II: MANUFACTURING AND HEAVY INDUSTRY

Moderators:	Terry A. Bethel, NAA Member, Bloomington, Indiana Edwin R. Render, NAA Member, Louisville, Kentucky
Union Panelists:	Mike Milsap, Sub-District Director, United Steelworkers of America, District 7, Gary, Indiana Pat Malone, Directing Business Representative, District Lodge #27 International Association of Machinists and Aerospace Workers
Employer Panelist:	Thomas Zahren, General Manager-Employee Relations, United States Steel Corporation, Pittsburgh, Pennsylvania

[Editor's note: Due to technical difficulties with the audio equipment, the transcript of this session has been substantially edited. It continues, however, to reflect the sense of the questions and responses in the session.]

Bethel: My name is Terry Bethel; I'm an arbitrator from Bloomington, Indiana. This session presents us with an opportunity to discuss "just cause" developments in heavy manufacturing and mining. Please allow me to introduce the panel. Pat Malone with the Machinists is a graduate of the Bellarmine College and the University of Kentucky Labor School and is Directing Business Representative in District Lodge 27. Mike Milsap is Sub-District Director with the Steelworkers in District 7 in Northwest Indiana. He started his career in the steel industry in 1973 with Republic Steel. Tom Zahren is General Manager for Employee Relations at the United States Steel Company. He is a graduate of Notre Dame, Cornell ILR, and Pitt Law School, and is responsible for labor relations including arbitration at US Steel. He has been in the steel industry for 25 years, starting with National Steel. Ed Render, my co-chair is a professor of law at the Brandeis School of Law at the University of Louisville. He is an arbitrator and member of the Academy since 1914 or something like that. [Laughter.] Ed agreed to address some of the ideas in the Mittenthal/Vaughn paper and about arbitration from the perspective of those of us who spend a lot of time in a manufacturing environment. Ed?

Render: A number of ideas in the Mittenthal/Vaughn paper are worthy of our attention. In the first paragraph, they indicated that one cannot define "just cause," but experienced arbitrators know it when they see it. This morning, Ted St. Antoine said he knows what he is going to do after a discharge case 90 percent of the time. If you are an advocate in front of Ted, do not bother to submit briefs. I'm not as smart as Ted, so I would cut that back to about 60 percent. Arbitrators can put all the cases they hear on a continuum, from those in which they know they are going to reinstate with back pay to those where they know they are going to sustain the discharge. In the middle, there are a substantial number of cases that require more thought. These are the ones that this meeting today is about.

Mittenthal and Vaughn separate the discharge decision from the remedy decision. I do not think that arbitrators can always do that as neatly as the paper indicates. In a contract interpretation case, we start with the words of the contract; and if we cannot find our answer there, then we look for past practice. If we cannot decide a case on the basis of past practice, then we know that management has all the rights to run the business that it had before this union arrived, so if management's action is not prohibited someplace in the contract or practice, then the company wins. Thus, in contract interpretation, we have some uniform guidance. We do not have that same kind of guidance in most discipline cases. Most contracts provide only that there must be "just cause" before management may discharge, and in those cases, the nature of the offense and the remedy are difficult, as a practical matter, to separate. To make matters worse, the seriousness of the same offenses can be very different in different industries.

Parenthetically, it should be noted that this discussion is not about discharges for specific rule violations that call for discharge for that rule violation. Terry gave a hypothetical of a nurse who was given permission to lie down on a couch and cover herself with a blanket whenever she was not busy with patients. That is an entirely different matter from somebody sleeping in an underground coal mine. The first time I ever did a sleeping case in an underground mine (you all know exactly where this story is headed), the grievant was caught sitting with his head bowed down. When confronted by the supervisor, his first words were, "God, forgive me for interrupting this prayer to talk to this boss." [Laughter.] At my hearing, the argument was naturally about whether the grievant was asleep, or just sitting there with his eyes closed. The agreement between the United Mine Workers of America (UMWA) and

