V. PUBLIC SECTOR

Moderator: Dan Nielsen, NAA Member, Racine, Wisconsin
Panelists: John C. Dempsey, General Counsel, American Federation of State, County, and Municipal Employees, AFL-CIO, Washington, DC
Anne McCully Murphy, Division Counsel, Fairfax County Public Schools, Fairfax, Virginia
Richard K. Zuckerman, Lamb & Barnosky, LLP, Melville, New York

Nielsen: If you intended to be in the public sector "just cause" breakout session, then you are in the right place. I'm Dan Nielsen. I'm with the Wisconsin Employment Relations Commission. I'll be moderating the panel here today. I need to start with an apology because we've sort of broken away from the theme of the day. We started with togas and went to robes, but we have very little sartorial imagination on this panel, and I apologize for that.

I have a colleague in Wisconsin, a very talented fellow by the name of Bill Houlihan, who tells me a story that he swears is true about going to a small town in northern Wisconsin to arbitrate a discharge case with a local service station and the Teamsters who had organized their two-man unit, or whatever, and negotiated a contract. He showed up for the hearing and the owner represented himself in the hearing. And, as the owner explained the reasons for the discharge, it was that the employee, who had been with him for six-and-a-half years, had been a pretty good employee but was just about to vest in the pension plan and was about to become a far more expensive employee. So, he thought he would fire him. Bill was nodding his head and said, "Well, you know, what about the contract?" The owner looked at him and he said, "Well, you know, they agreed I could fire him 'just cuz,' so that's what I did."

We're anticipating a somewhat more sophisticated analysis of the "just cause" standard this afternoon. We have a distinguished panel, and I will introduce our panelists to you. To my immediate left is Anne McCully Murphy, formerly of Morgan and Lewis. She is the Division Counsel for the Fairfax County Public Schools. Next to her is Jack Dempsey—not that Jack Dempsey—but still a heavyweight in his own right. He is the General Counsel for AFSCME. Rich Zuckerman is a management attorney with Lamb & Barnosky in New York.

We want to start off with panelist reactions to the Mittenthal/Vaughn paper, to the commentary on that paper, and any audience reactions or questions that might flow from those. We're going to focus on the public sector aspects of "just cause." We have a set of hypotheticals in the back that look at various aspects of "just cause" in the public sector and, particularly, the items of restraint that were illustrated in the paper. It is our hope that we never get to those hypotheticals because we are perfectly happy if the discussion simply flows from the questions from the audience and the comments from the panel.

Let's start with Anne Murphy. I'm sorry, just one more thing. We are recording these sessions, and we don't have an audience microphone; so as you ask questions or make comments, I may be repeating them. That's not because I'm slow or trying to fill time, but we intend to have BNA publish this session. Anne?

Murphy: Thanks, Dan. My reaction to the paper from the public sector perspective—and I would be interested in hearing from the audience and my fellow panel members as to whether they agree—is that the paper is very thoughtful and contained much truth for our kinds of practices. But, that in the public sector, some of these concepts take a different twist or even become exaggerated. For example, I think the whole concept of what "just cause" is or what a reasonable person's standard is, takes on a different twist in the public sector because of the statutory overlay. As an example, in my state, it is sometimes difficult to follow all the steps of progressive discipline because the statute requires such elaborate procedural protections before you can do things like suspend that no one bothers with suspension. If I get an arbitrator on one of my dismissal cases who wants to know why we haven't been through all the steps, then we have an interesting dilemma of how to present the case so we don't go off on a detour about the code and how we apply it in our jurisdiction. It means ultimately that our concept of when it is reasonable to fire this person might be different than what the arbitrator might gauge based on his or her experience coming out of the private sector.

Similarly, I think the statutory requirements on pay can affect the whole balance between the parties in a different way than what was described this afternoon. For example, in our jurisdiction, it's not unusual that employees are on paid status before they are terminated, rather than on unpaid status. So, if you add the provisions for pay to the fact that there are often long delays until we get to the hearing, that sets up a different balance in power. It

doesn't make it quite the same for the arbitrator who wants to split the remedy by putting them back without back pay. They could still recommend back pay, but the incentives and the balances are a little bit different. I think that affects the definition of what's "reasonable." My solution to some of these problems is to try and use a stable panel of arbitrators who know my statutory constraints and my workplace habits and so forth. Talking to my colleagues, other places in the public sector, I think some of these statutory overlays on what the definition of "just cause" is, or how you administer penalties, provide a disincentive to arbitration, which is a potential concern to all of us. "Just cause" becomes redefined to mean conduct that is really horrible. And, if the conduct is not really horrific, then put him back and we'll give him another chance. I'm not sure that's in the best interest of anybody. It sometimes leaves management unwilling to take cases that ought to go to arbitration. Depending on the power of the union, the union may not bother going to arbitration because the burdens are so substantial and the expenses are so substantial to take meritorious grievances all the way to arbitration. If the relationships aren't so good, on the other hand, then they may take everything to arbitration. But, the interplay between the statute and the customs in the public sector workplace do set up a different balance of power than what was described earlier this afternoon.

