CHAPTER 5

ASK THE ADVOCATES

Moderators: Gil Vernon, NAA Member, Eau Claire, Wisconsin
Randi Hammar Abramsky, NAA Member from Toronto, Ontario

Union: Dan Johnson, General Secretary and Treasurer of the United Transportation Union, Cleveland, Ohio
Marilyn Teitelbaum, Schuchat, Cook & Werner, St. Louis, Missouri

Management: Arthur A. Hartinger, Meyers Nave, Oakland, California
Cheryl King, GES Exposition Services, Las Vegas, Nevada

The Proceedings and Disclosure

Vernon: I think sometimes we arbitrators take too much credit. Behind every good arbitration decision is a good formulation of the critical issues, evidence that quickly demonstrates its relevancy, and advocates who weave a blanket of arguments that renders everything meaningful.

Abramsky: We'll be starting with a number of questions regarding pre-hearing issues, beginning with the most important of topics, arbitrator selection. We've come up with a number of factors and we're going to ask the panelists to rate the importance of the following on a scale of 1 to 10, with 10 being high. So, on a scale of 1 to 10, please state the importance of your personal knowledge of and experience with the arbitrator.

King: For me the most important thing is the quality of the arbitrator, followed by the arbitrator's reputation, personal knowledge, and experience. The arbitrator's reputation for the timeliness of awards is also very important, near the top of the list. Of lesser importance would be availability.

Hartinger: The top two to me are personal knowledge and experience and the arbitrator's reputation. We, along with most advocates, keep a pretty good record of awards. We go to our book

when we make an arbitrator decision. Whether the arbitrator's background is with union or employer is not particularly important and the quality of award I rank 5 out of a scale of 1 to 10. Because winning is the most important thing, I don't care about so much about the quality of the award. Timeliness is also not particularly important as long as I win—nor are fees or gender. Because good arbitrators are not particularly available, you just have to live with delays. Hearing style is very important. I like an arbitrator who will take control and run a good hearing.

Teitelbaum: I focus on my knowledge of the arbitrator, his or her experience, reputation, and hearing style. I put a lot more emphasis on the quality of the award than Art does because we have to live with that award and apply it to other situations. I do not like awards that require a company to make judgments in specific situations based upon past practice when the past practice has not been defined. It's not very helpful if the arbitrator simply repeats the positions of the company and of the union, and after a little bit of analysis says that you have to continue following past practice without clearly defining it. Although I think the timeliness of the award, fees, and arbitrator availability are very important, I'm going to put those other things ahead of it. Gender makes no difference. I want somebody to take control of the hearing—someone who will stop advocates from running away with the hearing and making it much longer than it should be.

Johnson: One of the most important things to me is that the arbitrator have an intimate knowledge of the industry. The overwhelming majority of my arbitration has been done in the railroad industry under the Railway Labor Act. I truly believe that there are a number of very unique aspects about the railroad business and the Railway Labor Act, so I think that's extremely important. I also believe personal knowledge and experience, along with reputation, is very important. I could care less about background. Quality of awards is very important to me for the same reason that Marilyn articulated, but timeliness is of lesser importance. The arbitrator's availability is not very important to me, gender is irrelevant, as are arbitrator rating services.

Vernon: It's been said that arbitrators are like dentists and inflict pain on their clients and hope they'll keep coming back for more. Why do you keep going back to arbitrators in spite of the fact that they caused you pain?

King: If you truly want one word it would be quality.

Johnson: You stole my word—quality, I agree.

Hartinger: Quality.

Vernon: Do you expect an arbitrator to disclose the number of prior or current cases he or she has pending with a party or counsel?

Hartinger: No.

Vernon: Dan, do you expect the arbitrator to disclose if he or she has attended a function and had dinner with an advocate?

Johnson: No.

Vernon: Why?

Johnson: Because I don't think it's relevant. Once I pick an arbitrator, I have confidence in my choice.

