the 1990s, we were still adjusting to this technology shock and other attempts to improve workplace efficiency. The adjustment got easier as employees became more and more accustomed to having decisionmaking authority. Productivity is rising. Numerous studies have pointed that out, and economy-wide productivity is flourishing. To ensure that such gains continue and even increase, labor and management must work together. They must jointly embrace innovative human resource practices and information technology, and continue to recognize the strong common interest they have in doing so.

Thank you.

III. INTRODUCTION TO JONATHAN HIATT

ROBERT GORMAN

I am now pleased to introduce Jonathan Hiatt, who is General Counsel to the AFL-CIO under President John Sweeney. Mr. Hiatt will respond to some of the issues raised by Professor Shaw and will share his perspective on additional matters as well.

IV. THE IMPACT OF ARBITRATORS ON WORKPLACE EFFICIENCY

JONATHAN P. HIATT*

Thank you, Professor Gorman. When I was invited to be the respondent to a professor from Carnegie Mellon, I assumed the conference planners were looking for controversy. So it may disappoint some of you that, try as I might, I find it difficult to disagree with most of Professor Shaw's remarks. Therefore, let me just comment briefly on a few of her conclusions, and then turn to two other related aspects of the "relentless search for efficiency in the workplace," in which, I would suggest, this particular audience of arbitrators is implicated.

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*General Counsel, American Federation of Labor and Congress of Industrial Organizations, Washington, D.C. I express great appreciation for research assistance by Andrea Ritchie, law student at Howard University School of Law, and to the law firm of Van Bourg, Weinberg, Roger & Rosenfeld for information pertaining to the Kaiser Hospitals arbitration system.

In recent years, the AFL-CIO has become very active in helping to establish, monitor, and critique worker involvement programs. The Federation's Center for Workplace Democracy assists an increasing number of affiliated unions that, themselves, have become more engaged in and supportive of such programs. To date, our conclusions as to what makes for a successful high-performance workplace are certainly not inconsistent with Professor Shaw's.

It is my understanding that after almost two decades of increased experimentation, practitioners and academics still basically disagree on standard definitions of high performance and methodologies to measure them. Because the type and degree of experimentation in the workplace vary tremendously according to firm size and industry, it can be very difficult to measure workplace transformation at an aggregate level. Indeed, it is only recently that empirical researchers have begun to systematically compare workplace practices across industries and sectors, and also as between union and non-union work forces.

Nevertheless, there are patterns that are beginning to emerge in the literature and in the individual stories of change in the workplace. First, and most important, is the clear evidence that it is not *whether* workplace change is attempted, but rather *how* it is attempted.[1] Specifically, if employees are not substantively involved in the change process, there is a much stronger likelihood that initiatives will be shorter lived and will have less of an impact on bottom-line performance measures. Top-down management initiatives that are perceived by employees as just another fad do not result in changes in the workplace that help increase the productivity and financial performance of the firm.[2]

The importance of "employee voice" underpins all other aspects of workplace transformation.[3] Voice implies the power to change things at the workplace. Work teams, Total Quality Management, gain-sharing or profit-sharing plans, training, information-sharing measures, job security—all of these practices are undermined if employees cannot see their own contributions actually resulting in

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[1]Black & Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity,* NBER Working Paper Series, Working Paper 6120 (NBER 1997).

[2]*Id.*

[3]Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union–Nonunion Comparison,* 47 Indus. & Lab. Rel. Rev. 549 (1994).

change. And as many have noted, American management has a very hard time giving employees true responsibility.[4]

Giving employees more responsibility translates to a greater stake in the firm's success above and beyond any form of compensation. The empirical evidence is fairly clear on this score: substantive participation (employee voice) results in greater gains than other workplace initiatives, with the combination of participation and other practices potentially resulting in the greatest gains.[5]

Moreover, when unions are involved in the transformation of work and there is genuine, independent employee voice, the gains to bottom-line performance of the firm are likely to be greater than those of nonunion firms. A union helps to give employees the power to change the workplace in meaningful and lasting ways, such as through binding, contractual assurances. It helps mitigate against managerial faddism as well: Black and Lynch's 1997 study—the first nationally representative study of American businesses that looked at high-performance work—confirmed that unionized firms are better able to transform new workplace initiatives into productivity gains compared with their nonunionized counterparts.[6] As a number of studies have shown, the combination of a union and participation/partnering initiatives can result in superior productivity gains,[7] as well as gains in quality.[8]

In unionized firms there are usually two additional preconditions that are required to enhance the prospects for a successful high-performance partnership. The first is a combining of "online" decisionmaking with some measure of "off-line" influence and/or decisionmaking. In other words, employees must be involved not only in the determination of their own wages, hours, and working conditions, but also in the business side of their enterprise—an area traditionally reserved to management.