the Bituminous Coal Operators Association (BCOA) required a bench decision. At the end of the hearing, I said to the grievant, "Well, Phil, I think they caught you asleep; and I'm going to give you 30 days off work to catch up on your sleep." There is a hole in the roof in the Holiday Inn in Beckley where the company rep went through the ceiling. He gave me the worst dressing down that I have ever had in my life. "Don't you know that sleeping is a capital offense in a coal mine?" I said, "Joe, you didn't tell me that." The truth is that he was right. Ever since then, when I have a situation in which I sense that there may be some kind of an unusual practice that I do not know about, I ask. In my opinion, an arbitrator is not out of bounds—contrary to what is said in the paper—to ask. It is right to ask because you can hurt the parties if you do not. For you who are advocates here, you should always treat your arbitrator like the village idiot. Do not assume that he or she knows anything about the traditions of your business or your relationship.

Bethel: Most of you will have no trouble with that. [Laughter.]

Render: I am serious about that. Do not assume that the arbitrator knows anything, especially in ad hoc arbitration cases. Do not assume that we know the first thing about your business. We may; but then again, do not gamble on it. When in doubt, tell us.

Bethel: But how do you balance that against the possibility of ruining somebody's strategy for trying the case? I ask questions when I get confused, but I am sometimes sitting there thinking, "I would like to know the answer to some particular question, but it may be an answer that the union or employer rep does not want to hear. Perhaps they would rather I go away confused."

Render: I think you need to ask it. I say that even though I am sensitive to the old saying, "Judge, you can try my case for me if you want to; but do not lose it for me."

Bethel: Well, that is what I'm worried about also.

Render: In the end, my philosophy is that arbitration is not a game. I wish labor arbitration were more like the federal courts in that we would benefit by knowing a little bit more about a case before we get to a hearing. I am not sure that it is always the best for us go into an ad hoc case completely cold.

Another comment that I had about the paper is that I wonder whether there is really a great difference between Whitney McCoy's standard and what Dick Mittenthal calls "the present standard." I have had the Whitney McCoy language thrown at me many times, but if I decide to put a grievant back to work, I simply

go to McCoy's last sentence and emphasize "unfairness." That lets me avoid the harsh applications of his standards.

When I write a decision in a discharge case, I do not go to the last sentence of the McCoy quote and explicitly ask: Was there discrimination in this case? Was there unfairness? Was there capriciousness? Was it arbitrary? What actually happens to me is that I develop a feeling or a hunch about the case. (I hope that somebody edits this tape.) [Laughter.] As I'm driving home from the hearing, I dictate a summary statement of the facts or a summary of the testimony. One of the things that will go onto the tape if I am going to sustain the grievance and put the grievant back to work is a sentence something like, "This just isn't right." That is, frequently I can generally support my decision with the logic from all the published arbitrators who are more widely known than I. Now, sometimes, I will start with, "This just isn't right," but then as I try to write my decision, I cannot finish it. I have to go back and start over again, sometimes with a different conclusion. So, given the way I think, I'm not sure that there is really all that much difference in those two standards.

When Mittenthal and Vaughn write about the reasonable man, I do not think this is *Prosser on Torts*. What companies want is reasonableness as applied in their industry. They do not think about "reasonableness" as an abstract thing, because what is reasonable in one industry may not be reasonable in another. If you have a 50-person labor gang in a steel mill, and a guy is absent one day, that is not the same as it is in some other environments where attendance and punctuality are extremely important, such as urban transit drivers who change shifts "on the fly." Later on in the paper, Mittenthal and Vaughn do make the point that arbitrators need to consider the industry in which they are working, but they do not mention it early on.