Vernon: Cheryl, would you expect the arbitrator to disclose if he or she had been invited to speak at a union's educational conference?

King: No.

Abramsky: Do you expect an arbitrator to disclose that his or her children are in the same school or on the same soccer team or in a rock and roll band in which you both have an interest?

Teitelbaum: No. Can I make a little comment about Cheryl's response on the last one? If in fact they're invited to Hawaii with all expenses paid, I expect that to be revealed. If they go to Springfield, Missouri, and get mileage, I don't have a problem with it.

Hearing Issues

Vernon: Let's talk about arbitrator conduct at the hearing. Is it OK if the arbitrator takes over questioning witnesses?

Teitelbaum: It gives me a chance to make sure the arbitrator is awake and is trying to see what's going. Also, the questions give me a chance to understand what the arbitrator does and does not understand. I find it very important.

Johnson: I would echo those same sentiments. I think it's extremely important because as an advocate we don't know for certain which way the arbitrator is going but when we see the type of questions posed and the type of material covered I get an idea of where I need to go, particularly in the area of closing arguments.

Abramsky: What should the arbitrator do with the unprepared advocates? Your hearing was scheduled for 10, it's now 10:30 and the lawyer is asking for still another 30 minutes. What should the arbitrator do?

King: In the world of arbitration 30 minutes is no time at all. I think an arbitrator would be wise to permit the 30 minutes and say that's it!

Teitelbaum: I disagree. They've already had their 30 minutes because they came half an hour late. It's an hour that's going to be eaten up and sometimes that makes a difference whether you come back a second day. The union is always prepared to start. Obviously, if the arbitrator concludes that the delay was caused by something unavoidable, he or she should grant the request but basically I would say start the hearing.

King: I've never known an arbitrator who would do that. I've always found that if either party has requested a 30-minute delay, I've never known an arbitrator to say "we're going to start the hearing."

Abramsky: After that extra 30 minutes the arbitrator gave has passed, the advocate asks for an adjournment because the documents or witnesses he or she needs are not available and the other side opposes the request. Should the arbitrator (A) grant the adjournment provided that the party seeking it pays the costs, (B) grant the adjournment provided that a relatively quick alternative date may be scheduled, (C) deny the request and start the hearing, or (D) explore settlement?

Hartinger: I think all of these cases differ and it's a question of reasonableness. But the majority of the time it's going to be the first answer—grant the adjournment provided that the party seeking it pays the costs.

Teitelbaum: I would say C only if there's just no reason at all for it. But if it's going to be granted it should be A and B together and it should include all the costs and attorneys' fees.

Johnson: I would agree also that it needs to be A and B together.

Abramsky: And would you agree that costs include attorneys' fees?

Johnson: I do most of my arbitration under the Railway Labor Act where most of the costs are funded by the federal government. I do not have to concern myself about attorneys' fees.

Vernon: If an advocate is bullying a witness on cross-examination and the opposing lawyer objects, should the arbitrator (A) ask the bully to tone it down, (B) call a recess and talk privately with the bully and opposing counsel, or (C) do nothing because it's cross-examination?

Hartinger: I vote for (A). Admonish the bully at the hearing and get the bully to tone it down—control the hearing.

Teitelbaum: It depends. If the bullying is occurring because the witness is not answering the question, the arbitrator should do two things: (1) direct the witness to answer the question and then

(2) ask the bully to tone it down. I've also seen arbitrators who understand what was going on and why the bullying was taking place resolve the issue by asking a direct question to the witness to get the answer that he or she has been avoiding. But if it's strictly bullying, tell him or her to tone it down.

Vernon: If the advocate, after repeated warnings, continues to be belligerent, the arbitrator should adjourn the hearing, call a cooling-off recess, ignore it, call for security, or offer to share some of his medication. Seriously, what do you expect from an arbitrator when you are behaving badly?

