can go over to the NLRB; all it costs them is the bus fare over there. They get this question decided and save several hundred dollars. The number of these types of cases that would come before an arbitrator is infinitesimal. It's like that old statistic that 18 percent of the women over 75 are single. Well, at 75, who cares?

CHARLES F. PRAEL [San Francisco, Calif.]: I want to come back to the case where the man was discharged for stealing gasoline, the grievance is arbitrated, the arbitrator upholds the discharge, but a new charge is made to the Board and the matter is litigated again.

It seems to me the problem of double jeopardy could be avoided if we adhere to the basic rule that the arbitrator's jurisdiction flows from the contract. Let the arbitrator decide only the matter submitted to him. If the question is, "Was this man discharged for just cause?" because he allegedly stole gasoline, and the employee does not contend or suggest at the arbitration hearing that he was discharged for union activity, but simply denies stealing the gasoline, the only question before the arbitrator is whether he stole gasoline, and if he did, whether this is just cause for discharge. The arbitrator, upon the basis of the evidence, finds that he did steal the gasoline and, therefore, the discharge was for just cause. I believe the Board should be bound by that decision because the decision was based upon the fact that the employee did steal gasoline and this constituted just cause for discharge under the contract. The problem of double jeopardy arises if you let the employee

later think up and present additional reasons, not advanced at the hearing, as to why he should not be discharged. But the fact remains that he has been found guilty of an action which justifies discharge. This is where you run into the problem of a second bite at the apple.

There are many cases where the questions answered by the arbitrator do not foreclose questions raised before the Labor Board. But, I submit, in a question like this, "Did the employer have just cause for discharging that man?" and the arbitrator finds that there was, that should be the end of the case. The employee could and should have raised the defense, "Yes, I stole the gallon of gasoline, but that isn't the reason I was discharged. I was discharged for my union activities," but he did not do so. If he didn't raise that defense in the first place, he shouldn't be entitled to raise it later. Look carefully at the question submitted to the arbitrator and answered by the arbitrator instead of viewing it as two pieces.

NORTON J. COME: Charley, before addressing myself to your question, let me ask you a question in return. What would be your answer in the situation where the employee came back, not simply with the defense that "I didn't steal it," but "It's true I stole it, but that was not the reason why I was discharged. I was discharged because of my union activity"? Would you say in that situation the arbitrator should go into the total circumstances?

CHARLES F. PRAEL: Right. I think in that case he should, because that's the defense. It is involved in the question submitted to him, "Was this man discharged for just cause?"

NORTON J. COME: Now, the question that you put, which I think also was raised by Mr. Wolf, is whether or not you really hold the employee to the defense that he raises at the arbitration. And that is a nice question. I think that there is a lot to be said for not giving him the second bite at the cherry. However, the other consideration, and it's one that the Board has felt outweighs what would otherwise be the technical rule that I know is applicable in private litigation, is that the Board is vindicating a public right. That is, the Board has a public responsibility to remedy an unfair labor practice, if there is one, and hence it does not believe it appropriate to foreclose adjudication of that issue absent a showing that it was in fact presented and passed on in private litigation.

This is part of the general doctrine that a waiver of statutory rights is not to be lightly inferred. And for that reason, in a case like *Precision,* which Arnold Ordman mentioned, the Board will give the employee what has been termed the second bite at the cherry.

CHARLES F. PRAEL: I might say, from that point of view, I am against the second or third or fourth bite of an apple as a matter of principle or technicality. As a matter of fact, I would suppose that if you try a man often enough, you will be able to convict him. He may win an acquittal four times, but, if you are allowed to repeat and repeat and repeat, you may eventually convict him. I agree with the principle that litigation ought to end somewhere, and when a fellow has had a fair shake, that ought to be the end of it.

NORTON J. COME: I have received a question which deals with a different facet of the problem. "Given a contract which provides that the bargaining unit is limited to the county in which the plant is located when the contract was executed, do you believe that an arbitrator should consider the union's claim that the company's decision to move its plant to another county was the result of anti-union bias, when such a move is made during the term of the contract?"

I suppose the way this problem would come up—I am having a little trouble visualizing it—is that there would be a transfer of work out of the geographic area, and there would be a claim that the employer violated the recognition clause which says that he shall recognize the union for a particular bargaining unit. Or, if the contract has a no subcontracting clause, a violation of that provision might be claimed. This gets you into the general question of whether the arbitrator should determine whether there has been a *Fibreboard* violation. I don't see why not, because I think that arbitrators have been, long before the Board came down with its *Fibreboard* decision, determining whether there is a violation of the agreement in subcontracting work and moving work out of the area. The mere fact that you allege that it was anti-union bias rather than some other reason for breaching the agreement, at least in my present view of it, shouldn't give the arbitrator any less authority to resolve or to determine the issue.

WILLIAM M. SAXTON: I would like to comment upon where I think the NLRB is far out in left field with its *Spielberg* doctrine.