Nielsen: All right. Jack Dempsey?

Dempsey: I was struck by the never-ending dispute over arbitral discretion with respect to the discharge penalty. It struck me as I was thinking about it that it's not really a dispute about arbitral discretion, it's a dispute about the discharge penalty. We don't agonize over arbitral discretion when we're talking about suspensions and other things. But, we do agonize over it as to the discharge penalty. And, so it seems to me, this whole debate is really about the uncertainty that we all have as to the appropriate circumstances for a discharge penalty. We heard today some analogies to the criminal justice system. We heard analogies to the negligence system in terms of trying to apply standards. I don't know that I have any answer to that other than to say that, from our perspective as a union representing workers, I don't know that absolute certainty is a goal to be much desired. I mean, we don't have absolute certainty in other legal forums. Certainly, if you go to a jury, you don't know what you're going to get. And certainly, you know, in other types of things, you don't know what the outcome is going to be. So, it seems to me that the ultimate goal or the ultimate satisfac-

tion of all this is that you do have a dispute resolution procedure that ends in a final and binding determination. That's the real objective in all this. Whether it is a discharge or something else, that is what the parties argue over. From my perspective, as a union lawyer, I'm reasonably satisfied with the way the system works. So, this struggle to find some absolute standard under which a discharge is upheld or set aside may be a worthwhile exercise, but I'm quite content with the way the system is working now.

Nielsen: Rich?

Zuckerman: Thank you. This is not scripted because we did not actually know where we were going to come out with regard to the paper before we sat down. But, I will tell you that I find myself in agreement with just about everything that Anne and Jack just had to say. One thing that I would add is that, having read through the paper and having listened to the presentation, I came away concerned for a couple of reasons.

The first concern that I have is in realizing how well-researched and written this paper is. It would be easy to just dismiss it if this were something that had been just slapped together. But, realizing who wrote it and who presented it and the research that was involved led me to think of a couple of things. First, I was making a list of areas on which we would probably all agree with what Dick had to say, such as that the standards of reasonableness differ by industry, location, and the type of employee involved. I think we would all agree that the arbitrator's definition of reasonableness is murky and highly personal. I think we would all agree that in disciplinary cases, arbitrators' decisions are much less predictable than in typical contract interpretation cases. And, that the parties are not normally asking for the arbitrator's personal sense of what is reasonable, but rather a more objective sense of reasonableness. Frankly, the clients want a fair decision by an objective, informed, and unbiased person.

But here's where I come out concerned: I'm not quite sure where we, as members of the labor and employment law community, are in terms of defining "reasonableness" in the context of it being something other than the abuse of discretion standard that was discussed in the paper. And I say that in the context of realizing the increasing frequency with which arbitrators' decisions in disciplinary cases are being second-guessed by the courts.

The standard of review used in a particular jurisdiction doesn't really matter. The language may vary, of course, depending upon what the standards of review are, and the standards can be any-

thing from shocking the conscience, to arbitrary and capricious, and to irrational. The bottom line is that, when the courts get these cases, it's almost as if they're looking at them two different ways. And, I look at what the courts say because they're the ones who are supposed to be telling us if we're doing things the right way.

One way the courts look at arbitration cases is to say, in effect, "I do not want to be bothered with your cases"; but this is only provided that they're run-of-the-mill cases. If they're the atypical case, if it's a situation where they think the arbitrator was wrong, then the judge is going to find a way to overturn that decision. That's not a surprise. That happens all the time in different fields. But, in the labor arbitration field with the *Trilogy*,[1] the appellate courts routinely state that it is not their province to be reviewing arbitration decisions, at least not unless the arbitrator was biased, committed fraud, or otherwise was on the take. The problem is that the trial court judges frequently disregard this rule and vacate the decisions. And this is not limited to New York, where I practice. You usually see these decisions in the public sector where you have the more visible cases, the public is involved, and the press is involved.

Just to summarize a couple of recent court decisions, they've all said the same thing in so many words: "We will intervene where the arbitrator has restricted the public employer's obligation to effectuate its primary function, such as protecting the health, safety, and welfare of the community, and to maintain the public trust." That's one set of decisions. There is another set of decisions, where federal and state laws and rules regulate an employer's affirmative obligation to provide and ensure a safe work environment. Here, we are increasingly seeing decisions where an arbitrator says, "I don't think this is 'just cause,' or, if it is, reinstatement without back pay is appropriate." But the courts are saying, "I am not letting you put that person back to work. What were you thinking about?" The courts are not part of the arbitration process in which we're all involved. They're taking the more objective view. They're not concerned with the dilemmas that arbitrators face when trying to issue a decision that will be acceptable to the parties and a decision that the parties will understand. The courts, I think, are

[1] *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

just trying to come up with the right decision and do what the courts think is right without regard to any of these other things.