Bethel: Let me interrupt, again, just for a minute, with respect to this. In the plenary session, I heard the words "objective" and "reasonable" tossed around about as much as I do when I'm grading law school exams. I am interested in the views of the advocates here. Are you really looking for someone whom you think is objective? If you're looking for someone whom you think is objective and the NAA is the brand, then why not take any member of the Academy? These would all be people who are unofficially certified. These are all people who are "acceptable" because that is a standard under which we get admitted to the Academy. But because we are not all interchangeable, maybe it is because advo-

cates are not looking for people who are objective. In fact, aren't advocates looking for people who are biased? Reasonableness for you has to do with the way you approach the case. This is not a criticism. It is what I did when I was in practice as well. So, in short, I am interested in the way the parties apply the idea of objectivity and reasonableness and what it is you really want.

Some of these guys, Mike Milsap and Tom Zahren, work in an industry where there is a permanent panel. I have been involved in those discussions, but determining who is going to be on their panel is not an easy process.

Zahren: No, it is not. The notion that we're going to get a pro-company arbitrator on the U.S. Steel/United Steel Worker's panel is naïve. We are looking for someone who is objective. We are concerned that we do not get somebody who is biased against us as opposed to trying to eliminate someone we think is a company shill. That is our approach. In terms of applying the reasonableness standard, as Justice Scalia said earlier today, the just cause standard really isn't the issue. It is the application of the standard that becomes the issue. We do not want to see much subjectivity. When Ed Render reacts to a case and he gets the impression, "This just isn't right," I do not think management representatives have a problem with that so long as Ed is not the only person in the universe who thinks that way about the case. If his reaction reflects the typical reaction that reasonable people would have to the facts, management is not going to have a problem with that result.

Bethel: Okay. What about from the company perspective? I do not know how often you choose ad hoc arbitrators, for example, but are you looking for someone who you think is objective? Aren't you trying to find someone who you think will be sympathetic to your case?

Milsap: I use published cases and I also do a lot of U.S. Steel cases with the Board. I look for bias. I do the research. I look at the awards. I look at two things. If they have ruled in favor of the union or company makes a difference, but more importantly, I look at their findings and how they wrote their decisions. Are they more lenient than other arbitrators? At the U.S. Steel Board, I would like to be able to pick the particular cases a particular arbitrator is going to hear because they all have a point of view. Although they try to be consistent, when the awards come out, different arbitrators have different approaches. Not every arbitrator is going to look at a particular case the same way. Some are tough

on discipline. Some are better on language. U.S. Steel's system is fair because we get whichever arbitrator whose turn it is.

But if I'm doing the research and I'm being able to select, I'm looking for somebody who has a tendency to put people back to work, based on years of service. And are they as tough as other arbitrators on how the company proves cost.

Malone: In selecting arbitrators from the FMCS panel, I go through the résumés and check—especially on a discharge or discipline—to find out how they have decided discipline cases in the past. It helps me quite a bit. Another way that I do it is to call other unions and other business agents to see what they have done and look at their cases they have had before a particular arbitrator.

Bethel: One of the points arbitrators sometimes make with respect to this is that advocates know less about us than they think. A lot of us do not publish very many awards and the cases that are published are not necessarily representative. I did a training program a few years ago and I tried a case between hypothetical union and company advocates. After I ruled, the people playing the role of the union advocate said, "We knew we were going to lose because you have decided only nine cases, and eight of them were for management." Well, I was already in the Academy by then so I pointed out that I had heard hundreds of cases. They insisted that some computer file they had contained my complete record. My only point is, although I do not keep score, my published cases are not representative of what I do. Getting information is hard. It may be that calling other people about it is one of the efficient ways to do that.

Audience Member: The actual selection process in ad hoc cases involves striking. You strike the person that seems most biased against you; you do not choose the person you think is biased in favor of you. It always surprises me when the union strikes somebody who was on my list to strike. So in the ad hoc case, I think you're trying to knock off bias against you rather than select bias in favor of you.

Bethel: Okay. Any other comments about that?

Audience Member: With the published cases, you generally have years and years of cases to turn to and use to see what the right decision is in the case.

Bethel: Part of the problem is what gets selected for publication. Reading published decisions is not a very efficient way to get a sense of your arbitrator. I used to send decisions to the publishers, but I never knew what they would publish. I sent cases that I

thought were interesting, but they would not publish those. And published decisions do not tell you anything about how an arbitrator conducts a hearing. . . . Sometimes the parties won't consent. I do not think arbitrators are supposed to ask until after the case is over.