We have seen successful examples of this, for instance with the International Association of Machinists (IAM) at United Airlines winning the right to evaluate supervisors; with the

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[4]Pfeffer, *Seven Practices of Successful Organizations,* 40 Cal. Mgmt. Rev. 96 (1998).

[5]Levine & Tyson, *Participation, Productivity and the Firm's Environment,* in Paying for Productivity, ed. Blinder (Brookings Institute 1990).

[6]Black & Lynch, *Beyond the Incidence of Training: Evidence from a National Employer's Survey,* NBER Working Paper Series, Working Paper No. 5231 (NBER 1995).

[7]Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union–Nonunion Comparison,* 47 Indus. & Lab. Rel. Rev. 549 (1994); McNabb & Whitfield, *Unions, Flexibility, Team Working and Financial Performance,* 18 Org. Studies 821 (1997).

[8]Cooke, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management,* 46 Indus. & Lab. Rel. Rev. 119 (1992).

Communications Workers of America (CWA) members at AT&T participating in the hiring of supervisors and department heads; with Kaiser Permanente and its several health care unions agreeing to partner on marketing strategy; with the Union of Needletrades, Industrial and Textile Employees (UNITE) and the New York garment industry working together to develop an export market in Europe for New York-union-produced goods; with Saturn and the United Automobile, Aerospace & Agricultural Implement Workers of America International Union (UAW) negotiating over the amount of corporate resources devoted to research and development; and with the United Steel Workers of America (USWA) fighting for and winning the right to partner with industry on investment decisions to modernize equipment in the steel mills in order to compete with new, more modern nonunion mini-mills both in the United States and abroad.

The second precondition lies in a reduction in the real or perceived numbers and gravity of contractual violations. Members will not contribute actively to firm betterment if they feel that previous agreements are not being honored. Thus, almost every partnership starts with, or at least is accompanied by, the parties' collaboration on reducing grievances and costly arbitrations.

This takes me to the first area where your help as arbitrators, in promoting the high-road quest for efficiency in the workplace, is sorely needed. I refer here to the role that the grievance-arbitration process was originally intended to serve: an informal, quick, binding, inexpensive method to resolve workplace disputes. It was designed to be respected, understood, and controlled by the workers and their immediate supervisors. As noted by the opinion in the historic case of *Webster v. Van Allen,*[9] arbitration is more satisfactory "where a speedy decision by men [and women] with a practical knowledge of the subject is desired."[10] Unfortunately, we all—employers, unions, and arbitrators—have strayed far from this historical intent: formalistic hearings rarely lasting fewer than two full days, standard postponements and other long delays, costs that are prohibitive for many local unions and small employers, and proceedings that few workers would associate with any "law of the shop" notion—this is what labor arbitration too regularly has become.

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[9]216 N.Y.S. 552, 554 (1926).
[10]*Id.*

Typically, the grievance-arbitration procedure is dominated by attorneys and court reporters; long, legalistic posthearing briefs; and long, legalistic arbitrator decisions. Arbitrations today are conducted like federal trials without the jury. Many companies bring two or more attorneys to present their cases. And unions in many cases are forced to send attorneys just to keep pace with their duty to fairly represent.

It can sometimes take years to bring discharge cases to arbitration. The delay results in no justice for anyone, regardless of outcome. Even if an employee is reinstated after one or two years or more, the employee's life has been seriously disrupted. The disruption on the shop floor is almost guaranteed to affect morale and productivity. What is also notably missing in the process is the participation of the workers themselves in resolving their own disputes.