I've also seen these decisions in cases involving the Americans with Disabilities Act and related state laws, which normally do not require excusing or trivializing an employee's culpability. Many arbitration decisions, as you know, will say, "Yes, she did it, but she should be excused under the circumstances." And, the courts are increasingly saying, "We don't care about the circumstances; the conduct was wrong, and we're not going to require the employer to put the person back."

So, I don't know what the "right" result is. I just have the sense that the parties want the decision to be the right one. The arbitrators want the decision to be the right one. The courts are disagreeing and saying, "No, we know what the right one really is." And, they're doing that more and more frequently, which I don't think is in anybody's interest because they're not specialists in labor and employment law. So, now we come full circle. I am intrigued by the last best offer approach. My notes reflect: yes, no, yes, no, yes, no, which is probably the reason why it was raised. I won't bore you all with where I came out, because I will probably change my mind in the middle of telling you what my last decision was.

One other thing that Anne had mentioned, which is something that I wanted to affirmatively agree with and specifically mention, and that is the increasing use of panels of arbitrators in an effort to try to standardize "just cause" determinations for some more certainty in the process. I find myself doing the same thing, but it conflicts me. It conflicts me because on the one hand, yes, I am getting a much better idea of what to expect so I can settle cases or tell the client, "Here's what we should do because here's what's going to happen." On the other hand, it closes the door to many terrific, knowledgeable, wonderful new or even experienced neutrals who can't get in because the panels are closed.

Ultimately, there is no way to have absolute predictability. If there were, none of us would be doing this, we'd all be lifeguards or something else, and we wouldn't be here today. On that note, I'll turn it back to Dan.

Nielsen: Jack, could I ask whether AFSCME perceives there to be a genuine problem in terms of judges interfering with the finality of awards, particularly in terms of the public policy exception? What's your perspective on this?

Dempsey: Well, I don't want to be cavalier about it, but we are a labor union. If we win, it's a good idea; and if we lose, it's a

bad idea. But honestly, I share the concern that the courts in the public sector are looking at a lot of discharge cases and overturning arbitrators. I don't think that's healthy. My perspective on this may be, in part, a reflection on the fact that our share of the market, as it were, is diminishing. This factor is playing out in lots of different places, one of which is in the courts. The fact that the labor movement no longer represents 30, 35, or 40 percent of the workforce is probably reflected in the increasing freedom with which the judges think that they can reverse arbitrators' decisions because the union side is not as strong as it once was. We will be again, I hope. But, I think there's no longer the great sensitivity to overturning labor arbitrators as there was 20, 30, or 40 years ago, in part because the labor movement is not what it was 20, 30, or 40 years ago. That's a factor we recognize and are now publicly admitting, which is why we're undertaking these new organizing initiatives.

Nielsen: Anne, what is your perspective on this?

Murphy: I'm probably not the best person to ask because, in my current position, I'm in a state that does advisory arbitration, so we have another layer before we even get to the courts, and then the standard of review in the courts is quite deferential. So in that sense, we're a little contrary to the national trend, I think.

Audience Member: When you spoke of a statutory overlay, were you referring to civil service regulations, for instance?

Nielsen: The question is whether the reference to a statutory overlay was to civil service regulations.

Murphy: That would be one example of a kind of overlay. But it also could come from a state code or a local ordinance. Sometimes it's all of the above.

Audience Member: I think that in some areas it really becomes an overlay if you talk about police, fire, teachers, and other employees who may be subject to some highly structured state laws. The general public employee that I represent typically doesn't have those kinds of protections. But the police and other special groups often have a lot of procedural rights written into the state laws.

Zuckerman: Sometimes, though, it works the other way around. New York's Court of Appeals just a few weeks ago issued a decision to the effect that police disciplinary procedures and rules are a prohibited subject of bargaining such that "just cause" binding arbitration over disciplinary matters is now prohibited. All of the collective bargaining agreements in the state of New York where

the parties negotiated those types of agreements and other procedural mechanisms in order to ensure fairness in terms of discipline are unenforceable. They are gone! The court went so far as to say, "We don't want arbitrators or unions or anyone other than management involved in issues pertaining to police discipline." That ruling probably also applies to other paramilitary organizations such as fire and corrections departments. The state legislature may overturn this decision, but this is how things stand in New York as of now.

Nielsen: In Wisconsin, the courts have done a similar thing, holding that where there's a police and fire commission in place in a city, police and fire discipline are for that commission. The commission independently has a right to insist on their procedures, so that the parties cannot collectively bargain for an arbitration provision, for example. A city is not required to have a commission, but if it does opt for a commission, the disciplinary process becomes a prohibited subject of bargaining, and an arbitration clause becomes an unenforceable provision.