Audience Member: Regarding the cases that BNA does not publish, Westlaw has many of the unpublished awards on line.

Render: Well, I'm always amazed at the number of my unpublished cases that are fed back to me in post-hearing briefs. The arbitrator who taught me the tricks of the trade, Carl Warns, a long-time Academy member, told me early on, "Be careful what you write because your decision is going to be hung up in the union hall and on a plant bulletin board and people are going to read it, irrespective of who won the case."

I think there is another issue involved in researching arbitration awards. Arbitrators are not always completely honest in revealing all of the reasoning that goes into their decisions. I had a case in which a fellow was being discharged for fraud in connection with workers' compensation. He was working at home when he should have been in bed. This happened in a rural area. The company became suspicious and put an investigator with a video camera up in the woods behind the grievant's house. The grievant was videotaped working all day long loading fertilizer onto a truck and doing other tasks that anybody with a back injury simply could not do. The only issue in the case was the identity of the person who was doing all this work. Now, there was a herd of cows out in the field between the video photographer and the fellow doing all the work. Along about sundown, this individual walked from the barn over to the house and then back over to the barn. As he started walking back over to the barn, all the cows started running toward the barn. Now, I was raised in the country. I know that if I walked from the house to the barn at feeding time, those cows wouldn't pay a bit of attention to me. But if I were the owner of the cows, those cows would come running. [Laughter.] Those cows identified the grievant. I didn't say so in my decision, but that was a piece of evidence that was in the record. When you research our decisions, you can get the result, but a lot of times you cannot really tell exactly what persuaded us.

Bethel: The Mittenthal/Vaughn paper discusses the fact that arbitrators apply mitigating factors in considering a remedy, but do not apply leniency. Many of us think about the length of service and good work records as matters of mitigation. But what

is the difference? Why isn't that leniency? The mitigating factors that arbitrators cite are not limited to length of service and work record. I have seen arbitrators cite "market factors," like the age of the employee and whether it is likely that he or she could get another job. That seems to me to be more like leniency than mitigation. What are your experiences with this?

Zahren: It could be a matter of semantics. You talk about length of service. For example, when you have an employee who has 27 years of service whose discharge is overturned, and you have an employee with 7 years of service guilty of the same serious misconduct, but that discharge is upheld—that, to me, is leniency. You can call it a mitigating factor, I guess; you can split hairs about it, but length of service doesn't change the nature of the conduct. It doesn't change the consequences of the conduct to the employer. So I do not know how you call that a mitigating factor.

Bethel: The arbitrators are the ones, I think, who have made this distinction. I used to work on a panel in which there was an opinion from one of our members that had extended discussion about the inappropriateness of arbitrators applying leniency, but the arbitrator never really said what leniency is. He noted that arbitrators may appropriately apply mitigation. So we are the ones who made the distinction. As Tom probably knows, I do consider length of service a mitigating factor, but it is not clear to me whether we are making a distinction that makes any sense.

Milsap: I agree with Tom. I think it is a form of leniency because if you discharged somebody with 5 years of service and not somebody with 25 for the same offense, I think it is. But I also think we have to give consideration to longer service employees. These are people who dedicated a big part of their life working for the company. And I think we have to consider it.

I must comment on Mr. Render's comments about asking questions because I strongly disagree with arbitrators asking questions on issues that are not brought up. I like it when they ask questions. I want them to ask a lot of questions—but only about what we are talking about. If nobody brought up practice, I think it is inappropriate for an arbitrator to bring it up because it may not have been something that the parties relied on to make their decision that brought them to arbitration. So by asking the wrong questions you throw something in that was never an issue to begin with.

Malone: I always cite the grievant's service. I also use his record if it is clean. Of course, there are some cases where I never bring

it up at all. [Laughter.] I like for the arbitrator to get a picture of who the grievant is and what he has done in the past because I think the arbitrator is going to make a judgment about the reasonableness of the case.

