CHAPTER 7

DECISIONAL THINKING

WASHINGTON PANEL REPORT*

ROLF VALTIN, CHAIRMAN

As is true of judging, reporting is the product of a multitude of influences. So is the nature of the discussions—the topical selections, the directions, the emphases and de-emphases—which form the basis of the report made by any particular group. Some identification of the reporting group should therefore be given at the outset.

You should make nothing of the fact that we are the Washington, D. C., group. This is somewhat ironical, for our Program Chairman, upon first forming three geographical groups, determined that cases reaching the federal judiciary in the nation's capital might be of such special fallouts as to call for the formation of an additional and separate group. He presumably had in mind the judiciary's appellate level.

We considered it a coup when we persuaded Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia—a veteran widely held in great esteem—to become a member of our group. The victim of a heart attack on the tennis court, he died shortly before our first meeting. And, as things turned out, we proceeded without a replacement.

Judge Leventhal would have been a most stimulating participant and would undoubtedly have pushed us into lines of inquiry which we did not in fact pursue and which we might profitably have pursued. But we think it may legitimately be observed that input going to appellate functioning represents a dimen-

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sion which is a full step removed from what we have been asked to look into. The reason is that an appeals court judge is not normally a trier of facts and normally accepts the factual findings made by someone else as that from which he must proceed. And not only is it true that arbitrators rarely function in an appellate capacity, it is also true that the findings of the facts—and, indeed, even the manner in which the facts are stated—are time and again the pivotal element in arbitration decisions. We assume that the disappointments of labor and management practitioners on this score have been of sufficient intensity and frequency to confirm the validity of the point we are making.

Judge Greene is a distinguished jurist with impeccable credentials, enjoys his life in Washington, and handles big corporate lawsuits more frequently than is typical of district judges in other parts of the country. But he does not judge in a peculiarly Washingtonian manner. His inner voices, the legal constraints upon him, and the workload pressures under which he labors are no different than they would be were his seat elsewhere on the federal bench.

Much the same is true of Rich Bloch and myself. We happen to reside in Washington and we do somewhat more federal-sector work than we otherwise would do. But we are both full-time arbitrators with varied practices. Both of us engage in some umpiring and some ad hoc work, and we both get exposed to labor-relations practices and environments of all sorts. Aside from age and talent, the distinction between us is that he is a lawyer and I am not.

The other two members of our group, chosen by Rich and myself, are not Washingtonians to begin with. The lawyer in this instance is Cosimo Abato; the nonlawyer is James Vandervoort.

Cos is from Baltimore. He has been in practice, representing unions, for some 18 years. Most of his clients are unions of the nonindustrial type—building trades, service employees, trucking employees, etc. They are characteristically organizations that operate without well-oiled grievance procedures: there is a lack of stable employment, those elected to grievance-procedure posts are neither schooled nor skilled in fact-gathering, and there are no data-collection and record-keeping systems. Cos thus functions in an environment which is markedly different from that typically found in our mass-production industries. And therein—the nature of his practice—lies the key to many of his observations. Some of them are startling—as, for example,

when he says that 75 percent of his wins are owed to the uncovering of facts which he accomplishes in cross-examination. But Cos's input must be accepted as representative of one segment of collective bargaining and the arbitration which goes with it. And his input illustrates what is constantly to be kept in mind in any light-shedding endeavor involving American collective bargaining: that it is not a monolithic institution.

Jim is a management representative in the manufacturing industry. He is the Director of Labor Relations for United Technologies at Hartford, Conn., and he has long been intimately involved in the arbitration process. He oversees a grievance procedure which overwhelmingly produces settlements and which requires resort to arbitration in but a handful of cases. In that sort of environment, abhorrence for mediation by the arbitrator—one of the differences between Jim and Cos—is to be expected. Also, given the fact that his is a large multiplant company, it is to be expected that Jim is opposed to bench or brief-memorandum decisions. His primary concern is for the law-making which comes out of the decisions, and he needs that law-making to be understood at all of his plants. I am not suggesting, of course, that Jim and Cos are of identical socioeconomic bents. I am saying that they come from different labor relations worlds and that this principally accounts for the differences which we discovered in their inclinations and assessments.

This, then, is the so-called Washington group. It should be apparent that it would be a mistake to view us as special or distinct in relation to the other three groups. Nor, however, would it be fair to view us as the Program Chairman's mere afterthought appendage.

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We report without hesitation that two fundamental conclusions emerged from our discussions. The first is that judges and arbitrators function quite the same when it comes to the process of arriving at their decisions—when it comes, in other words, to the decisional thinking, as the program refers to it. The second is that institutional differences and similarities in the two forums are nonetheless to be appreciated and that it is at least as important to identify some of the institutional factors as it is to undertake the quasi psychiatric examination indicated by the program title. We will proceed along these two fronts in the given order.

Judging Is an Art

Judge Greene characterizes judging as an art rather than a science; rejects the notion that judging is a wholly analytical process; sees himself as a fallible human being; grants that he is influenced by a multitude of predilections—predilections which, though they vary among us, are inescapably part of all of us and inescapably produce such value judgments as we are called upon to make; understands that the predilections are at work both in assessing the reliability of witnesses and in subsequently deciding cases; seeks to be aware of his predilections as a check against wanton biases, but comes back to the realization that he, and no other, has been asked to decide the case; recognizes that precedent and other legal requirements must be observed and may dictate the result in the case, but has found that equitable results are usually achievable within that framework; does not hesitate to spin the inventive wheel where the constraints are not present; tries to decide quickly, believing that it gets no easier two or three months later; does not resort to coin-flipping or other forced means for deciding when he is badly torn—but, rather, ends up in the sort of weighing and reweighing which amounts to brooding but which somehow brings the decisive element in the case to the fore; is subject to time pressures and does not want to become known among his colleagues as the low man on the output totem pole; grants that he decides cases with an eye toward being reversed on appeal, but holds greater concern for doing what *he* believes to be right; occasionally even entertains the thought that reversal is not likely if his holding squares with what he feels comfortable with; nevertheless understands that residual discomfitures in some cases are unavoidable; and unabashedly allows that his first and foremost objective in every case is to make sense—which translates into saying that he wants to do what, to him, is fair and reasonable.

Rich and I are wholly in accord with Judge Greene. All that he says applies equally to us. We, of course, grant, that federal judges face a wider range of subject matters; they function on criminal matters, on tax matters, on constitutional matters, to name some of them. But if this is translated to saying that federal judges deal with public-law cases whereas arbitrators deal with labor-agreement cases, we can return to our emphatic echoing of Judge Greene's observations. And we do it gladly, and with

pride, for we like the candor and realism with which Judge Greene has captured the judging process.