Audience Member: As a matter of clarification, I think most of us believe that the rationale of the New York Court of Appeals was predicated on an assumption that where the state legislature has stated its opinion about discipline such by adopting a law granting towns or villages the discretion to make a disciplinary determination, then there's no place for collective bargaining. There hasn't been any interpretation of this decision yet, but I would think that in those areas where the legislature has not spoken, perhaps the court will come out differently and say that collective bargaining can create a different process, such as arbitration, to handle disciplinary matters. But as of right now, most of us on both sides are looking at this as the end of all the contract disciplinary procedures.

Audience Member: In terms of the murky nature of "just cause," one phrase that keeps coming up in public sector disciplinary cases is "behavior unbecoming to a public employee." Try to find anything like that in a private sector contract. That's a pretty broad umbrella. That's your teacher or moral turpitude type case. That's your police officer or other employee with a paramilitary organization. And, that's supposed to cover all those different things. What does it mean? It means, "I know it when I see it." That's what it means.

Nielsen: Speaking as a public employee, I've always been very careful when interpreting those "conduct unbecoming a public

employee" standards because I think they're terribly dangerous, personally.

Well, we've lost our only union representative here, so we have a real risk of consensus developing!

On the topic of arbitration awards being vacated by courts, how many people here have been personally involved in a case where an arbitration award has been tossed by a court on whatever grounds? Okay, that's maybe a quarter of the people in the audience.

Audience Member: In the advocacy session yesterday, we listened to a presentation by Peter Feuille who had done some research on the vacation of awards. My memory is that he said that approximately 1 percent of all awards are challenged in the courts; and of those, fewer than one-third get vacated.

Zuckerman: I must say, I'm not concerned about the fact that only 1 percent, or thereabouts, are brought to court; what gets my attention is that a third of the decisions are vacated. The fact that a third of those appealed are vacated, to me, is an extraordinarily high percentage of success when we are supposed to be operating under the rubric of the *Trilogy*. And, in New York, according to the courts, an award will not be vacated unless the arbitrator has done something horrific, which does not include, by the way, whether the arbitrator got the facts wrong, the law wrong, or even the names of the parties wrong. The courts say, "Parties, you bargained for this. It's your problem, and we're not going to get involved." Given that standard, I'm really astounded to hear that a third of those cases are vacated.

Nielsen: I still recall as an undergraduate, Bill Petrie was my professor and he was teaching a course in arbitration. He described the process as being one that was immune from attack under the standard of a mere mistake of fact or law. I thought, that was the field I wanted to go into. It seemed to fit my operating style to a tee! Yes?

Audience Member: I've been with the state of California for 22 years and this is the first year during that time that we have filed four petitions to vacate an arbitrator's award. Obviously, the state's management believes that the awards are vulnerable and that the courts are open to that in California. And California has a statute that says a decision will be overturned only if it is arbitrary, capricious, fraudulent, or a couple of other things. And now they are opening the doors. It looks like it's going from California to New York. And California, two years ago, over-

turned the right to good cause discipline in collective bargaining agreements.

Nielsen: I think a few years before that, in California or one of the other large states, a state supreme court wiped out significant parts of the state's collective bargaining law. I remember that this was discussed during the program in San Juan.

Zuckerman: My recollection is that California wiped out an interest arbitration statute.

Nielsen: Okay. Maybe that's the one I'm thinking about. And that was big news back then because that was something that had been legislatively approved.

Audience Member: Just a comment picking up on the remark earlier about the 1 percent of awards that are taken to court. I was not here for yesterday's sessions, so I don't know those numbers. But my sense is that would be a universal number, I think, of arbitration in general and not limited to just the public sector. My experience, both as a civil servant with the federal government for a long time and then as an arbitrator, is that, first of all, there is very often an administrative review opportunity before something gets to court. In the federal sector, things might go to the Federal Labor Relations Authority. In the District of Columbia, where I do some cases, many of those would go to the DC Public Employment Relations Board on exceptions. They're easier, faster, and cheaper, and people tend to take exceptions rather frequently because it's very low cost.

Secondly, in both the federal sector statute and the DC statute, my sense is that more awards get overturned on the grounds that the award cannot be contrary to laws, regulations, and so forth. Some of those applicable laws and regulations may govern how the arbitrator makes the decision in the first place. So the question becomes whether the arbitrator has properly interpreted the office of personnel rules on entitlement to overtime or the employee's choice between compensatory time off and time-and-a-half pay.

This limitation can also come into play in cases involving the application of the appropriate remedy. I was involved tangentially with a case in the federal sector where an arbitrator found that an employee had improperly been denied overtime pay. The remedy adopted by the arbitrator was to award double time for those hours. Now, the employer was probably outraged at being told that it had to pay anything, but it didn't fight that. It fought, instead, on the grounds that federal law says you're entitled to only time-and-a-half pay.

Audience Member: In those jurisdictions that do have this type of an overlay, I would think that the arbitrators and the advocates are aware of these things, and that the rulings and decisions would comply with them.