Bethel: I agree with Tom's comment that in terms of the effect that the conduct has on the employer, it does not make any difference whether the grievant has 27 years or 7, but to the employee, it can make a huge difference. For example, there may be pension factors. I have had cases in the steel industry where somebody had 29 years and 6 months of service. I viewed those cases differently. I talk about mitigation in my award, but this was a form of leniency because I was concerned about the impact of the discipline on the employee. Now, if he had shot someone, I couldn't worry about it so much. But in cases that are borderline, I will use length of service, especially very long service if there are going to be consequences, as a mitigating factor. That does not mean, however, that I always reinstate people who have been around a long time.

Zahren: We certainly expect length of service to get into the analysis. I am just saying that what we are talking about, is it leniency? Is it mitigating factors? In the end, does it really matter? I would be very concerned, though, if I thought an arbitrator was taking into account how difficult is it for the person to get another job. These "market factors" you are talking about, I think that is beyond the arbitrator's purview.

Audience Member: I am not sure it is proper either way. What do you end up with when you start going down that trail? You have 29 years, and that justifies mitigation. What if you have 15 years? It is a slippery slope that you're going down. If you punch the supervisor in the nose, I do not care if you've got 29 years and 364 days, bang, you're gone. It is problematic for these issues to be brought into arbitration. Doesn't mercy belong to the employer?

Zahren: Mitigation is not always possible. If the offense is so serious that no amount of mitigation is going to override the seriousness, then discharge will result. But if it is one of those offenses that could go either way, then as a management advocate, I know that an employee with 1 or 2 years of service is gone, but the employee with 32 years of service and a good record will require me to take a second look. And I expect an arbitrator to do the same.

Bethel: You'd take a second look in part, though, because you know what the arbitrator may think of something like that, right?

Zahren: Right, because it is so fundamental that it is a mitigating factor—good, long, loyal service.

Audience Member: I've seen cases where the company will try to turn the long service argument around with the basic premise being, "Well, here we have an employee who has 30 years of unblemished service. He should know better. He should know better than to do the kind of misconduct that he committed."

Audience Member: This discussion reminds me somewhat of Kathy Krieger's comments in the last session, when she observed that we are looking at labor relations and arbitration through a criminal justice lens rather than a relationship lens.[1] To say that you should not apply mitigating factors like length of service is a criminal justice approach. That is, if you rob a bank at 25 or rob a bank at 50, no matter; it is the same crime. But if you look at a relationship and say, "These folks have a lot invested in that relationship," then having a lot invested should make a difference.

Bethel: Okay. That is a nice parallel to the last session. Yes?

Audience Member: But you can see mitigation in sentencing guidelines in criminal law. You have this "one, two, three strikes and you are out." The same is true with a parent–child relationship—first time it is a "time out," but next time it is a spanking. You are still working the same considerations in the family relationship that you do in sentencing guidelines. I liked what Kathy Kreiger said this morning, but then I began thinking about it. I am not sure, in terms of penalty, that you really change what happens when you use a familial or a criminal model. Perhaps we need to talk about burden of proof, you know, the different standard as between criminal and family. But in sentencing guidelines or how you deal with your children, they're pretty much the same.

Bethel: If we are going to treat this as a familial matter, shouldn't these matters be solved within the family without bringing in some outsider who is not really a part of the dynamic? Yes?

Zahren: I have a question about the notion of an industry standard. There was a case of a police officer flying down the road at 80 miles per hour before he activated his siren and lights. He ran a red light and killed another driver. He was terminated. At the hearing, evidence was presented that in other jurisdictions, officers are permitted to run red lights any time they are in hot pursuit. The argument was that this employer should therefore not penalize the identical conduct. What is your reaction to an argument like that? It is essentially the argument, "Well, they allow

[1] *See* Chapter 3.II.

that, why can't you?" Should evidence of how other employers in the same industry deal with a particular type of behavior be relevant?