Our group did some reading as part of carrying out our assignment. Our readings included pieces by Jerome Frank and Benjamin Cardozo. By way of elaboration and further elucidation of what all five of us regard as centrally true of the judging process, we want to close this part of our report with a few excerpts:

> "As the word indicates, the judge in reaching a decision is making a judgment. And if we would understand what goes into the creating of that judgment, we must observe how ordinary men dealing with ordinary affairs arrive at their judgments."
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> "The process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another. . . . [But] judicial judgments, like other judgments, . . . in most cases, are worked out backward from conclusions tentatively formulated."
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> "The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics."
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> "After canvassing all the available material at his command and duly cogitating on it, [the judge], brooding over the cause, waits for the feeling, the hunch—that intuitive flash of understanding that makes the jump-spark connection between question and decision and, at the point where the path is darkest for the judicial feet, sets its light along the way."
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> "What are the stimuli which make a judge feel that he should try to justify one conclusion rather than another? The rules and principles of law are one class of such stimuli. But there are many others, concealed or unrevealed. . . ."
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> "Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions, the habits and convictions which make the man. . . ."
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> "Judges . . . are far more likely to differ among themselves on 'questions of fact' than on 'questions of law'. . . ."
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> ". . . in learning the facts with reference to which one forms an opinion, and often long before the time when a hunch arises with reference to the situation as a whole, . . . minute and distinctly personal biases are operating constantly. So the judge's sympathies

> are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge's initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness's testimony."

Yet:

> "The courts have . . . repeatedly declared that it is one of the most important functions of the trial judge [serving without a jury] . . . to consider the demeanor of the witness.
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> "They have called attention, as of the gravest importance, to such facts as the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity."

Lest these excerpts be considered as outdated, we give you an observation found in a recently issued decision by the United States Court of Appeals for the Third Circuit. Referring to the choice which a judge has to make between two seemingly controlling legal precepts as a value judgment, the dissenting opinion (Judge Aldisert, quoting his colleague Freedman) commences with this: "The way you come out in this case depends on how you go in."

We view these excerpts as going to the heart of the difficulties, both for the parties and for the judge or arbitrator, which inhere in adjudication. We would do no more than particularize were we to walk you through the anatomy of any of our cases which have required judging in its true sense—that is, any but the easy cases. And such fine-tuning would not change the basic message: that the process is of endless complexities and uncertainties and that those who search for scientific foundations for outcome predictions are embarking on an exercise of futility. We do not accept the Program Chairman's distinction between intuitive and cerebral judging. Again, except in the easy cases, we think that it is a mixture of the two forces which spells the result.

Institutional Differences

We now turn to a series of institutional comparisons. Our discussions pursued no particular theme, and we ranged freely. We will pass on what seemed significant, but we cannot avoid proceeding in somewhat disjointed fashion.

Tenure and the Lack of It

Federal judges have lifetime tenure. They can be removed only through impeachment. As everyone knows, impeachment is a difficult and cumbersome process. Federal judges have been removed by it in but seven instances in our history. Bills by which to facilitate removal without the impeachment process are occasionally introduced in Congress. And Judge Greene is among those who believe that there should be a way, without the hindrance of impeachment, for dealing with plain bad behavior, alcoholism, and the like. But the recognized difficulty is that the line to be drawn between problems of this sort and disgruntlements over the judge's legal and public-policy views may become obliterated. Up to now, the concern for retaining the voice of federal judges as a free and independent voice has prevailed.

Arbitrators are without tenure. Even those who function as permanent umpires hold contracts of but two- or three-year duration. This is not to say that arbitrators are without security whatever. The volume of the nation's arbitration load has been rising so steeply and steadily as to yield a favorable supply-and-demand situation for arbitrators. Further, as in the case of baseball managers, established arbitrators tend quickly to be picked up by a new set of clients upon the rupturing of the relationship with old ones. Blackballing, once the dread of arbitrators, seems to be a thing of the past. But, in utter contrast to federal judges, arbitrators serve at the pleasure of the litigants.

We discussed some of the fallouts of the contrast, and we pass on the following for your consideration. They flow from the premise that arbitrators are more conservative and more cautious in the performance of their work than are judges.

First, whereas judges are glad to make novel pronouncements and are eager for the opportunity to hand down landmark decisions, arbitrators make the agreement their security blanket and thus come up with technically defensible but unimaginative holdings. Cos deplores it; Jim views it as fitting and consistent

with what he bargained for. The exchange gave Jim the opportunity to ask Cos whether a labor court with tenured administrative law judges might be the better way. The answer was a resounding "no."

Second, judges interject themselves at hearings to a substantially greater extent than do arbitrators. We had in mind chiefly the raising of questions concerning the merits of the case. Cos and Jim were agreed that such question-asking is widely resented by collective bargaining parties and that arbitrators are aware of it and therefore tend to be guarded. Judge Greene allowed that, though normally a listener, he moves in hard when he perceives that there is an uneven match between the two lawyers representing the litigants before him. He linked this to his overriding desire to come up with the right results. Rich and I took the stance that sphinx-like arbitration is bad arbitration and that arbitrators should inquire about anything which they see as requiring clarification—though they should do it without motivation of helping one party or the other. Jim holds no great concern for the differences among arbitrators on the extent to which they inject themselves, but he prefers arbitrators who are essentially listeners and he is skeptical as to whether the pure-motivation distinction is capable of implementation. Cos seems to prefer positive arbitrators, but he was also heard to mutter, "I'm not sure I always want you to have all the facts."

Third, judges are more at liberty to resort to mediation than are arbitrators. Jim's view of arbitrators who seek to mediate has already been given. Here, however, it was his turn to do some muttering. If I heard him correctly, he said something to the effect that mediation is OK where he signals for it! Judge Greene rarely mediates, but confirmed that federal judges are wholly free to mediate and that some among his colleagues do it routinely and habitually. Judge Greene also made the observation that mediation by a judge serving with a jury is one thing, but that mediation by a judge serving without one is quite another: the latter, unlike the former, has to hold concern for becoming infected with prejudice by virtue of learning things which would not be part of the trial evidence. Rich is a consummate mediator. He is likely to resort to mediation, and in more than half-hearted fashion, whenever he senses an opening for it. The only question is whether his sensory antennae are reliable. But he grants the soundness of Judge Greene's admonition—which, by definition, applies to arbitrators. And he heeds it. I am not saying,

however, that this is necessarily a matter of conformance to ethical standards. Rich and I are among several arbitrators who serve on the Foreign Service Grievance Board. There, when one of his mediation efforts fails, he seems rather delighted in disqualifying himself on grounds of prejudice and letting one of the rest of us pick up the marbles. Cos favors forceful mediation in appropriate cases—which, one may gather, is something like half of them in his practice. He holds the conviction that, both as a matter of making sense and as a matter of holding down costs, mediation in arbitration represents true public service. Here again, however, the nature of his practice needs to be understood. In many of the cases which come to his office, it is true not only that there has been no real use of the grievance procedure—which is tantamount to saying that there have been no real settlement efforts—but also that the parties do not properly understand the case until it unfolds at the arbitration hearing. Cos wishes that arbitrators as a whole were more daring and resourceful in assuming a mediating role, but, attributing it to their insecure lot, he does not entertain much hope. As for myself, true to form, I am somewhere in the middle of all this. The only thing I am certain of is that I have been accused both of being a compromiser and of failing to seize the opportunity for compromise.