Audience Member: I tend to believe there is more judicial scrutiny applied to public sector cases than to private sector cases because you've got that "contrary to the public interest" matter to deal with.

Zuckerman: In New York, the courts have been pretty clear, I think, that in order to prevail on a public policy argument of vacating an arbitrator's award, whether it's a disciplinary award or otherwise, the public policy has to be clearly enunciated in a statute, or in the court's decisions. Not just, "I woke up one day and decided we can't put Homer Simpson back into the Springfield nuclear power plant because it's dangerous." I don't know if the standard is that high in the places where you all work. If it's lower, then that might explain some of what we're talking about now. If it's as high as New York's, then I don't have a good explanation for it other than the courts are saying, "Arbitrators, you're getting it wrong, and we're going to fix that."

Audience Member: The courts, in my experience, are doing what Justice Scalia longed for. That is, they're lying! They are articulating the standards from the *Trilogy*. They're talking about the very limited public policy exception. And, I'm not aware that there's a separate public policy exception for the public versus private sector. It just comes up more often in the public sector. But, the courts, after articulating the strict standard, then come to the famous "however" clause. That is, this particular award somehow managed to run afoul of that standard, and we are going to overturn it. I don't see anyone trying to change the articulated standards. I see them, instead, ignoring the standards while they're pretending to follow them.

Audience Member: To follow up on something that Jack said earlier, if you look at what's happening in the public sector and compare it, for example, to the Sixth Circuit, the court did exactly what you said. The arbitrator is required to draw the essence of the award from the collective bargaining agreement. But the four elements that the Sixth Circuit puts forward to evaluate awards are nothing more than the authority of the court to determine whether the arbitrator got it right in the first place. If not, the court is going to overturn it. And the dissent in the *Michi-*

gan[2] case was rather candid in saying, "You know, we're overturning 30 percent of arbitration awards." The Supreme Court hasn't done that. And so it seems to me that it's not just the public sector where there might be a greater opening, but that it's happening in the private sector as well, at least in the Fourth, Fifth, and Sixth Circuits. Those are all circuits in which a lot of arbitrators' decisions are being overturned.

Nielsen: I agree. It seems to me that the Supreme Court and the lower courts are going in completely opposite directions on arbitration. While the Supreme Court is maintaining a very strong deference and a great unwillingness to involve itself in arbitration matters, particularly these days where arbitration is increasing the scope, the lower courts seem to have a much greater willingness to say, "Yes, we agree with everything the Supreme Court has said on this; but, you know, this one actually rings the bell."

We've got someone in the back. Saul?

Audience Member: In those states where bargaining has been under threat, are there any fallback employment law provisions such as those available under civil service rules? Can unions use those at all?

Nielsen: I think most of the states still have some sort of civil service mechanisms in place. The places where collective bargaining has been authorized by executive order, such as in Kentucky, Indiana, Missouri, they all still have some sort of civil service mechanisms in place. As inadequate as they may be, they're still there.

Audience Member: There's an interesting twist in Illinois, which is very heavily organized and AFSCME represents 95 percent of the state employees; but they still have a state civil service system. In the custodial, mental health, and juvenile facilities, there's a very rigorous standard on abuse. The labor arbitrators are applying this standard very stringently, while the Civil Service Commission is considerably more lenient. So, with the encouragement of the union, employees are bringing more cases in the Civil Service forum.

---

[2]The speaker was referring to the concurring opinion of Judge Sutton in Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M, 438 F.3d 653, 658 (6th Cir. 2006) criticizing the standard adopted by the Sixth Circuit for reviewing arbitration decisions in Cement Divisions, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, 793 F.2d 759 (6th Cir. 1986). That case established a four-pronged test under which the Sixth Circuit frequently overturned arbitration awards. The Sixth Circuit has since overruled Cement Divisions and adopted a mode of analysis more consistent with U.S. Supreme Court precedent. See Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M, 475 F.3d 746 (6th Cir. 2007).

Audience Member: Do you see the differences in how much the courts are meddling depending on whether they're specialized, generalized, and so forth?

Audience Member: The only tangentially relevant information I can provide to you is based on the research that I did in preparation for today, which was, admittedly, cursory in terms of trying to answer that question. It did seem to me that it was less a question of the forum than it was the standard of review, because you will still find judges saying, "I would overturn this if I had the authority to do it, but I don't, so I won't," as opposed to the states where there's a lower threshold, and those judges are saying, "I can because I want to, and it's the right thing to do."