With the War Labor Board in the 1940s and 1950s and thereafter, particularly in the auto industry, worker committees resolved workplace disputes with an umpire. Disputes arose and were addressed immediately. There was a sense of worker participation in the process, and the results were sure and swift. Either the worker was back to work or he or she was down the road looking for another job, but the process was timely and it met most everyone's need for a sense of justice and finality. The more we have formalized this process, the further from the concept of worker justice we have wandered. Far too frequently workers now view the grievance and arbitration process as ineffective and something that does not really involve them. Even on the day of the "arbitration" hearing, workers play a minimal role. As witnesses, they are limited to answering narrow questions crafted by attorneys about matters that happened long before. Although at times they may get some satisfaction in having participated in a television-like trial, more often they feel as if they are merely bit players in someone else's show.

Too often, the value of arbitration as an efficient and economical tool for resolving workplace disputes is in serious question. Certainly, it is too often in conflict with the concept of employee involvement in the workplace as described by Professor Shaw.

Fortunately, as I alluded to earlier, there are some examples where the parties, with valuable support from arbitrators, have made a concerted effort to reverse this trend. The Paper, Allied, Chemical and Energy Workers International Union (PACE) and some 65 paper companies around the country have entered into a

high-performance partnership program, and the elimination or significant reduction of outstanding grievances has been a hallmark accomplishment in the early stages at many locations. Similarly, the United Farm Workers (UFW) and Bear Creek Rose Company, the world's largest rose producer, have removed 200 grievances from the lineup awaiting arbitration since the parties entered into a partnership effort recently. They presently have only one or two grievances a year that require arbitration. At the same time, the company has realized a profit for the first time in the past ten years.

Here in California, a new arbitration system has been jointly developed by Kaiser Hospitals of California and various AFL-CIO affiliates over the past couple of years. Prior to adopting this new process, Kaiser arbitrations were averaging two to four days of hearing per case. Final resolution of those cases did not usually take place until about two years after the disputes had arisen. There was a backlog of several hundred arbitration cases in Northern California alone. Under the new system, a panel with one or two appointees from each side and a neutral arbitrator hears four to six cases per day. Documents are exchanged beforehand. Each case begins with a detailed opening statement. The panel then caucuses and discusses what testimony is actually needed. Testimony is given in narrative form. Oral argument is required at the end of the truncated hearing. The panel then meets again, attempts to reach consensus, and may encourage a settlement. If there is none, the arbitrator issues brief written awards reflecting the panel's decisions within 48 hours of the hearing.

To make this simple system work, the arbitrators have been playing a very proactive role. They meet with the parties before the process is implemented to encourage individuals who are uneasy with it and to help the parties hammer out their own details as to procedures. By allowing broad opening statements, they encourage all involved to attempt to gather facts together. Then they discuss what facts are really in dispute and advise the parties what should be addressed with testimony in narrative form. They encourage simple presentations as well, dispelling the notion that the adversary process is the only way to adduce evidence. They spend as much time as necessary meeting with the panel members, to learn from them the "law of the shop," and then teach them how to apply these "laws" consistently and fairly. They craft and write decisions that guide the parties not only for the case at hand, but also for the future, so that panel members from each party come

to learn how arbitrators think about and resolve disputes. Over time, the arbitrators and the attorneys seem less necessary, because the parties can predict how new cases would be resolved in arbitration. Armed with that expertise, the parties are able to settle many cases on their own. Finally, the arbitrators have encouraged the use of new technology—e-mail, voicemail, and faxes—so that the parties are in much closer and more constant communication about every grievance. This seems to improve chances of early and satisfactory resolution.

As a result of these changes, the workers, the supervisors, and the union are forced to reevaluate the merits of their cases earlier in the grievance process. A culture of resolution rather than litigation has developed on both sides, fostered by the willingness of the arbitrators to participate not only in the panel hearing days, but also in occasional meetings between the parties to review and improve the process.

The backlog has been reduced from several hundred cases to just one or two dozen at any one time—from a work force of approximately 15,000. Pending grievances are usually resolved before or on the day of hearing. Meanwhile, the parties have committed to a much broader high-performance partnership. Its future success remains to be seen; however, the partnership could not even have gotten off the ground with the grievance situation as it existed before.

An increasing number of the AFL-CIO's affiliates are placing additional emphasis on organizing. Many of their more experienced union representatives have been reassigned to organizing work. As a result, newer and less experienced union staff and rank-and-file stewards are called upon to file, process, and advocate grievances. This requires a major educational task for the labor movement. It also requires that arbitrators actively inform the parties that there is, in fact, a better way than multiday arbitration proceedings costing tens of thousands of dollars. Such proceedings lead to decisions, but not necessarily to solutions.