Fourth, judges are more firm and precise than arbitrators in ruling on objections at the hearing. This is partly the result of the facts that judicial hearings are formally structured, that there is no question about the applicability of the rules of evidence at judicial hearings, and that judges are usually better informed about their cases by the time they commence hearing them than are arbitrators—so that they are in a better position to rule on questions of relevance than are arbitrators. But we submit that tenure versus lack of it plays a substantial role in the willingness versus the lack of it to make clear and dispositive rulings on objections raised at the hearing. Arbitrators tend to be skittish on this score. Judge Greene, by contrast, matter-of-factly said, "That's what I'm there for." He noted, somewhat gleefully, that he has the power to hold recalcitrant lawyers in contempt or to declare a mistrial and to move the case to the bottom of the docket—thereby putting the litigants on notice that theirs will be a wait of a year or so. He added, however, that he rarely exercises these powers. It suffices that it is understood that he possesses them. Rich believes—and has so expressed himself

elsewhere—that the failure to make clear-cut rulings on objections raised at the hearing is a common failing among arbitrators. He shudders at the repeated recourse to "I'll take it for what it's worth," believing it to be no disposition at all and believing it to be bad arbitration because it leaves the parties in the dark as to what they have to meet or can safely let go. The problem, in Rich's opinion, stems from two factors: (1) lack of knowledge of the rules of evidence, and (2) disinclination to take a stance that might offend one of the parties. Cos emphatically agrees with Rich. Jim seems more tolerant and not to have had bothersome experiences on this score. And my unenviable lot is to confess that I have never taken a course on the rules of evidence. I can truthfully say, however, that I have long been impressed by the proposition, which was laid down by a *lawyer*-arbitrator, that: "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."

Bench Decisions and Opinion-Writing

We discussed three means by which to make rulings: bench decisions, brief memorandum decisions, and full opinions.

Judge Greene tells us that federal judges are generally without rules which would require them to go with one route or another. The sole exception is that findings of fact and conclusions of law have to be stated in civil trials without a jury. With this exception, federal judges are free to dispose of any case via any one of the three vehicles—and they freely exercise the choice. To my surprise, many a case in federal district courts is disposed of via a bench decision.

I am in tune with Cos on the objectives of speed and economy, and I have made bench rulings in some cases. But I took the position in our discussions that most of the cases which I hear are cases which I want to study and think about before deciding them and that I would have a hard time working under a system in which bench decisions are mandated, regardless of the nature of the evidence and the arguments presented at the hearing.

This led to the discovery that bench decisions in federal district courts and bench decisions in arbitration are rather different animals. For one thing, the judge, having disposed of pretrial motions and having read affidavits, usually knows something about the case before hearing it. His bench ruling is

akin to one that an arbitrator might make upon a multiday hearing and with opportunity for study prior to the time at which the decision is announced. And for another, the judge's bench ruling and supporting reasons are transcribed, and the judge is given the opportunity to work on the typed version for polishing and elaboration purposes. This is particularly pertinent when it becomes known that the case if going forward on appeal. Indeed, the judge at this stage has the option of preparing a full-blown opinion.

We also discussed what has become my favorite vehicle for accomplishing speed and economy while yet providing the parties with insight into the basis for the decision—to state it otherwise, while yet providing a means for keeping the arbitrator honest. This is the memorandum-type of decision which bypasses a statement of the facts and the parties' positions and which addresses both the facts and the arguments directly only to the extent needed for providing the focal reasoning. There will, of course, be some variations in this format in accordance with the nature of the case. But the constant idea is to avoid elaborate explanations and to keep writing to a minimum.

The upshot of such a memorandum decision is that those who were at the hearing will understand what has been decided and why, but that little of informative value will have been provided for others. Jim, for the reasons already given, does not view the technique as a useful one. He also noted that he is opposed to devices for making arbitration quicker and cheaper; he wants quality and he does not want to encourage expanded recourse to arbitration. Cos expressed different views on the memorandum type of decision. For one thing, he wondered why I raised it for discussion and why I felt that resort to the technique required the parties' prior consent. By his experience, there is nothing special about it—meaning that many arbitrators characteristically give him mere three- or four-pagers. For another, he believes that he has to be a cynic on this score: he has not found such pieces of work to be accompanied by lower bills. And for still another, he sees ours as a result-oriented world. He is convinced that this includes his clients and their management counterparts, and he therefore attaches but secondary importance to either the nature or the length of the opinion. At the same time, however, he cannot be read as willing to forgo the opinion altogether, for he says that his irate moments in arbitration come when he cannot understand how the arbitrator arrived at

the holding. And he adds, once more with the sort of cynicism which is wrought by bitter experience, that long opinions do not necessarily incorporate understandable or persuasive rationale.

For Judge Greene, there seemed to be little usefulness in the discussion of the memorandum decision. It represents the equivalent of what he does when he issues a bench decision.

We discussed quality workmanship in opinion-writing. Here, it seemed to us, the influence of tenure versus the lack of it can cut both ways. As to the judge, it may be that the lack of apprehension as to the litigants' reaction makes for excellence of product. As to the arbitrator, it may be that the concern for survival will be a powerful inducement for striving to achieve the ingredients of good writing. As a longtime colleague of mine once observed: "This is where we sell ourselves." We are not prepared, however, to venture a generalization of superiority in opinion-writing as between judges and arbitrators. Both in the end want to pass muster with their critics and peers, to borrow a phrase from one of our excerpts.

The Role of the Advocates

We want to say a brief word about the role of the advocates in the two forums. We flatly state that advocates with legal training are needed in court trials. The reason is that court proceedings are highly systematized and that the litigants themselves are not likely to be familiar with such areas as the rules of evidence, the appropriateness of one claim or another in relation to the subject matter, the availability of counterclaims, when and how to make motions, the waiving of an affirmative defense, and so forth. Judge Greene says that he could not survive if those before him did not know how to proceed in accordance with the dictates of the system—that the state of his docket is such that he cannot take the time to teach nonlawyers. Arbitration, in these terms, is obviously a different entity. Further, arbitration is concerned with a subject matter—namely, the labor agreement—which represents familiar territory for the participants. We do not, accordingly, view legal training as a requisite condition for effective advocacy in arbitration. We quickly add, however, that ours is a distinction based on *particular skills.* We are not saying that able advocacy is of less impact in the one forum than in the other. To the contrary, we see it as axiomatic that it matters greatly in both forums that the facts

be effectively marshaled and that telling arguments be made as to the proposed application of the facts.