Render: I would tend to admit that type of evidence. I'm not sure how much weight that I would attach to it, but I sure would not prohibit the introduction of it. Among police departments, say Baltimore and Washington, DC, they probably do things similarly. AK Steel is probably not terribly different from U.S. Steel, so if you have an advocate say, "Well, here is the way it is done over at U.S. Steel," in an AK Steel case, I would not say it is irrelevant. Now, to the extent that somebody tried to say it was a binding past practice, I wouldn't buy that. I like to use the Federal Rules of Evidence definition of relevance. Evidence of a way of doing things in a related environment does make it more or less probable on the question of how it is done in this environment. So, if you have policemen running red lights while chasing people in other cities, that would be relevant.

Audience Member: My question is do, or should, "just cause" standards evolve or change within an industry? You brought up the example of the steel company labor gang with one person absent. If you follow steel, you probably know that there aren't any 50-person labor gangs left anymore. It is a one-person labor gang; and when that one person is absent, it has a far greater impact on the ability of the company to function.

Render: A company ought to be able to clean up its act any time it wants to, period.

Milsap: I'm not sure I understand that answer with respect to his question.

Render: When the company decides that it is going to get serious about absenteeism, it should be able to do so by giving its employees notice that absenteeism at the employee's whim will no longer be tolerated.

Milsap: How do we overcome 50 years of precedent?

Render: You post a notice that fairly notifies employees of the change.

Bethel: The question he asked in the back was that if you post a notice at Mittal Steel that from now on discharge will be imposed for the first unexcused absence, but no other steel company has discharge for a first absence, are we going to consider the reasonableness of the rule in that context? Or is knowing about the rule enough to allow Mittal to impose the penalty?

Oldham: Jim Oldham. I think it can be complicated. Suppose an employer unilaterally posts on the bulletin board, "From here on we are having a zero-tolerance policy with regard to drugs," and that has never been the case before. I think that would be right before an arbitrator as to whether the company has the right to do that.

Render: I think if a company adequately notifies everybody, it can do that.

Bethel: What if the company announces a zero-tolerance policy for blue socks? I think that the question that Jim is talking about is whether the zero-tolerance policy, itself, establishes "just cause." Is "just cause" simply what the employer says it is, or is there some other standard that must be met?

Render: The management rights article usually says that the company can make *reasonable* rules.

Malone: That is a good point, Ed. I would argue that "zero tolerance" is never reasonable. It is immediate without any other consideration like disparate treatment or anything else. So whether it is zero tolerance or not, if it is not a reasonable rule, there is no argument—no discipline.

Milsap: Forget the blue socks. Take zero-tolerance of drugs or drinking. If management proves that there is a basis for the policy and what the practice of that facility has been over a reasonable period of time—if they have done all those things, they're going to be sustained. On the other hand, if some manager simply put up the rule because he or she is the boss, and then discharged the first person who technically violated it, the company is likely to lose.

Bethel: Go back to the issue he raised a little while ago. Suppose Mittal Steel puts up a notice saying anybody who reports to work intoxicated is fired—a zero-tolerance policy. Suppose that termination on a first offense of that nature has not been the policy in the past. Finally, suppose that the reason management imposed the new zero-tolerance policy is because a drunk employee fell off a scaffold at U.S. Steel down the road and Mittal does not want that to happen in their plant. So, they decided to be proactive. Now nothing has happened in their plant, but is what happened at U.S. Steel good enough to justify the new policy?

Milsap: That would be good enough for me if the Occupational Safety and Health Administration (OSHA) came in and said, "That person fell because you didn't have safety standards in

place. That is why the person got hurt and you are getting fined for that." Certainly as a result of that, the employer would have the right to impose the new policy.

Bethel: But what about the employer next door who is worried about the same thing happening to it?

Milsap: I would look at that from the standpoint of the contract. If the language says the industry standards are controlling, then management can act. If it does not rely on "industry standards," then I would think it is great what the industry is doing; but the contract that I have before me is between that union and that employer.