I know that many of you are active participants in permanent panels, and that your experience and insight serve to achieve exactly the goals just described. As earlier speakers here have suggested, the vision enunciated in *Webster v. Van Allen*[11] can and should remain the central vision animating the work of the Academy.

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[11] *Id.*

Finally, a second area where arbitrators will have a great impact on the "relentless search for efficiency in the workplace" involves the contractual protections that must be afforded to the so-called contingent work force, including subcontractors' employees, temporary agency employees, independent contractors, and leased employees.

When employers' search for efficiency is based not on the high-road partnership that Professor Shaw describes but instead on a low-road, short-term, top-down, bottom-line approach, there is a great temptation to unilaterally withhold or withdraw contractual protections that are owed, in the name of seeking greater flexibility and efficiency in managing the workforce. This inclination is heightened with the pressures of the global economy.

With all due respect, arbitrators are at times too prone to readily accept such employers' reliance on extracontractual contingent work relationships, unless they are explicitly prohibited under the terms of the collective bargaining agreement, or unless the employers have acted in manifest bad faith.

Yet, in balancing employer interest in efficient operation with union interest in job security and bargaining unit stability, arbitrators have affirmed in a number of critical cases the application of contractual protections to contingent workers.[12] One arbitrator summarized the prevailing rationale supporting such action as follows:

> [A]rbitrators are intolerant of action by management which invalidates any contractual *quid pro quo,* which results in subversion of the Agreement, which tends to undermine the strength of the bargaining unit, and which tends to deprive members of work rightfully theirs under the terms of the contract. Any actions thus resulting are suspect and require justification by management conforming to the standards of good faith and reasonableness.[13]

Even where a contract either affirmatively recognizes the employer's right to subcontract or is silent on the issue, where no finding of bad faith has been made, and where no adverse effects on current members of the bargaining unit were shown, arbitrators have nevertheless found at times that the employer's use of contingent workers represented an effort to circumvent the collective agreement and potentially undermine the bargaining unit.

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[12]*Boise Cascade Corp.,* 105 LA 1094 (Fogelberg 1995) (*citing* Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985)).

[13]*MSB Mfg.,* 92 LA 841, 845 (Bankston 1989).

Applying the joint-employer doctrine, arbitrators have emphatically held that employers cannot circumvent contractual provisions with respect to wages or seniority by utilizing a contingent work force, so long as contingent workers are performing bargaining unit work. Remedies granted by arbitrators employing this approach have included compensation for the difference between the contractual wage and wages paid by temporary agencies.[14]

Arbitrators have held the line on subcontracting issues in the face of "the strongest management rights clauses," in sectors arguably most affected by cut-throat competition.[15] Despite increasing economic pressures, arbitrators have held that the propriety of the employer's exercise of discretion in search of efficiency and productivity must still be balanced against "the integrity of the collective bargaining relationship."[16] They have reasoned that business justifications must still "be assessed in view of all the attendant circumstances," including the intent of the parties.[17] One arbitrator, specifically referring to clauses reserving to management the right to subcontract, stated:

> It would be, in my view, self-evident that the collective bargaining agent of the employees could not have intended by agreeing to the Employer's right to subcontract to destroy the collective bargaining relationship or substantially impair this relationship. The Union's agreeing to contract language or a reservation of rights to the Employer to subcontract does not necessarily mean that it will commit suicide.[18]

Employers sometimes cite uncertainty regarding personnel needs as justification for the use of workers hired through temporary agencies. Arbitrators have stated that the issue is not whether an employer has the right to use agency workers, but rather whether "the [e]mployer must treat agency workers who perform unit work . . . as members of the bargaining unit."[19] They have concluded that "[the employer] must."[20]

To justify decisions to subcontract, employers sometimes rely on past practice, regularity of subcontracting, and history of