Appeals

We want to touch on the area of appeals. The appeals rate respecting district court decisions is about 20 percent. With respect to arbitration, a distinction must be made between going to the courts for the purpose of having the arbitration decision vacated or modified and going to the courts for the purpose of redress against noncompliance with the arbitration decision. The former is done by the loser; the latter is done by the winner. Stated otherwise, whereas the former amounts to the bucking of the supposed finality of arbitration decisions, the latter, whether or not of lofty purpose, amounts to siding with that precept.

Cos reports that he flatly refuses overtures by his clients for the overturning of arbitration decisions. He does so as a matter of enlightened self-interest—telling his clients that both they and he have to live with the corps of arbitrators commonly used in the Baltimore area. As to going to court for enforcement purposes, Cos reports that he incurred literally no instance in his first ten years as a practicing lawyer, which are roughly the ten years following the *Trilogy,* but that he has been averaging something like two instances per year in recent times. Jim cites examples of what he views as horror arbitration results and plaintively expresses the wish for easier access to the courts for appeal purposes, but he has never gone to court for overturning purposes and he has never refused to comply with an arbitration decision.

Rich and I are opposed to easier access to the courts—not, we trust, to save our hides, but because we are concerned about the undermining of those grievance procedures, still in the hefty majority, which state no exception to the rule that arbitration is final and binding. We think General Motors has it right when it resignedly says: "Arbitration decisions are final and binding—some bind more than others." And what is to be kept in mind about Jim and Cos is that, though each is doing some lamenting, neither wants a labor court and neither wants to return to the days of strikes over grievances. Both are backers of arbitration as a system which soundly balances the interests of inexpensiveness, promptness, and justice.

The Development of Facts in the Courts and in Arbitration

We single out one further institutional comparison before closing. There is a significant difference between the two forums in the manner in which the facts in the case are developed. The courts are aided by interrogatories and depositions—by truly exhaustive discovery procedures. This is not to say that the judge's lot in finding the facts is easier than that of the arbitrator. Nor is it to say that the court system is the clearly healthier one. Indeed, Judge Greene holds substantial concern that discovery procedures are getting out of hand and allowing the richer party to win through administrative harassment. And abuse from both sides, he tells us, turns into the equivalent of pleading wars.

But, these pitfalls aside, we think it should be said that most grievance procedures do not match the courts' discovery procedures in thoroughness of fact-development and that arbitrators are more likely than judges to have to contend with paucity of facts. Further, arbitrators usually have zero knowledge about the case when they start to hear it and therefore cannot reasonably be expected to be alert to particular shortcomings in fact-development while hearing the case. The recognition that particular factual facets are missing usually hits them on the way home or when they start to study the case. Rich and I offer no remedial prescriptions, but we do plead for awareness of the differences between the courts and arbitration when it comes to the possession of factual material. And we do venture the comment that we have worked with some parties who are better at resorting to certified mail to make sure that time limits are being observed than they are at using the grievance procedure as an instrument for adequate fact-development.

Conclusion

We return to the twofold conclusion that we stated at the outset. We think judges and arbitrators are of one cloth when it comes to the judging process—when it comes to the innumerable factors which are at work in the midst of the process and which somehow are brought into confluence to produce the decision. But it does not follow that taking a case to a federal judge is the same thing as taking a case to an arbitrator. As we have sought to show, the two forums are institutionally distinct in important ways.

There is one distinguishing feature which is of fundamental and ever-present influence. We have not gone into it because it has been a repeated theme in the annals of the Academy. But a comparative examination of the kind we have been asked to undertake should not close without at least making mention of it. We are referring to the fact of the continuing relationship of the collective bargaining parties and the contrary posture of the litigants before the courts. And we think it noteworthy that it was Judge Greene, the only one among us without labor relations experience, who spotted and first raised the contrast in our discussions. The outsider identified what is perhaps the most basic ingredient of adjudication in the collective bargaining sphere.

Clearly, the conduct in adjudication of those who must live with each other following the adjudication is bound to be very different from the conduct of those who will be going their separate ways following it. And the difference inescapably reflects itself, in overt as well as subtle ways, in the respective roles of the arbitrator and the judge. There are collective bargaining spokesmen who wish it were otherwise—who want, as they say, judge-like arbitrators. We submit to them that they may be overlooking the judge's greater latitude, not to say free-wheeling, in a number of areas and that they presumably are not prepared to relinquish the tenet that the arbitrator, as the creature of the collective bargaining relationship, is to be the parties' servant.

WASHINGTON PANEL DISCUSSION

Chairman Valtin: Who wishes to lead off? You have heard a series of assessments and conclusions. Do you think they are sound? Do you think they are unsound? Do they vary substantially from your own experience. Who is ready to fire away?

Mr. Ken Schwartz: I represent unions in Los Angeles. I have a problem in regard to one of the topics, the timing of the decision from the time you have the arbitration hearing to the time we get it. We have had situations where we have had a discharge and we didn't get the award until almost 12 months after the discharge occurred. While I understand the problem with bench decisions, there should be some time limit from the time you have that hearing to the time you get the arbitrator's award. In my conversations with arbitrators, socially, they tell me that their mind is pretty much made up by the time that hearing is over, irrespective of the fact that the advocates will file briefs. We would like to have a situation where no briefs are required—not only not required, but not permitted—and the arbitrator hands a decision down in a period of 30 days after the hearing.

Mr. Charles Killingsworth: In a couple of umpire situations in which I operate, I have gotten the parties to agree that in a discharge case, unless there is something very, very unusual involved, I will write a letter within one week following the hearing saying what the decision is going to be. The award is that the grievance is granted or the grievance is denied. If there is a back-pay issue, usually I defer a ruling on the back pay, but at least within one week the man knows whether or not he gets his job back. The parties have found that perfectly workable. And even though sometimes the decisions take two or three months or longer to get out, the decisions are for posterity, whereas the guy that is out of a job wants to know where he stands. I don't see why this system can't be much more generally used than it is.

Panel Member Abato: I think what is being discussed now is just the tip of the iceberg. My experience is that arbitrators may attempt to have the parties agree to a bench decision or a quick letter. But in too many cases I have found that management will not agree, and I am afraid that sometimes it is because the lawyer wants to write a 50-page brief in a very simple discharge

case. But the real problem here is that the *Trilogy*'s pronouncement that arbitration should be a quick, efficient, and uncostly procedure has just not proven to be true. Everybody wants the experienced arbitrator. We find difficulty in getting a hearing, forget the length of the decision. We have terrible problems once you pick an arbitrator in setting a date of hearing because the arbitrator is so busy, the parties are so busy, or what have you. So this entire matter of a speedy decision is just one of the many problems that we have in carrying out the concept of the *Trilogy* that arbitration should be a quick and inexpensive procedure. If something isn't done, we are going to fall from our own weight, because my experience in recent years is that the courts are getting to be faster than arbitration and arbitration was supposed to be the quick way to go.