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Bethel: This session is industry specific. We are people who either work in or are interested in manufacturing or heavy industry. The question before us is whether "just cause" means something different to us than it might mean in other industries? We may be more concerned about safety, for example. I have done some Internal Revenue Service (IRS) work and I have never had a safety case from them. I have had a lot of safety cases in manufacturing. Jim Oldham and I had a series of cases at Bethlehem about a provision in the steel industry contract that allows employees to invoke a right not to work pending a safety determination. So that is one difference that we may think about. The airlines clearly have an interest in safety as well.

I cannot speak as easily as the managers and union representatives about the changing workforce. What do you see now that you didn't see before? I can tell you what happens in law schools—the students these days come to class with baseball caps. And when the Indiana Supreme Court was there taking argument in the moot court room, the students were all in there with their baseball caps and shorts on—something we would not have dreamed of doing back in 1914 when we were in law school.

Render: What about a derogatory blog that may or may not have a substantial impact on the company?

Audience Member: What is a "blog"?

Render: A blog is basically a diary on the Internet. You heard about the employee of Delta Airlines who was fired for putting a picture of herself on the Web? That was a blog.

Audience Member: What a about a situation where contractor employees are referred to as "scabs" on an employee's Web site? Can that be a problem for the employee?

Bethel: There are probably blogs or Web sites on which employees and unions make disparaging and provocative comments about management. Can such comments lead to discipline? That is the question he was asking. Has anybody in the room had any cases of this nature?

Audience Member: Obviously there would have to be an established nexus in order for it to be an issue.

Bethel: You could establish nexus if they were saying, "Jeeze—I just found out how to electrogalvanize steel and here is the formula." But suppose they are just saying, "Well, the management of this company couldn't run a cool-aid stand without losing money." Trying to impose discipline for such a statement would be problematical, I believe.

Render: Then there is the case where the employee posts information on a Web site that the company is cheating on the contract.

Audience Member: We have experienced employees taking shots at the company on the Internet. Obviously, they are doing it during off-duty time and some of them are general allegations like Terry mentioned where the employee just says that the company can't run anything. But some of it is very egregious. It is threats—threats against the company or personal threats to kill unnamed managers. That is a really significant thing. You do not know who it is. And you do not know if they are serious. You do not know if they're just at home drunk and they're just rambling. But it is a really serious thing that is becoming very common. People are becoming a lot more computer savvy and setting up these Web sites and these blogs.

Render: One of the issues raised in a recent BNA book regarded the duty of loyalty. Blogging is just an extension of the duty of loyalty. You can deal with it if it has an impact on the company.

Bethel: Most of us would take seriously a threat to kill someone, even if you phoned it in so that you were not at the plant when you did it. But would a blog be different? Experts have claimed that one of the problems with the Internet is that it is too easy to say things that you would never say to people face-to-face; or to say things that you do not actually intend just to act out fantasies. So if an employee puts down in a blog that he is going to kill some su-

pervisor, is that something we should take as seriously as we would a threat in another context? Maybe something that brazen would be an issue. But it is a different culture or a different sort of setting than we are used to seeing for communication between employers and employees.

Milsap: You do not want to be threatened in any event.

Zahren: No. I do not. . . .

Oldham: The context is important though. Each case is unique. You have to know the context to know how serious the behavior is, don't you?

Zahren: A blog is just a vehicle for certain types of behavior. So whether it is people talking, whether it is an e-mail, whether it is a phone call, whether it is something on the bulletin board—whatever it is, it is a communication. That is all a blog is. For example, I am sure other employers in the room have policies against sexual harassment, creating a hostile environment, violence in the workplace. It is the conduct that is really important as opposed to how that conduct is carried out, how the communication is made, whether it is electronically or some other fashion.

Bethel: If the harassment is alleged to come from a blog in which someone makes disparaging or sexual remarks against another employee, is it enough for it to be on the blog if you are strict about your sexual harassment policy? Or is it something that has to happen at work? Is it communication that has to take place at work? When all this sexual innuendo is directed at another employee or group of employees at the workplace, is such a blog the kind of communication that can create "just cause" for discharge?