Evidence

Abramsky: Moving on to evidence and we have a hypothetical. It's a layoff case and counsel wants to introduce hearsay evidence on a significant point and issue. The business agent took an informal survey conducted of 30 bargaining unit employees about the amount and type of work they've been doing since the grievance layoff. The opposing side objects to the introduction of this material, not only on the basis of hearsay but because of its potential prejudicial effect. Counsel who wants to introduce the evidence responds by saying that he will have to call all 30 employees if this evidence is not let in. Should the arbitrator (1) let it all in for what it is worth; (2) reject the hearsay evidence; (3) say something gutless like "I will listen and sort it all out later;" or (4) none of the above.

Teitelbaum: It's probably none of the above because I think none of those responses are helpful and I don't think it's an easy answer. If management has been putting managers on to testify about what people are doing even though they're not there, then a survey, if it's done well, by a business agent should go in too. I don't think that saying "let it in for what it's worth" lets the advocates know what worth you're going to give it. If you're going to treat it as of any value, you need to tell the advocates so that they can go out and get sample testimony themselves if it is a significant part of their case.

Hartinger: It really is a case-by-case determination. That's the kind of evidence that drives me crazy, where somebody has a summary of things that people said and there's no way to test it credibly. I would prefer an arbitrator to look at that evidence rigorously. If it is probative, then why are you letting it in all through hearsay? I would rather an arbitrator examine that evi-

dence rigorously than let it in and say that he or she will sort it out later—even though that happens often.

Teitelbaum: I don't disagree with you, I think it is a difficult issue from both sides, it happens on both sides.

Oral Closings

Abramsky: Some of you come from traditions that rely heavily on oral closing arguments. Do you have any self-imposed time limit after which you don't think an arbitrator will pay attention? How long do you think an arbitrator's attention span lasts?

King: Our closing arguments have definite time limits—an hour for both sides after multiple days of hearings, and we usually have a panel of arbitrators. If any of those arbitrators cannot stay focused for a one-hour closing, in all likelihood they wouldn't remain on the panel. So, I would hope that arbitrators have the attention span of one hour for closings—30 minutes each side.

Johnson: Under the Railway Labor Act, for a variety of reasons I try never, ever, no matter how long the hearing is, to go over 15 minutes in my closing. Sometimes if I have extensive procedural and effectual arguments I will go to 30 minutes

Vernon: Where did arbitration advocates learn to count? When does a 5-minute break mean 15 and when did "just a few questions" come out to be 30 or 40 questions?

Mediation

Vernon: Let's discuss mid-hearing settlements. I think this topic will inspire lots of discussion. What is more effective at inspiring a settlement mid-hearing? (A) When the arbitrator gasps at some new damaging evidence? (B) When the arbitrator with a dazed look during piercing cross-examination says, "You know that reminds me of a very interesting case that I had once in Omaha"? (C) When the arbitrator adds to the grievant's oath or the supervisor's oath with, "You better be telling the truth because, 'Lucy you have some 'splaining to do'"? (D) When the arbitrator says that "my plane's at 2:30, can we cut this short somehow"? Or (E) All of the above?

Abramsky: That was our light-hearted segue into the topic of mediation during the hearing. Our first question is: When if ever should an arbitrator offer to mediate? (A) Only when suggested by both counsel; (B) never; (C) after hearing opening statements in an appropriate case; or (D) fill in the blanks—your choice.

King: I'm going to go with D. I would like to fill in the blank because it's a very tricky situation for an arbitrator to offer to mediate a case that is already at arbitration. I think it's most important that the arbitrator be very familiar with both parties because we've decided on arbitration. Had we wanted mediation we would have hired a mediator, and as most of the arbitrators know and all of the advocates know, every good arbitrator does not make a good mediator and vice versa. It is a very, very fine line for an arbitrator to offer to mediate a case already before him or her. I think it is appropriate if you are familiar with the parties, because it brings to bear all kinds of unanswered questions. If the mediation isn't successful, do I continue with arbitration? I'm going to learn things during a mediation session that I wouldn't perhaps learn during arbitration. So I think that it's a delicate line, for an arbitrator to offer to mediate a case that is in front of an arbitration board. I'm not saying it should never be done but you had better know what you are getting into and what you're offering up because of all the potential downfalls and consequences. Of course, if it works, then everyone's happy.