Far too few arbitrators are willing to risk the wrath in the future of one party or another by coming down on those parties. I recently had an arbitrator take the lawyers out in the hall, after the hearing was all presented and before argument or briefs were going to be presented, and say, "Gentlemen, I think suspension is merited, but I am not going to sustain the discharge." Too few arbitrators will do this. They will charge us for two and a half days of writing a decision when they already know at the end of the hearing what they are going to do. I would appreciate very much if all arbitrators, when they have made up their mind, which is not unusual in a discharge case, would tell the parties. After briefs or at any time, if you have made up your mind, you would do both parties a service by getting it to them as quickly as possible and giving them the results in any form. But I will tell you that most arbitrators won't do it, and most management attorneys with whom I deal don't favor it at all. I see nothing wrong with it. Judges do it for sure.

Mr. William Murphy: I want to add a footnote to the complaint about the delay in rendition of the awards. I simply want to say that the management and union people do not have to accept this unconscionable conduct tamely. The Code of Professional Responsibility sets its face clearly against this delay. If it is an appointment from one of the agencies, you should file a complaint with the AAA or FMCS. If it is an Academy member, you should file a complaint with the Academy. We do the best we can to police this. We have rejected applicants for membership in this Academy because of complaints that the parties have made about delay in rendering awards. So don't just privately

grumble to yourselves about it; at least take this action. There is one other thing, I believe, that might stop this practice to a large extent if management and union representatives would do it routinely. That is, adopt a form letter to the arbitrator which would run something like this: "We have just received your decision in this case and we note it took you one year to reach it. One year from the date of this letter, we will send you a check for your services rendered."

Panel Member Abato: As a practical matter, when you have an important case before the arbitrator and management will not agree to ask that arbitrator how come it is taking so long—because the truth is that they are not in any hurry for this decision, for it may have great ramifications and the contract may be running out within four or six months after we get the decision —it is pretty hard for one side or the other to start writing letters to an arbitrator complaining about his decision. Let's be practical. We live in a real world. If both parties will do it—"it is taking too long"—and we let him know, fine. In a recent case it took eight months to get a decision—unconscionable, no reason, not that difficult a case, four hours of hearing. The parties jointly wrote at least four letters to that arbitrator and finally wrote the Federal Mediation and Conciliation Service. He finally rendered a decision, and within one week thereafter I got a panel of arbitrators with his name on it. So apparently there was nothing being done to this arbitrator, even as a result of both parties complaining to the Federal Mediation.

Mr. William Levin: It has frequently occurred to me that there has not been much of an effort by way of discovery by the parties before the arbitration. And I am not talking about the expensive, burdensome kind of discovery that is characteristic of federal court. I guess I am really talking about a more sophisticated use of the grievance procedure. But since discovery is such a key element today in judicial determinations, I am wondering what the panel talked about in terms of discovery prior to arbitration hearings.

Panel Member Abato: Discovery by use of the grievance procedure is what the Supreme Court envisioned in the *Trilogy*. I have to speak from my experience in representing some 60 unions which are mostly smaller, local unions. Contrary to popular belief, union officials, in my experience, are not omniscient or omnipotent. One day a truck driver, the next day a union official; one day a carpenter, the next day a union official—not

educated, not trained, not intellectually enlightened. So that the utilization of a grievance procedure has to depend upon the parties who are using it. And the problem is that there just is no discovery process in the grievance procedure. It is very perfunctory: "Here's the grievance. We don't think what you did was right or fair." The other side says it was right and fair. Next step: it finally gets to me after they submit it to arbitration. So I think that the problem is in the people who utilize it rather than in the concept that it should be utilized for discovery. This really fits into something that Ted Jones was talking about today which really gave me some thought about the arbitrator's applying rationality, the likelihood of what happened, the probability of what happened, and I give you this instance of something that just happened to me while it is very fresh in my mind.

The grievant was discharged. He was the shop steward. One of the very important issues in this case was whether, in fact, he knew about this document, these rules and regulations of the company which specified that he could be subject to discharge for this offense. He testified that he did not know of those rules, and several other employees testified that they did not know of those rules. On cross-examination, the company attorney showed a series of grievances which this very shop steward had handled in which they talked about the company's rules and regulations. And the inference was, the direct question to him was, "How in the world can you expect us to believe that you, the shop steward, did not know about this document—these rules and regulations—when, in fact, you must have known?" And I am sure that the arbitrator bought that argument. In fact, this almost semi-illiterate shop steward, who had a big mouth but not a great deal of brains, did *not* know and never in the grievance procedure had once asked to see the company's rules and regulations which they had relied upon in these various grievances that he had handled. That's a fact. I sympathized with the arbitrator who was applying the laws of likelihood and the laws of probability and all the other rational laws, but he was dealing with an irrational human being. I don't know how you are going to have discovery in a grievance procedure unless the people who utilize that procedure are sophisticated enough, intelligent enough, to have discovery.

It is not at all unusual when we get sued in a civil rights case or in a failure-to-represent case, and full court discovery comes about, that we discover things that were never known before by

either party, who handle grievances every day, about differentiation in discipline, for example, given to one party and another, because in a hearing of that grievance they didn't go into that.

So that discovery is marvelous! I don't like court discovery; I agree with Judge Greene that it has gotten out of hand and the rich party prevails. But the discovery has got to be by the individuals, and as long as you are dealing with human beings in the grievance procedure, you are never going to have what the Supreme Court said you should have—that the grievance procedure should be that type of procedure. It just is not possible. We are stuck with it. As arbitrators *you* are stuck with it; as attorneys *we* are stuck with it. It just doesn't happen.

(Second Day)

Panel Member Bloch: I must say that I am not much upset over the prospect of employers or unions going to court with our awards. I think that, as a matter of labor relations policy and public policy, it makes sense to make the overturning of an award very, very difficult, not for the sake of the arbitrators, but for the sake of the parties. They have made this contractual bed and now they should lie in it. But the prospect of being overturned has never been of much concern to me and, indeed, in the rare cases, which used to happen more often than they do now, where you would get, for example, a conflict of Title VII, I didn't have the slightest qualms of going ahead and saying, "Well, your contract says this, and that's it." But the prospects of the court review never really bothered. I think in terms of keeping arbitrators in line, the sanction of not eating tomorrow is much more compelling.

Panel Member Abato: I would say that there are arbitrators who don't agree with Rich. I just had a case with a very prominent arbitrator where the company refused to comply with his award and we had to seek enforcement. He was called as a witness, and on the witness stand he came "this close" to being held in contempt because he refused to answer the question on cross-examination of what his process of thinking was with respect to the making of the decision. He had his own lawyer present, and finally, upon the strong advice of his own lawyer, he answered the question. But I think he was absolutely right in terms of being asked to express himself on how he arrived at his conclusion, what his internal thinking-process was, and I think

that that may be part of the reason why arbitrators don't like to have the courts look into what they do. They are asked some very difficult questions.