If the NLRB didn't have the General Counsel staff and all they had were trial examiners, they would be functioning as arbitrators do. The NLRB is a two-headed agency. First of all, it's an investigatory agency and, secondly, it performs the trial function. Now, the investigatory people do not try the cases from the standpoint of making the quasi-judicial decision. That's another staff; it's another part of the National Labor Relations Board. The arbitrator is more like a trial examiner. He is one individual who acts in a quasi-judicial capacity. And I don't think he ought to make inquiries or probe any more than the trial examiners do. That should be left to those charged with the preparation of a case. In the NLRB situation the case has to be prepared by the NLRB because it acts as prosecutor and the trial examiners act as judges. But in the question of contract interpretation, the preparation job is not for the arbitrator; it falls upon the parties. I think it is very unfair to set standards for arbitrators that you don't require of the judicial officers of the NLRB. Trial Examiners don't investigate; arbitrators don't investigate. They are to decide. If you are in a court of law, the judge doesn't go out and talk to witnesses; he doesn't say, "Now, are you sure, lawyers, these are all the laws that have been violated in this case? Are you sure there are not a few more you would like me to find for you?" That is not part of any judicial inquiry, and it should not become a part of the arbitrators' role.

CHAIRMAN COLE: I have an anonymous question for Mr. Come. I don't know who sent it up.

"How many cases would you say the NLRB has in a year where there has been a prior arbitration case?"

NORTON J. COME: I don't have any idea.

WILLIAM M. SAXTON: That's the usual NLRB answer. Norton, would it be very many, or very few or . . . ?

NORTON J. COME: I would say that it would not be very many because what we try to do is to screen them out, as Arnold Ordman indicated. Most of them are disposed of at the regional office level, and they do not see the light of day. The ones that you see are a very small portion of the total picture.

CHAIRMAN COLE: In order to keep within the bounds of our recommended time limit, I will have to limit us to either two more comments or two more questions.

DEAN A. DENLINGER [Dayton, Ohio]: It seems to me the Board's *Spielberg* doctrine is a good one. It does prevent management from being hit twice with the same problem, and it is basically a protection. My objection has been not that there is a *Spielberg* doctrine, but that it appears to be sparingly applied. I think that was Mr. Prael's objection, too. What troubles me is the tendency of arbitrators to misuse the *Spielberg* doctrine. The Board, as I understand it, is merely saying, "Where an arbitrator has ruled on the same issue, we normally won't rule on that issue again." The Board isn't telling arbitrators to rule on issues that are not before them, but is simply saying to arbitrators, "Tell us what you have ruled upon so that we will know whether the *Spielberg* doctrine applies." I am very troubled by the suggestion that arbitrators are called upon to do anything different than they did before, other than to make clear the basis of their decisions.

CHAIRMAN COLE: Norton, I would like you to comment on that.

NORTON J. COME: Fundamentally, you are correct. We would be happy, speaking from the standpoint of the Board, if we advanced no further, at least at this point, than getting the arbitrators to clarify for us whether they have decided what I will call the statutory issue—the 8 (a) (3) aspect of the discharge case. In the cases that give us the trouble we are not able to ascertain that. And I think that if there were greater clarity in this area the Board would be helped, and at the same time the arbitrators would not find the task too difficult. I think that's what is going to make *Spielberg* work more effectively.

DEAN A. DENLINGER: May I add just one more comment? The thing that has troubled me is that, the few times we have had this conflict, arbitrators have rarely taken more than 30 days after the submission of briefs to render their decisions, whereas trial examiners are never that quick. It's extremely troublesome, when you have problems of contract interpretation, to go past two negotiations while the Board thinks about it. And that is, in my own limited experience, the greatest single problem in accommodating the two.

CHAIRMAN COLE: One more.

DUANE B. BEESON [San Francisco, Calif]: I have a few comments that I would like to make in connection with the hypothetical or perhaps real case submitted by Mr. Wolf in connection with the accretion doctrine.

This, to me, points up what Mr. Come has been saying about the question of accommodation. The accretion doctrine is a difficult one to apply because of the many possible factual situations; it is difficult to know what the Board will do. But I would suspect that, in the case that was hypothesized, the employer should use in the arbitration proceeding a defense based upon the Board's accretion doctrine. There would be very little possibility of his defending himself on the basis of the contract and not complying with the union security provision. But if he does defend himself on the basis of the accretion doctrine, saying that the union security clause can no longer apply because of the Board's interpretation of the law with respect to representation, he is undertaking what the Labor Board might do if the case were brought before it. If he doesn't do this, the issue is never raised. I suspect it should be raised.

The question of whether it is or isn't gets into this problem of accommodation. The Board will take the case or not, depending upon the kind of defense that was raised or the kind of defense that was not raised. And if it's essentially a factual type of situation, I suspect that under the *Spielberg* doctrine the Board would go no further than to say, "These facts were examined by the arbitrator. The arbitrator did not act contrary to the principle of the NLRA. We will not give this particular situation a second hearing."

What I find most troublesome about the comments that have been made by both management and labor spokesmen are the statements, in such absolute terms, that arbitrators must not go beyond the bounds of the agreement, that they are restricted to it. That's impossible in many cases because of the National Labor Relations Act.

As I see it, there is no absolute rule that the arbitrator must restrict himself to the agreement. There can be no absolute rule.

At times he must consider the statutes. It's a pragmatic problem which the parties must meet and resolve the best way they can. The arbitrator is charged not only with doing justice but also with maintaining his position as an arbitrator as well.

WILLIAM M. SAXTON: We didn't say the arbitrator should never look at the law. What we said was that he should look at it only if it is directly incident to the question he is deciding. What we are saying is that if the law isn't directly incident to it and it isn't raised by the parties, he shouldn't go out hunting to find some law to fool around with. I think those are two far different things. We didn't say he should blind himself to the law.

CHAIRMAN COLE: I am sure this meeting ends with many people feeling frustrated because they didn't get a chance to say many things they wished to say, but I am also sure this can be straightened out in a manner known to all of us.