Hartinger: I'm going to go with A. I assume that every time I go to an arbitration that the arbitrator would be willing to mediate and I assume that the other side knows that. If we discuss it and agree to ask the arbitrator to mediate, mediation is appropriate. So I'll go with A.

Johnson: I think that I probably hold the minority view. I'm not at all opposed to mediation for the most part. I think Cheryl made some very good points, particularly when she noted that certain compromises and/or disclosures may put the arbitrator in a position where he or she is unable to make what I consider a fair and impartial decision. However, I believe that when an arbitrator gets to the point that he or she is divided or uncertain, I would much prefer having the opportunity to be part of that solution and to mediate rather than playing Russian roulette and trying to figure out which way he or she is going to go.

Vernon: For those of you who answered A, that the arbitrator should mediate only when suggested by counsel, let me just ask you a frank question: Is it a good idea only when it's your idea?

Teitelbaum: Yes.

Vernon: What's wrong with the arbitrator asking the parties—"Now that we're here, now that you've heard opening statements and you now more fully understand each other's positions—let's take 5 minutes out and make sure we're really stuck?"

Teitelbaum: What I don't want is mediation for the same reasons that Dan and Cheryl mentioned—that we make offers of compromise in mediation. I am concerned that an arbitrator who mediates will not give me more than what I offered to settle for in mediation. On the other hand, if both counsel are suggesting a settlement, that offer will never be heard by the arbitrator.

Johnson: The way you phrase it I would not be offended if an arbitrator suggested mediation in front of both advocates in the course of the hearing.

Vernon: Are you ever afraid when that invitation is made, that you'll offend the arbitrator by saying no? Do you sometimes say yes when you really want to say no?

Johnson: I don't think that would offend an arbitrator, so no.

Teitelbaum: I agree. I don't think it would be offensive and if it was then I probably have the wrong arbitrator.

Vernon: What's the difference between good and bad mid-hearing mediation?

Hartinger: Bad mid-hearing mediation is when it's a clear waste of time, when you're spinning your wheels and could be using the time to put on the evidence and move the hearing along.

Abramsky: What percentage of your arbitration cases are mediated to resolution?

Hartinger: I would say 20 percent. I do a fair number of collective bargaining agreements in San Francisco, which has a mediation-arbitration statute.

King: I rarely move from arbitration to mediation. I think my interest arbitrations are the only ones where I've even got a suggestion. I think they know the way I feel is basically that we're here to arbitrate, which is different from trying to encourage the parties to settle.

Johnson: The same applies to me.

Abramsky: In Ontario we have a neat arbitration statute as well. There the norm is for arbitrators to offer to mediate in almost every case and arbitrators are actually selected for their mediation skills. Everybody is comfortable with this process but when I go over to a case in the United States, that same comfort zone is not there and I rarely ask a party if they want to mediate. I think they expect me to arbitrate and that's what I'll do unless I hear otherwise, even though I think the case should settle and it's unfortunate that they're not mediating. But I take my cue from the parties. I think the difference comes from Canada's arbitration statute, which

encourages to parties to accept mediation and to embrace it as a good way of doing business.

Vernon: Let's assume that the mediation doesn't work. The arbitrator's mediated at the invitation of the parties and no settlement is reached. What should the arbitrator do? (A) Offer to recuse him- or herself, (B) continue regardless of any dissatisfaction on the part of the parties, (C) say, "Oops, I didn't really mean to let it slip that you've got a dog of a case," (D) learn not to mediate, or (E) other. What should the arbitrator do and should it be a precondition to mediating that the arbitrator would recuse him- or herself at the request of either party?