Audience Member: I'd like to play contrarian just a little bit. I've been in this business for 30 years, 10 years as an arbitrator and 20 years as a labor union advocate. When I was an advocate, I did dozens of cases. I had this one case where the arbitrator sustained the grievance and put the grievant back to work in a discharge case. The company, probably inspired by their very capable corporate labor counsel, challenged the award in federal court. And when I saw it filed in a particular judge's court, I said, "Oh, damn. You know, this is a federal judge who really has seen very little of labor law. He never came from a firm where there was any labor law work." So, the whole time we were writing motions for summary judgment, I was just cursing the fact that that this was the judge I'd drawn. And sure enough, he vacated the award. We appealed it to the Eighth Circuit, and they overturned the judge's decision, and reinstated the award. The vindictive CEO continues to go on with this, and he appeals to the Supreme Court; and of course, they deny certiorari. Well, that's the only time I've ever had any experience of that happening. And in all of my experience as an arbitrator, I've never had anyone else try to vacate an award.

It seems to me not so amazing that 30 percent of the time you draw a judge who doesn't know labor law very well. He's never read the *Steelworker's Trilogy*. And, if you're in the public sector, he rarely ever sees a labor case. So, it's not so unusual that in perhaps 30 percent of that 1 percent, you might find a vacation of an award. And I would even suggest that the courts are also increasing the application of the public policy exception toward arbitration. I mean, in the last 10 years we've seen the federal courts say that employers can have an internal alternative dispute resolution policy that allows you to take these cases into final and binding arbitration, and all the arbitrator has to do is apply federal law. I think sometimes when we get into discussing the fear about arbitrators'

decisions being overturned, it's more of our own angst about this possibility as opposed to it being a serious policy problem.

Nielsen: Okay?

Audience Member: I live in the Sixth Circuit, which overturns just about every arbitration award it seems to see; it's a huge problem. But I think we're being too logical, here. I really think the focus is what John touched on earlier. What is different between now and 30 years ago? The two differences are that there are a lot more drugs and alcohol in the workplace, and unions are not as strong as they once were. With the decline in union strength, judges don't look at unions as a potent political force, and they don't feel scared to overturn arbitration decisions. It's really all result-oriented when it gets to the judges. They just can't keep their hands off the cases, and I don't know what we can do about it.

Nielsen: I would suggest that, at least a little part of it, is that you have fewer and fewer people who can make a living doing just labor relations law and arbitration. That's particularly true on the employer side. That's different than it was 20 years ago, where people could pretty much do labor work full time. So now you have people who are flip-flopping back and forth between different forums where they have different rights and different procedures, and you're seeing a bleeding between those forums in the way that people want to practice. You're seeing discovery requests in arbitration cases and you're seeing a view that everything's appealable. And I fear that employment arbitration, with its kind of more formalized approach, as it begins to bleed into labor arbitration and you have more and more arbitrators doing both and more advocates doing both, you're going to see a melding of these processes, probably to the detriment of labor arbitration. So the attitude that these decisions should be appealable, I think at least in part, is due to the change in the nature of the practices of the advocates.

Harvey?

Audience Member: I have a question for Mr. Zuckerman. What is your opinion regarding automatic sanctions for any party that challenges an arbitration award in court and loses?

Zuckerman: What's the scope of these sanctions that you're talking about?

Audience Member: Recently, the Seventh Circuit awarded attorneys' fees in favor of a union against an employer for challenging an award when it found that the appeal was absolutely baseless. The court indicated in pretty strong language that at least in that circuit, an employer that takes an appeal without having some basis

is going to get hit with attorneys' fees. It was a Rule 11 sanction. My question to you is do you think that concept would be beneficial in the public sector in state courts, such as in New York?

Zuckerman: My answer to your direct question is, yes, I am in favor of attorneys' and/or clients being sanctioned for engaging in frivolous litigation. I would take that so far as to say that I don't care if it's in federal court or in arbitration, in all candor. What I heard you to say, though, was that the court made a determination that it was, in fact, a frivolous application. And of course, it's hard to disagree with the idea if you knew going in that you had no basis for an appeal, and you did it anyway. When you're looking at a public sector case and the basis for the appeal is just public policy without any articulation of what that means, depending on the standard in your state, that may well be sufficient to get you slammed and you should be thinking really hard before you go. The flipside of that, though, is that when there are grounds to appeal, by all means do so; that's why there's a court system.

Audience Member: You're not arguing for a harsher approach to Rule 11 for labor cases than for other kinds of cases, are you?

Zuckerman: Absolutely not. It should be the same standard all the way across the board. I am not suggesting in any way that it should be a harsher standard just because it's a labor case.

Audience Member: What we really don't know is whether we are in a stage where arbitration is still the preferred method of dispute resolution, or whether it is just a way station along the way to court. I mean, how many cases actually go to court? There are probably very few. And if that's the case, then we are maybe arguing over the number of angels on a pinhead. But I do know that labor arbitration as a means of dispute resolution is shrinking, simply because we're shrinking. And that's dangerous. It's reflected in the courts' increasing willingness to overturn decisions. But it's also reflected in the fact that many law schools are no longer offering courses in collective bargaining and labor law. It's now called employment law. So, you know, it's a reflection of that as well.