Chairman Valtin: I just don't know how you can seek reversals of arbitration decisions where you have agreed in the contract that the decision shall be final and binding. It seems to me that what you have to start to do is to write exceptions into the agreement as to that precept. Else he doth have it both ways. You are free to overturn on certain groups; so is the other side. And before you know it, arbitration is a fourth step, with a fifth step yet to come. I just don't know how you can get away from it.

Mr. William Simkin: Most of my experience, as everybody knows, has been at so-called permanent arbitration. Under most continuing arbitration arrangements, over the years dissatisfactions of one kind or another develop, usually on both sides. I think inadequate use has been made of a device that I would like to see developed in those relationships: Periodically there would be a conference set up with a few top people on both sides where they would take their hair down and in no uncertain terms talk with the arbitrator about the problem that they saw developing and the concerns they had about tendencies that he may have. I do assume a relationship where the parties would be willing to discuss with each other, as well as with the arbitrator, complaints that are not identical, to get them on the table, to lay it out in no uncertain terms so that people know where the problem areas are.

Mr. Carleton Snow: Did the group have impressions concerning how widely med-arb is used by arbitrators and how the parties respond to it?

Chairman Valtin: It appears to us likely that judges resort to it more frequently than do arbitrators.

Panel Member Bloch: We did have some very strong responses to a willingness of the arbitrator to step in as the mediator in the midst of a session.

Panel Member Vandervoort: You have got to separate just-cause cases from contract interpretation; just-cause cases are far less significant. But in matters of contract interpretation, we are obviously before the arbitrator now because one party or the other is alleging that the clause means something different than the other one says it does. I don't think mediation is appropriate at all. I think the lines are drawn at that point and the matter has

to be litigated. So I do not welcome mediation at all in contract interpretation cases.

Panel Member Abato: I would disagree very sharply, from a different experience. I find more and more that parties, to avoid a strike or whatever, leave many things unanswered and deliberately draft language that nobody can understand, hoping either that the problem will never arise during the course of the agreement or that, if it does, their view will prevail as to what the language means. I do not find tight-drawn contracts. If the role of an arbitrator, in contract interpretation and certainly in discipline cases, is to fashion a "law of the shop," his function can very well be to mediate, to try to get the parties to agree. Mediation can be of great service there, especially in the great majority of contracts where the parties have deferred, for one reason or another, a resolution of their dispute and drafted language which nobody can understand.

Panel Member Vandervoort: I couldn't disagree more here. He raised something that I am now going to raise with some trepidation, considering the audience. I listened to Professor Morris this morning and I found it a little disquieting, because it seemed to me that he sees the role of the arbitrator, "the proctor" I think he called it, in essence as one who will, in his infinite wisdom, fill in the blank spaces in a contract. That fills me with fear. I have great respect for arbitrators. I work with them all the time, so this is not meant as a derogatory statement. But I have never met an arbitrator who really knows enough about our business that I would be content to have him make a decision about subcontracting or any other business matter. He simply doesn't have the background or the informational base to do that. We try to write agreements that don't leave such great gaping holes. As we live with each agreement, we recognize that it is very imperfect, but I still think it is best for the parties to work these things out in collective bargaining and for arbitrators to follow the contract as closely, at least, as they can.

Chairman Valtin: Jim, it is fair to say, though, in the selection of arbitrators you have managed not to select "proctors." It doesn't really matter what Charlie Morris says or how he characterizes the whole business. The main point remains that the parties are free to select their own arbitrators and that's where it is so different from the judicial system. It is within your people's control, and the control gets well exercised most of the time—the kind of arbitrators whom you are paying.

Panel Member Vandervoort: Certainly that is true. And if we had bad experience, as we have not had, with an arbitrator who wandered way outside of the contract, the only recourse we would have obviously would be to cease to use him.

Mr. Carl Yaller: Judge Greene is attributed as having taken the position that he is willing to act as a mediator in jury trials, but not in nonjury trials, for fear that during the negotiation process certain evidence which would be inadmissible would be presented before him and thereby contaminate the decision-making process. Is that a legitimate concern? Are arbitrators immune, and what percentage and to what extent are advocates in the negotiating process carriers of that contamination?

Panel Member Abato: I think, to be fair to Judge Greene, that he also recognizes that some of his colleagues do not have the hesitation that he has about inserting himself in a nonjury situation. He made it very clear that he has his own compunctions, but that others don't. And in fact, as we all know from practicing in the federal courts, in a status conference and any other kind of scheduling conference, judges do, to a great extent, insert themselves into the process and try to squeeze the parties into a settlement without any hesitation about their role as a mediator or about their role as an enforcer in getting rid of the case.

Panel Member Bloch: It leads to a terribly interesting problem, though, and particularly in the context of med-arb and in the context of how far an arbitrator should go in inserting himself into the process. And you can highlight the problem with a series of hypotheticals.

The first one is where an individual calls—a number of us have had this experience. I have had a call at least once from a union president who said, "We have a son of a bitch on the West Coast who has just been fired and we want to make sure he stays fired. Can you hear the case?" My answer is, "No, I certainly can't. And when you call someone else, you might approach it slightly differently."

The next set-up is not, perhaps, quite as extreme, and this is in the context of the arbitration hearing. You step outside to meet with the parties and one attorney—assume again the union attorney representing the grievant—says, "We've got a bummer today. I am sorry about this, but we really can't go anywhere on settling. You will just have to decide it." To me it is very clear that that is an impermissible comment and that the arbitrator really must make a very stern response to it, including resigning

from the case. I recognize that that may well be a purist attitude. But in the context of mediation, does stuff get in that can't get in in other ways, and what is the arbitrator's obligation? That is a very, very hard issue, and my reaction is that it really has to depend on what sort of evidence you are talking about.

I think that there does come a point where arbitrators and judges have become tainted, to the extent that the mediation has gone so far that they are really kind of hanging it all out and it had better settle because if it doesn't settle, you are no longer in a position to hear the case from an objective standpoint because the parties have made real, heartfelt concessions to you.

You are now getting what, I guess, Ted Jones might have called the "honest to God" facts, as opposed to the found facts. And it seems to me that, yes, there is very reasonably a point where you are just going to have to step down. That's a very difficult judgment call, particularly difficult when you are at a situation where you know the result for this case which both parties would be very satisfied with. But it has nothing to do with the dispute and it all comes about because you have been talking to them out in the hall.