King: Before that ever happens in an arbitration, the parties should agree about what would happen if mediation failed. Then both parties would be fully aware going in of what they would like the arbitrator to do if mediation failed.

Teitelbaum: I agree with Cheryl, but I think that in fact an arbitrator should never mediate and then offer to recuse him- or herself when it all falls through unless that's been discussed and agreed to in advance. You've spent this time in mediation and the arbitrator may have told you that one offer or the other was more reasonable. If so, one of the parties is going to want to recuse the arbitrator. So, absolutely, you make an agreement right up front as to what's going to happen. These problems are the reasons why I rarely mediate with the person who is going to be the arbitrator except in interest arbitration.

Johnson: Again, I do all my arbitration under the Railway Labor Act, where most of the cases are paid for by the government. However, the long and the short of it is that I would hope that an arbitrator who intends to mediate would at the beginning of the mediation offer to recuse if in fact either side believes that he or she should do so if the mediation fails to produce an agreement.

Decision Writing

Vernon: May an arbitrator properly rely on case law neither side has cited, yes or no?

King: Yes.

Vernon: May an arbitrator properly rely on collective bargaining agreement provisions not cited in the grievance, yes or no?

Hartinger: Yes. It has been done and it's pretty frustrating.

Vernon: May an arbitrator properly rely on legal arguments not made by the advocates?

Teitelbaum: Yes, but I think that is very dangerous. What I think should happen is this: the arbitrator should get both counsel on the phone and tell them that he or she thinks that certain relevant arguments were not made and why he or she thinks they should be considered. I've had several arbitration awards where the arbitrator thought he knew more than the advocates, picked up on a clause, interpreted a clause that nobody had ever referred to, and he did it wrong. It was so wrong that both parties agreed to set aside that portion of the arbitrator's award.

Johnson: I would like to amend my answer. I think there's a difference between reliance on a provision such as where the issue has been framed, e.g., was section 10 of the contract violated and if so what's the remedy? If an arbitrator says section 10 wasn't violated but section 8 was, that would, in my view, be improper and unfair. But, on the other hand, again looking at the entire contract in the context of analyzing an outcome on a particular issue I have no problem with it.

Abramsky: Would you ever try to overturn an award because the arbitrator relied on a provision that was not cited to you?

Johnson: I think that kind of challenge would generally be unsuccessful. If the issue was the way I framed it earlier, that is an arbitrator picks out another issue that wasn't before them, there might be a basis for judicial challenge.

Teitelbaum: Most of us have taught our clients well enough that they file a grievance stating "the company has violated the collective bargaining agreement including, but not limited to," a particular clause. So, the jurisdiction's there.

Abramsky: Next question, and this is a yes or no again. Are too many arbitration awards too long?

Teitelbaum: No.

Abramsky: Do many awards look too much like legal treatises written for publication rather than the parties?

King: No.

Abramsky: Are too many awards improperly proofread?

Hartinger: Yes.

Arbramsky: So in general you don't feel that arbitrators are writing too long or writing the great American legal document for the publications.

King: I do not if the awards are focused on the question at issue and the events that happen at the hearing. If they're going on and on just for the sake of writing, that would be different. However, if the material pertains to that hearing, even when we are talking

about multi-day hearings, and if they're using those writing skills in an appropriate manner and it's lengthy, I don't have an issue with that.

Vernon: I once had an advocate tell me (and he's sitting in the room) that the perfect arbitration award starts out by framing the issue in a yes or no form and then says "yes," period.

King: I think they're too long if 70 percent, 80 percent of the award is just repeating the facts that each party sets forth and their positions and the analysis itself is only a few pages.

Vernon: If I cite an award, 10 awards, 20 awards, 40 awards, in my brief, do you expect the arbitrator to actually read them all?

Teitelbaum: Only if he or she is going to rely on them.