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[14] *W.R. Grace & Co.*, 91 LA 170 (Taylor 1988).
[15] *New England Health Care Employees Union, Dist. 1199 v. Saint Francis Hosp.,* Case #12-300-72-98, slip op. (Golick Mar. 4, 1998).
[16] *Id.* at 11.
[17] *Id.* at 16–17.
[18] *Id.* at 17.
[19] *Local 1199 Drug, Hosp. & Health Care Employees' Union v. Kingsbrook Jewish Medical Ctr.*, Case No. 1330-0113-89, slip op. at 16 (Wildebush Feb. 6, 1992).
[20] *Id.*

negotiations on the right to subcontract. But arbitrators have not automatically embraced those arguments, particularly in view of changing economic circumstances and increasing use of contingent workers.[21] Another interesting situation arises when an employer's use of temporary agency workers has been "casual or irregular" in the past, but has become regular; or has been regular, but increased in "intensity." In such cases, arbitrators have rejected the argument that a union's failure to challenge past use of contingent workers hired through agencies reflects an understanding that they have no contractual protection. They have also rejected the employer argument that contractual coverage cannot exist without explicit agreement language recognizing agency workers as "employees." Instead, arbitrators have recognized that, although the use of a contingent work force may not have been problematic from the union's perspective when it did not pose a threat to job security or bargaining unit integrity, employers' increasing reliance on temporary workers to provide flexibility and efficiency must be evaluated against the basic purposes of a collective bargaining agreement.

Even in the face of explicit recognition clauses, where contract workers are found to be employees of subcontractors or of temporary agencies or leasing companies, arbitrators have nonetheless applied the joint-employer doctrine. Where the "right of control" test has been met, arbitrators have limited employers' extracontractual use of such employees.[22] Similarly, even when arbitrators have been inclined to leave the ongoing use of contingent workers to the bargaining process (when contracts are silent on subcontracting), they have nonetheless imposed limitations on an employer's use of temporary employees where the use of a contingent work force was found to actually threaten the existence of the bargaining unit.[23]

Where employers are found to have violated the contract by failing to extend contractual protections to contingent workers,[24] arbitrators have found that "an award of make-whole relief is warranted" as to both bargaining unit members and contingent workers. Even when no "bad faith" has been found by arbitrators, employer arguments against the propriety of such awards have

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[21]Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997), at 750–53.
[22]*GTE Haw. Tel. Co.*, 94 LA 711 (Gilson 1989).
[23]*Friedland*, 94 LA 816, at 819 (Daniel 1990).
[24]*Kingsbrook, supra* note 19, at 18; *see also W.R. Grace & Co.*, 91 LA 170 (Taylor 1988).

been rejected. Also rejected have been arguments that relief cannot be granted for past employer conduct, or that unions lack authority to demand benefits on behalf of non–bargaining unit members. Such arguments fail on the grounds that the proper remedy "restor[es] the parties to the position they would be in," but for violation of the agreement through failure to extend contract protections to contingent workers performing bargaining unit work.[25]

I do not mean to condemn all contingent work force arrangements. Especially when novel work force arrangements are effected as a product of worker and union involvement, there may be great benefit to both the enterprise and the employees. But when done with an intent to undermine contractual worker protections or weaken bargaining units themselves, contingent work force arrangements frequently yield short-term efficiencies at best. Indeed, even when such outcomes are not intentional, their effect on long-term efficiency and productivity can be equally damaging. And you, the arbitration community, are often our protectors of last resort.

Thank you.

V. INDUSTRY BREAKOUT SESSIONS*

SESSION I—STEEL
ARBITRATION AND RESTRUCTURING IN THE STEEL WORKPLACE

SHYAM DAS**

Changes in the steel workplace designed to enhance efficiency have come before arbitrators in several contexts. Arbitrators have ruled on grievances protesting that changes made unilaterally by management violate existing contractual obligations covering subjects such as local working conditions, seniority, and contracting out. In deciding other grievances, arbitrators have fleshed out the

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[25] *See, e.g., Kingsbrook, supra* note 19, at 18.

Editor's Note: Seven industry-specific breakout sessions followed Professor Shaw's and Mr. Hiatt's respective presentations: (1) steel, (2) transportation, (3) communications, (4) public utilities, (5) education, (6) state and municipal government, and (7) health care. Each session was moderated by a member of the Academy, accompanied by management and union representatives. The format and formality level of the sessions varied. As a result, some sessions did not lend themselves to publication. Presented here, in various formats, are those that did.

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