Zuckerman: Dan, with your permission, this is slightly off the specific topic, but it's a trend with regard to public sector and "just cause" issues, at least in New York, and I want to throw this out because it's all part of this same discussion and I think it's directly relevant to what Jack has been saying with regard to the fact that we have so many fewer cases being resolved by labor arbitrators. In New York, there is a definite trend in which neutrals, whether they are arbitrators making binding decisions or hearing

officers in disciplinary cases who make recommendations to the decisionmaking body, are getting sued. They are getting sued in their official and individual capacities by the employee who has just been discharged. They're getting sued in federal court. They are getting sued under Section 1983 for violating the person's free speech rights or due process rights. As a result, what we're finding is that there are more and more people who are refusing to take on the responsibility of deciding employee disciplinary cases or even cases involving disabled employees who are seeking workers' compensation-type benefits because they're afraid of being sued. In my office alone, we've had a bunch of these cases.

I was just asked to serve as a hearing officer in a nondisciplinary case, and I told the employer I'd be glad to do it. But I said that I would do it only if they passed a resolution providing me with all the statutory indemnifications that exist, and also defended me when I got sued, which I knew I would. Not surprisingly, they said, no.

We're seeing this more and more. We have a teacher disciplinary case that's ongoing now where a member of the Academy was named as the arbitrator, and he recused himself because he'd already been sued by that grievant once before. This is happening more and more frequently. And we're not talking about people who just fell off the turnip truck. We're talking about members of the Academy. People who are here today and others who couldn't be here today who are now saying, "I'm not doing this anymore." And I think that also goes directly to what you were saying because I can't remember ever being involved in an arbitration proceeding in which the union was representing the employee where there was even a joking threat about commencing litigation against the arbitrator. You just don't do that.

Nielsen: Harvey, I had promised you a followup.

Audience Member: I wanted to follow up on this. I heard you say that you were rejecting the concept that because arbitration is supposed to be final and binding that there should be a higher burden on the appellant in taking an appeal. In the Seventh Circuit case that I just cited to you, the court made the point that the appeal was *baseless*. It didn't say "frivolous"; it said "baseless." And the court made the point that there were too many appeals of arbitration cases, which are supposed to be final and binding, and it implied that parties should beware that unless they have a good reason to take this case on appeal, they're going to face sanctions. Now, that's different from a pure Rule 11 situation. Given your

negative comments this afternoon about appeals, I'm asking you to confirm that you would be in favor of a looser standard for sanctions in the case of an unsuccessful appeal of a final and binding arbitration award.

Zuckerman: I think that there is nothing unique about the standards pursuant to which labor arbitration awards should be judged. Whatever the standards are in the Seventh Circuit or in the New York Court of Appeals, there's nothing so unique about labor arbitration let alone discharge cases that would commend a different standard of review. As far as I know, the same standards would apply if it were an arbitration decision in a no-fault case, in an unemployment case, a divorce situation, or whatever it might be where there is alternative dispute resolution of a matter. Theoretically, the Seventh Circuit doesn't want to see those appeals, either. So whether you define it as "frivolous" or "baseless," I don't think there should be a looser standard just because it's labor arbitration. I don't think it should be a more stringent standard. I think we take the standard that's been given to us, and the court should apply it. My point was that notwithstanding the articulated standard, we're getting the lie. And my challenge to everybody here is to figure out why that is and what, if anything, we should be doing about it so that we don't have to be addressing the issue of having a judge telling an arbitrator that the court knows better than the person who's got the expertise in the area.

Audience Member: I'm intrigued by your comments about lawsuits against arbitrators coming from losing grievants. Anybody can sue, as they say. But what is the success rate? Are any of those cases getting beyond summary judgment?

Zuckerman: I don't know of any in which the plaintiff has been successful. What I do know is that one of our Academy members, who is very well known to all, actually had to go up to the Second Circuit Court of Appeals to get a decision that said that she was entitled to absolute immunity as an arbitrator in a teacher disciplinary case. I know in the cases that I'm handling right now, the ones that are still pending are all in state court. What has happened is that the arbitrators have not appeared. One person wrote a letter to the court, basically saying, "Look, I don't care what you do, just tell me; but I should still get paid since part of the relief that was sought was that I shouldn't get paid." Basically, the arbitrators and the hearing officers are relying upon me to make their arguments for them. And of course, no one's picked up the phone and said that; but I recognize it's part of the process and we would all do

it. And I make the arguments and the courts don't get that far because they reject the appeal. But some of those cases are still pending. And not every arbitrator or hearing officer is incorporated or has liability insurance other than homeowner's insurance. When you see your name on the caption and it says "individual liability," you make your phone call to the homeowner's people and they tell you, "Don't worry, we'll get our divorce expert right on top of this." And when you go to take out a home equity loan, you have to report to the potential lender that there is a potential claim against you for personal damages. That's what's going on. And that's what has people completely flipped out. I'm getting sued as the advocate or the counselor to the employer. That's happened twice in the last 10 years. And you know, that's part of trying to disqualify your opponent so that they've got to bring in the insurer and drive up the cost of defense.