Hartinger: If I place a citation in a brief I would expect the arbitrator to read the citation, otherwise why bother?

Vernon: Do either of you use string cites?

Hartinger: I don't like to, no.

Teitelbaum: No.

Vernon: Do you expect the arbitrator to not only read those case citations but discuss them in the award?

Hartinger: It depends. If there are a lot of different citations, then there could be some that are not worthy of discussion.

Teitelbaum: I don't want to pay the arbitrator to read these things unless they are described in the brief and the arbitrator is relying upon them. Then, he or she should read them. If the arbitrator is not going to rely on the decision, then he or she should not spend time on the citation.

Vernon: I'm going to read to the advocates a quote from an arbitration award and then I'll ask you some questions about how you feel about it. The quote is this: "First, the arbitrator would like to thank the parties for their very well-presented cases. They were ably represented by very skilled advocates who forcefully and professionally articulated their respective positions, making it very difficult for the arbitrator to disagree with either position. But after careful consideration and on balance I . . .." When you read that sort of arbitration award what do you think? (A) Goody, I get to bill my client more; (B) I'm so good I can take the rest of the day off without pay; (C) I feel much better even though I got screwed in this award; (D) oh no, the arbitrator's bill is going to be huge; (E) none of the above.

Teitelbaum: D.

Vernon: Marilyn is answering D. She's worried about her bill. Seriously, do you find pandering in awards, do you find arbitrators

are being too apologetic and if you do find that, how do you feel about it?

King: I actually don't find it that much.

Vernon: Anybody find pandering in an award?

Johnson: I don't really find it that much either. Although when I read that statement at the beginning, the first thing I obviously say is, "oh oh," because I'm not sure where we're going. If it comes out my way, it's a good award; if it doesn't, it's a piece of garbage.

Hartinger: I don't think I see too much pandering. I like to see angst when it's a bad decision. When we win nobody really reads the award carefully—the client expects you to win. If you lose, the client wants to know why and having a good solid discussion with some angst built into the award helps. I don't know if I would call it pandering, but I don't mind that.

Remedies

Abramsky: Now we're going on to the category of remedies. When an arbitrator splits the baby—e.g., orders reinstatement but not back pay—I view it as (1) cowardice, because he or she couldn't make the tough decision, or (2) doing the right thing because the alternatives would not have been acceptable.

Johnson: It obviously depends on the case. A lot of factors are involved; however, in most cases because the alternatives may not have been acceptable

Teitelbaum: I agree. I don't think the cowardice thing is really an issue, but I think there are some arbitrators that want to make everybody happy. I can guarantee you, and I have been arbitrating about two to four cases a month for every one of my 27 years, nobody's happy when the arbitrator tries to make everybody happy. We want a decision and we want it well-reasoned.

Hartinger: My first instinct is cowardice. But it's a case-by-case determination. If I am facing an order of reinstatement I can see how an arbitrator, trying to make an equitable judgment on awarding back pay, could appropriately choose no back pay. Sometimes you're faced with a situation where the discharge might be sustained but the grievant is a jerk. I can understand the tendency to split the baby there.

King: It truly does depend on the situation. Sometimes we see a decision where no back pay is awarded and you do feel that the arbitrator is being a coward. It depends on the reasoning with

respect to the back pay issue. If the decision is well-written and the arbitrator has a good explanation about why someone is reinstated without back pay, then I think that's acceptable. The appropriate remedy to a reinstatement may be no back pay, but we want to know why you did what you did.

Abramsky: Should arbitrators be bolder in fashioning appropriate remedies and how so?

King: I think arbitrators are starting to be bolder, particularly in situations where they're working with a panel. Sometimes, if they can't agree on the remedy, they decide to give parties an opportunity to help fashion a remedy and take over only if that doesn't happen. The industry issues are becoming more and more complicated and sometimes both parties know what the outcome will be but want to have an opportunity to give input into the remedy.