Chairman Valtin: You have to recognize the danger is there even by the mere overture to the arbitrator to step outside and "Let's have a look at this." It could be nothing more than one side broadly indicating, "Yes, we are ready to compromise this," and the other side saying, "Under no circumstances. We think we have a solid case." Back we go into the room, and you have to decide. It is conceivable that that conversation is going to influence the arbitrator. I don't think anybody can stand here and say, "Under no circumstances would that influence me." If that's true, then what you have to decide is whether, by golly, despite that danger, the situation is such that you take the risk. But I just don't think you can say even in the most cautious way that there won't be some prejudice.

Panel Member Abato: I have, again, a problem of the institutionalization of a process caused largely by lawyers.

What I am hearing, and what I am seeing in the arbitration process every day, is that it is no longer like Justice Douglas described it; no longer does it serve the purposes which Justice Douglas said it should serve. In fact, the picking of an arbitrator is even a game now rather than selecting a "proctor." We begin to shop for the "right" arbitrator.

So what we are hearing is that—and I think it is true—we no

longer have a shaping of a collective bargaining process and that's unfortunate because, as I see the role of an arbitrator—maybe it's not practical, but it's the way I would like to see it—is that he serves a greater function than a trier of facts and a decider of the particular case presented to him. If he should do that, then I can see no problems with his attempts at mediation, and no one should feel bad about it and no one should discredit him for trying to do it. If the facts of life are that we have gone too far past that, maybe there ought to be a re-examination of the *Trilogy*.

Panel Member Vandervoort: Of course I represent management, and it is true that in the overwhelming majority of cases, the moving party in an arbitration is the union, which means that I am in a position of defending myself. I am not there to get anything; I am just there to lose as little as I can lose. Mediation implies compromise. Half of something is something. So that's why I am not very keen on mediation.

Mr. William Simkin: I guess I am renowned as a so-called mediator-arbitrator. If there are ways that you can get to what you call the "honest to God" facts of the case, the more the better, and if there is any way that you can get them that is in any way sensible, I think you ought to get them. But I don't know how many times people have come to me in discharge cases with the kind of remark that Rich Bloch mentioned, not so much before the case is scheduled but during the case, and I have a favorite remark that I pursue: "What's the matter? Did he run against you in the last election?" I think if you get a remark in a discharge case, it is your obligation to find out somehow or other if that remark is prompted by interunion politics rather than by the facts of the case.

Panel Member Bloch: What if you do find it was not prompted by interunion politics and he was dead serious?

Mr. Simkin: Let's not kid ourselves. In these last few years unions are taking a high percentage of cases to arbitration which they know are losers and should be losers, only because they are fearful of court procedures. In the old days, the union steward or union president would say, "Look, brother, you know you don't have a case. Forget it." They don't do it very much any more, and we are getting whole hosts of grievance cases that are absolutely silly on the merits. Now, most of the time you don't need a tipoff. The facts are enough, so that will do the job. I have said several times that one of the worst sins that an arbitrator

can commit is to give a union a case, by some means or other, that they want to lose.

It is not so bad to rule against the union on a case they want to win. They have got a contract coming up and they can get it changed in the next contract, if it is a really meritorious case. But if we give a union a case they really want to lose, and it is important to the company, it is extremely difficult in the next negotiation to ever get that case changed because the arbitrator has ruled. This is a psychological factor which makes it very difficult.

Panel Member Bloch: Bill, are you saying that if you heard a case—let's take a case where the union was making an excellent case on the merits in the hearing room, but outside you heard what you refer to as a tipoff that they really want to lose this—are you saying that you would take that into consideration and rule against them?

Mr. Simkin: If it is a contributing factor. If it is an excellent case on the merits, no. I would conclude that there is something wrong with the tipoff. But they don't happen in the excellent cases. In most cases the tipoff is unnecessary, but once in a while it helps.

Panel Member Bloch: There is where we do differ absolutely.

Mr. Frank Kramer: With Alcoa, I feel very strongly about the idea of an arbitrator being a mediator. I would not knowingly ever hire one if I thought that was what he was going to do. I recognize that it can vary, perhaps based upon industries. But if you have a long-standing and a reasonably well-working grievance procedure, it seems to me that what we are talking about in trying to arrive at some compromise settlement should take place during that process. I see a marked change between that point and arbitration. Once I have been unable to resolve it through negotiation, whether it be discipline or contract, then I am going to arbitration really to get a final decision, and I don't want any mediation at that point. I think that that is a strong disservice and I really don't think that an arbitrator can try to mediate and then arbitrate fairly. If the arbitration process is viewed by either the local management people or the local union people as another half-step in the grievance procedure, we just encourage more and more people to go to arbitration because, somehow, up there "They are going to mediate and I will get half a loaf." I am strongly opposed to any idea that they should mediate.

Chairman Valtin: I think over and over again that what we have run into depends so much on what industry it is and who the parties are. With General Motors, for example, it is absolutely proscribed, and it is understood. There are other situations where the contrary is true, and clearly, arbitrators have to be guided by the environment in which they function.

Mr. Elliott Beitner: The focus of this conference is the decisional thinking of arbitrators and judges as triers of fact. I think, with that focus in mind, we are really functioning as juries. We are the triers of fact, and I think it is as unacceptable for an arbitrator, generally, to attempt to find out what is "really happening," or whether you can settle a case, or what each party wants, as it is for a juror to go out on a cigarette break and discuss with the attorneys what they really want and what the jury should really do. I have only once acted as a mediator, and I did that for purely selfish reasons. I walked into a hearing in a remote Michigan area, knowing that I had to be home that evening to take my wife out to dinner, and I saw 75 people waiting to testify. And after the opening statements, it was suggested to me that the union might be technically correct, and if they were correct, it would cost the company a fortune and the union wasn't interested in exacting that fortune. I functioned as a mediator, settled the thing, was completely precluded from hearing the case on the merits if the settlement fell through, and even though I got home for dinner, I vowed never to do it again. I think it is clearly improper.

Panel Member Bloch: But your impropriety is directly proportional to your social life!

Panel Member Abato: I have this terrible feeling, and as I look at Dave Feller, who is largely responsible for the *Trilogy*, I am really having a problem because what I am hearing is that we are now having a court system. The arbitrator is now functioning as a judge when he was never presumed to be a judge. He was presumed to be a "proctor." What I am hearing here today is that everybody has fallen into the institutional trap (not everyone—I have heard some who seem to express what the *Trilogy* is all about) and maybe the whole arbitration concept should go down the drain and we should go back to judges who are probably much more skilled at being triers of fact and we should forget about the concept of the *Trilogy*. I just don't know what I am hearing, but I am not hearing the *Trilogy*.