Nielsen: At the time I bought my current house, I had a discharge case pending decision with a fellow who had twice sued the union over their handling of his various grievances, and he had once sued the company as well. I will say that I consciously refrained from issuing that award until after the approval on the mortgage came through. Just on the off-chance, you know?

Yes?

Ginsberg: Did I hear you say that you have a concern about the neutral who does employment as well as labor; that you are concerned that the two processes may be blending one with the other?

Zuckerman: My concern is that they are completely different processes. And as you have more advocates with blended practices, I see a real danger of leakage from one process into the other.

Ginsberg: Well, the leakage is by the advocate. The leakage is by the litigation person in the firm who has done other kinds of things and he walks into labor arbitration. Or, he walks in to an unemployment compensation hearing, and that's what he carries with him. Okay? But, I don't agree with you if you're saying that the neutral who does both kinds of work can't tell the difference. Different standards apply, and we know that. I mean, you've got the statutory overlay of Title VII and you've got to do various things. You go into your labor arbitration case, and it is totally different.

Audience Member: Okay. You're in a grievance arbitration, you've got two advocates in front of you, both of them who are reasonably new and both of them have mixed practices. The company sends their demands for discovery and depositions and such.

The union representative complies. Now, do you have any concern about what's happening to your process?

Ginsberg: No, it's the parties' process.

Audience Member: I'm just saying that it's a slippery slope, okay?

Ginsberg: It could be if you don't know what you're doing.

Audience Member: I think even if you do know what you're doing, you get used to what you're used to. And it just seems to me that there is a problem that will develop over the next decade or so of the formality of employment litigation edging into the labor arbitration process. I just believe that's going to happen. I think it's going to happen from the neutrals' end of it, and I think it's going to happen from the advocates' end of it.

Nielsen: Back corner?

Cross: Paul Cross, Los Angeles. I think that there's already been some of that slippage that you describe that's been imposed by the courts. We've run into a number of cases where we've filed individual lawsuits for workers under state law for union workers where the standard response from the employer's counselor is that "You have to take this to arbitration even though we're not arbitrating a claim arising under a collective bargaining agreement." In California and perhaps elsewhere around the country, there's a very strong tendency on the part of the courts to flip anything they can out of the judicial forum because of the overburdened caseload and because they have a lot of retired judges who are going into arbitration work. They're saying, "Even though it's a statutory claim, you've got to go to arbitration where we have no right of discovery, no depositions, no requests for production of documents, and only a board order for production of information," which takes so long to get that it's essentially worthless. So we are being pushed into a forum that is not designed to handle those kinds of cases. Often times, they're class action types of situations. And, at least in situations where unions are relatively weak in their bargaining power, I can see employers seeking to obtain through collective bargaining a requirement that you must take these claims to arbitration under the bargaining agreement. So, you're facing a situation where a court has told the parties that they have to arbitrate these claims and they won't have the remedies and the availability of discovery that they normally would have in civil court.

Audience Member: There's always been the interesting issue of whether a union can waive an individual's right to a jury on a

statutory claim like that. Could you be compelled, ultimately, to channel those claims to arbitration even if you were resisting it? I don't know the answer to that.

Nielsen: Going once! Going twice! Yes?

Audience Member: In response to Paul, if the court sends you a case and says that you've got to apply the statutory law, then you serve in the place of the judge, in effect, and the parties get all of the protections of the statute in question. You get an employment case, it shouldn't be called arbitration, but I lost that argument years ago. You've got to apply all the statutory protections. Therefore, you will have discovery, a reasoned opinion, and, hopefully, you'll have a transcript. In that way, you bulletproof the district court judge.

Nielsen: Well, I should respond to the notion that an arbitrator might at some point not comply with the law like they're told to, but we're out of time.

Thank you all, very much. Thanks to the panel.

VI. MEDIA, COMMUNICATIONS, AND TECHNOLOGY

Moderator: Catherine Harris, NAA Member, Sacramento, California

Union Panelist: Barbara Camens, General Counsel, The Newspaper Guild—CWA, Barr & Camens, Washington, DC

Employer Panelist: Susan Frier Wiltsie, Counsel, Hunton & Williams, Washington, DC

Harris: Good afternoon, everyone. Like almost every other arbitrator that I know, just cause is a large part of my practice. We are fortunate to have with us here today two brilliant young lawyers. Barbara Camens is the general counsel for The Newspaper Guild and has been practicing labor law since 1982. She also represents The News Media Guild. Susan Wiltsie, of Hunton & Williams, is the counsel for the firm's labor and employment group, representing employers in every aspect of the collective bargaining process with particular depth in representing publishing companies.

In preparation for this session, the three of us concluded that in the cases we want to discuss with you, we were not dealing with the Mittenthal/Vaughn problem—namely situations in which the parties have attempted to restrict the arbitrator's discretion