Abramsky: For those who answered yes that arbitrators should be bolder, how do you see that arbitrators should be bolder? What should arbitrators be doing that they're not doing in your views?

Teitelbaum: We have a lot of contract interpretation cases dealing with, for example, contracting out or layoffs, where the arbitrator's idea of making the employees whole frequently doesn't make them whole. For example, I had a contracting case that cried out for a monetary award, including attorneys' fees. I won with one arbitrator but when the company refused to apply the decision when the same situation arose again, the union had to arbitrate it again. We won again but received no monetary damages this time. I think awarding damages could help cut down on the number of repeat arbitrations and that won't cut down your business because unions have more cases to go to arbitration than they have money to take them.

Vernon: Question for the advocates in the audience. Do arbitrators often have their minds mind made up before they leave the hearing? For advocates in the audience who have filed written briefs: Do you believe that a written brief has ever snapped victory from the jaws of defeat? Do you think a good written brief has done the job?

Editor: [Very few audience members indicated that they think a brief changed an arbitrator's mind and the majority indicated that they believed the arbitrator had made the decision before leaving the hearing.]

Vernon: Name the one worst thing an arbitrator's ever done, and name the best thing you've ever seen an arbitrator do.

Teitelbaum: The worst thing is probably letting the company call the grievant in a discipline discharge case. Probably the second worst thing is letting everything in for whatever it's worth and giving no sign of how you feel about it.

Hartinger: The worst thing for me is the inability to control a hearing when you have a very aggressive advocate on the other side who is going crazy during the hearing—I can't stand that.

King: I came from an environment where we had a panel and arbitrators knew that they wouldn't be on the panel if they didn't know how to control a hearing. Our oral arguments were controlled by time limits and not attorneys' fees. However, one of the worst things, and I just think it's inexcusable, is to wait up to 13 months for a decision. No case is that complicated.

Johnson: Again, given the fact that most of the arbitration I've done is strictly appellate, the worst thing, and unfortunately this happens quite frequently, is when the evidence clearly shows that the decision maker on the property is prejudiced and was prejudiced from the beginning and the arbitrator fails to sustain the claimant's case because of a fatally defective procedural error. The best thing I saw an arbitrator do is recuse herself because of bias from the beginning against a particular grievant.

Teitelbaum: Turning to the good things, I think the best thing is for the arbitrator to take control of the hearing. This means actually making evidentiary rulings. If I never again hear an arbitrator say that he or she will "let it in for whatever it's worth," I would be so happy. That just makes absolutely no sense and makes short arbitrations into long ones. Sometimes hearings go on and on because you can't get an answer out of the witness you're cross-examining. I know a number of arbitrators who will either step in and say that calls for a "yes" or "no" answer or they will ask the question themselves because they know when they're looking the witness in the eye they're going to get an answer out of him or her. I think a more proactive arbitrator can move these hearings along and get us to the disputed issues rather than playing all these games.

Vernon: Cheryl, what is the best thing you've ever seen or heard an arbitrator do?

King: It's not a rarity. A good arbitrator is someone who writes a meaningful decision without going beyond the scope of the question at issue, particularly in a contractual matter.

Abramsky: Dan, what is the number one rule in arbitration that every advocate learns the first day on the job?

Johnson: Don't piss off the arbitrator.

From the Floor: You said you never want anything in for what it's worth. As a union advocate, I don't know if you do or not, but in so many of my discipline cases I get letters of commendation about the grievant acting as a softball coach or the grievant's performance evaluations. That material is irrelevant, everybody knows it's irrelevant, I always let it in—does that offend you?

Teitelbaum: No, but I think performance evaluations can be relevant. Furthermore, I wasn't saying you might not let it in anyway if it's innocuous, but you should tell the parties that it doesn't have any substantive value in order to discourage the other side from putting in rebuttal information. The arbitrator should rule on the relevancy, and if it's not relevant either don't let it in or tell the parties the weight you are giving it.