Oldham: Again, it would depend upon how is it related to the workplace.

Bethel: Well, I just told you. The only people this alleged sexual harasser is harassing are people who work in the same company; although, they probably do not get onto the Internet during the day and realize they have been harassed. They do not know that until they get home. Let's assume those are the facts.

Audience Member: Ok, but what does the employer do about it? I want to know what you are going to do with those facts.

Bethel: The employer fires the blogger.

Audience Member: On what basis?

Bethel: For sexual harassment.

Audience Member: For sending and receiving harassing material.

Bethel: Now it was not done at work? All the activity was off site, but all the people harassed were co-workers.

Audience Member: Presumably, the person who is the recipient of it has to voluntarily log on to the blog in order to be harassed.

Audience Member: You are told by your colleagues that this is out there and you should know about it.

Bethel: Sure. Yeah. "Look what he is saying about you."

Milsap: I think it depends on whether the employer representative in that arbitration is able to prove that the employee who put that information on the blog is having an effect in the workplace—that it constituted harassment and that the person felt harassed when he or she saw it.

Bethel: Does it have an effect in the workplace if co-workers see the blog and then start making fun of the target at work the next day?

Audience Member: Absolutely!

Audience Member: That raises an interesting point. As we get to a time when more and more the workplace is in the electronic universe, people might be working from home, they might be communicating electronically. So a blog may very well infect the workplace, which makes the physical location where it occurs irrelevant.

Zahren: I'm a little troubled about these blogs being connected to the workplace. Assuming there was sexual harassment directed at individuals on a blog, regardless of the fact that access and input to the blog is off duty, if the harassment were connected to the workplace and if the employer did nothing about it, you can bet the Equal Employment Opportunity Commission (EEOC) would be all over the employer. There would simply be no question that the blog had created a hostile work environment. What more connection to the workplace could we possibly have? The employer has an obligation to stop that because there is no question that it has an impact in the workplace and people are talking about it. From the employer's perspective, there is an obligation to stop it and to stop it as promptly as you can.

Render: But you've got to have a connection to the workplace, first.

Audience Member: Unless the EEOC has ruled, I am not sure what would happen. I do not think they have ruled because this is something that I think is absolutely new.

Render: Arbitrators do not enforce Title VII. We enforce company rules against sexual harassment. And, you know, in that context, you've got to show a relationship to the workplace.

Bethel: It may well be sexual harassment. The question is whether it is the kind of sexual harassment that the employer's rule affects, namely, sexual harassment involving employees or involving the company.

Audience Member: It seems to me that this is similar to other kinds of off-duty conduct. If a worker threatens a supervisor in a bar off the premises, then it is still going to be a dischargeable offense. And I see no difference between that and the worker who engages in sexual harassment of an employee off the premises as well.

Zahren: Well, you could have a fight over the affections of a woman in a bar, and it has nothing to do with the workplace. There may be a problem with that.

Bethel: Yes. For another example, if a supervisor and a bargaining unit employee live next door to each other and they get into a fight because somebody's dog barks all night, I do not think that is a dischargeable offense. A supervisor doesn't have a shield against aggressive conduct from someone just because he works at the same plant, does he?

I come back to this issue of whether a blog is a different context. For example, I have written e-mails that, thank God, I didn't send out. And I have said things in e-mails that I regret saying—that I would never have said to someone in person. There have been articles about how people behave much more aggressively in e-mail than they would in person. That is essentially what the blog is. You have this cloak of anonymity. Even though you know they can find out who sent the e-mail, you do not feel as vulnerable as you would if someone were sitting right in front of you. I do not know whether that makes a difference or not.

Render: That is the reason I use the telephone.

Bethel: Yeah, yeah. I'm certainly sure you do not open your e-mail because I've been trying to use it ever since we agreed to take on this program. [Laughter.] I have to call Ed and tell him that he has e-mail.

Well, I believe our time is expired. Thank you all for coming.