Mr. David Feller: I don't think the *Trilogy* has anything to do

with it, but I do object to the notion. I have never tried to mediate, except maybe once at the invitation of the parties. But I have seen a past president of this Academy attempt to mediate and then decide the case when it failed. I will tell you the facts of the case because it underlies what is missing from some of this discussion. You have a responsibility to a continuing relationship between the parties; you are concerned about the effect this will have on the continuing relationship of the parties. And that's different than a court; that's a fundamental difference. And sometimes, facts which are not properly part of the case are very important, in terms of the impact of what you do, on the continuing relationship of the parties. And those facts, which maybe you shouldn't know about, come out in this mediation process, and you say that that contaminates you and you can't decide the case because you've got to decide only the particular case.

There's a Steelworker wildcat in one small section of a plant. The company does the usual thing—calls up the union, the district director, and says this is a violation of the contract, get the people back to work. It is a very hot political situation. And he says, "Look, today is Wednesday. Why don't you wait and I will call a meeting on Monday and I will get them back." The company says, "No. They have got to get back right away. You call the meeting now." He says, "All right, I'll call the meeting now." It is a hot and hostile group. They throw tomatoes at him. He says they've got to get back to work. They want to take a vote. He says no, you are not taking a vote on it; you are going back. They go back. And then there is a notice: they are suspended for three days, so they can't go back. Then the whole plant went down because what happened is that the company had undermined the district director. They had put him in a position where, at the meeting, they had said we will go back next Monday. He said, no, you won't, you are going back tomorrow. And they show up and they can't go to work. Then the leaders get fired.

Well, some of this began to come out during the hearing. Now, technically they were fired for going on strike, in plain violation of the contract. There wasn't any question about it. Now the question is, do you sustain the discharge? Well, under those circumstances, that arbitrator decided that he ought to try to get the company to settle this and put those people back because it would greatly damage the relationship between the

company and the union at the plant and it would have a long-lasting impact if he did not put them back to work. He tried to get them to do it. They wouldn't. He said, "Okay, I am going to decide the case." He wrote an opinion that you can't make any sense out of at all; none of this stuff about the district director, of course, is in the opinion. Technically, the opinion is just crazy. How does he reinstate these people? In fact, he did the right thing in terms of the relationship of the parties. I think both parties recognized that.

Now, is that improper or proper? In the technical case—the record he had before him—there was no way he could not deny those grievances; but, in fact, denying those grievances would have done great damage to the relationship between the parties.

Panel Member Bloch: I think that's an easier question than asking whether you give it to the union or take it away from the union in a case they can't live with than it is with one party saying, this is one we have got to have. When you are talking about both parties, surely you can draft an opinion, without regard to what the rest of the world reads it as doing or saying, that they can live with. I don't have much of a problem with that.

Mr. Feller: I get the impression that the company made it clear that they couldn't live with it. I think the company may have wanted to sustain the discharge. They refused to agree to put the people back. The real problem is that what he was looking at was what this would do to the relationship in that plant in the future and deciding the case on that basis.

Panel Member Bloch: You surely would be the first to grant that that is the most inherently dangerous thing an arbitrator can do—to walk into a situation and say, without regard to what this thing is really made of, "I have a feeling of what it good for the parties in the future." That is just pure disaster.

Mr. Feller: It is dangerous, but not necessarily disastrous. These are things you do, and I think you should do it rarely and only when you have a really good sense from a long-term relationship with the parties. You are right, I quite agree, that it is a temptation you should resist except in the most compelling circumstances, but it is one which you should not resist when the circumstances are really compelling and you really know. Now, when an ad hoc arbitrator comes in and doesn't know the parties and what not, I think it is impossible for him to do it. He can't know enough about the relationship.

Panel Member Vandervoort: This is one that really strikes

home. We don't know enough of the background, of course, from what you have told us, but as you described the company's actions in that case, it sounded to me like it was not a very smart move on the part of the company.

Mr. Feller: It was dumb.

Panel Member Vandervoort: But it is very possible that they had been plagued with wildcat strikes and had decided, as a matter of policy, that they would take whatever anguish and whatever pain was involved in order to put a halt to that, and I don't really think that an arbitrator has the right to arrogate to himself that kind of decision.

Mr. Feller: You understand that the problem in the case is not that you want to come down hard on wildcat strikes. The problem is that they insisted with the union that the men come back the next day. Then the district director took the heat and went out and got them to come back, and when they came back the next day, then the company wouldn't let them work. The problem is what it does to the director and the union and the relationship the next time there is a wildcat.

Panel Member Vandervoort: I think you ought to let them worry about that.

Panel Member Bloch: Just to keep it in perspective, it is not necessary to find mediation an evil in our discussions here. The fact is that one of the virtues of arbitration, and perhaps a prime virtue over the court system, is its flexibility—that the parties can select the arbitrator they want, and that the arbitrator who will mediate at the drop of a hat with one group of parties will refrain from it like the plague with the others. That's the way it should be.

Mr. Herb Grossman: I don't have an objection to arbitrators mediating or looking out for the interests of the parties to protect them from each other, if that's what the labor agreement involved says. I have not seen many that require or ask an arbitrator to mediate, or that ask an arbitrator to look out for the interests of the parties because they can't handle them themselves. I think that the relationship of the parties is best handled by them. They are the ones that are responsible for developing and maintaining the relationship.

Mr. Simkin: I think we make a little bit of a mistake sometimes by calling this mediation in arbitration. It is in a sense, but at least what I do is not what I normally call mediation. It is a different kind of function. Broadly speaking, it is finding out in

every way that is legitimate, and some people might call it illegitimate, all the facts of the case and giving due recognition to the effect of the decision on the relationship of the parties. But in many cases it is not normal mediation. As I said, I don't say, "Come now, let us mediate." This is the worst possible approach. But to say that you have to sit up there like a piece of stone and simply listen to a bunch of language and then withdraw into your high tower and write a decision is, I think, the worst possible way to arbitrate.

Mr. Feller: If you have a functioning grievance procedure, then the mediation should take place there, and if you have that kind of procedure, the greatest mistake in the world would be to get into mediation in the arbitration process, because then you undercut the functioning grievance procedures. But in lots of cases and lots of situations where there is no functioning grievance procedure, the parties don't know what the case is about until they get to arbitration, and those you have to deal with differently.

Panel Member Abato: What you are doing is making the parties face what they wouldn't face or couldn't face at five of twelve, and in that context you will come out with what the parties really want, in the final analysis anyway.

Mr. Feller: That's what I am trying to do.

Panel Member Abato: And, in fact, they will indicate to you the proper answer to the problem which they should have come up with at five to twelve but couldn't. So in a sense you are right: it may be more fact-development than it is mediation. It is absolutely necessary that an arbitrator do that, but you would be amazed at how few arbitrators are willing to do it for fear that they will turn the parties off. They are wrong, but there is that fear, because of lack of tenure, that they will turn the parties off. It is rare for an arbitrator to even do what you are talking about.

Mr. Feller: One of the reasons is, of course, that I don't depend on arbitration for a livelihood; therefore I can do things that the parties may not like, and I can understand why there are other people who may not want to do it.