From the Floor: Why is it so difficult to get the parties to respond promptly when we send the list of dates on which we are available to have the hearing?

King: Sometimes you're looking at up to 10, 15, 20 people's schedules.

From the Floor: I never geta prompt response, sometimes never get a response at all, sometimes have to send two letters. Why don't the parties have enough respect for us to give us some idea of when they want to have the hearing?

Hartinger: We try to respond promptly to that kind of correspondence. It's obviously very important to get a date set and get it done. I think one reason for delay again could come from coordinating witnesses and making sure you got everybody at the hearing.

From the Floor: How do you feel about bench decisions?

Teitelbaum: I think they're appropriate in certain kinds of cases. I haven't found an arbitrator that wants to do it and management rarely agrees to it.

Hartinger: I don't have a problem with it in a longstanding bargaining relationship, but it's the exception in my cases.

Johnson: It's the exception in my cases, too. However, I think with certain minor discipline cases under the Railway Labor Act, and by that I mean cases where we're not talking about permanent dismissal but maybe short suspensions, I don't have a problem with it at all.

From the Floor: In addition to what comes in by way of evidence that is hearsay, my focus is on what do you have for us that you think we should take in terms of controlling the hearing earlier. I often hear we need to take better control, but that's kind of vague for me.

Teitelbaum: I think the evidentiary thing is a big deal, but second is the breaks. In the cases I'm doing, management takes breaks before and after every witness, before and after cross, etc., and this takes up a huge amount of time. The other thing is making the witnesses answer the questions, because cross goes on and on and on when it takes a long time to get an answer to the question. There are several arbitrators in the audience that are really excellent at focusing you on what they see as the issues and do not hesitate to tell the parties that they understand so that we can move on. I think that kind of active role is good.

Hartinger: I agree with Marilyn. Controlling break times is important. And directing the advocates to resolve disputes about exhibits and evidence is also important. If two lawyers are arguing about evidence, I like a "hands on" approach from the arbitrator. This can be done by admitting the evidence not in dispute, and quickly focusing on what is in dispute. Most evidentiary disputes are resolvable if the arbitrator steps in and gives some guidance to his or her thinking. With this guidance, I am usually able to resolve issues with my opponent. Finally, some aggressive advocates should be admonished early on. Arbitrators should foster an environment where the evidence can be presented in a streamlined and efficient manner. Advocates who interrupt this process and excessively object or inject colloquy into the record, should be shut down early.

From the Floor: The same question to every member of the panel. When you discussed mediation during the arbitration hearing what did you mean by that term? Did you mean that the arbitrator suggested a solution or did you mean that the arbitrator started exploring with the parties a possibility of a compromise or some solution in a real meaning in the term of mediation?

Teitelbaum: I definitely was not talking about imposing a solution because that, in my mind, is not the definition of mediation. That's more like a bench decision. There are probably hundreds of styles of mediation, but I was speaking to exploring the possibilities of settling the case with the arbitrator facilitating that settlement and not imposing a decision, as in a med-arb situation.

From the Floor: The reference to briefs earlier in the panel discussion had to do with their impact on the arbitrator's mind and the decision. To me, the greatest value of a brief is to improve my understanding of each party's position and arguments and maybe help me to write a better opinion. Would you agree that briefs can be very desirable even if they never change an arbitrator's mind about how the case should be decided?

King: Absolutely. Because that has to do with the quality of the award and how we can live with it later. I think you're in a better position if we lay it out carefully in a brief.

Teitelbaum: I was shocked to hear that most of the advocates in the audience state that briefs don't make a difference. I wish the arbitrator would tell us when he or she does not need a brief to make a decision. If we must write a brief, I hope that it will aid in decision making and in getting it right.

Vernon: I think Marilyn's last point brings us full circle. Behind every good arbitration decision are good advocates and that includes good briefs whether they change our mind or they don't. We as the National Academy owe a great deal of thanks to all advocates.