

National Academy of Arbitrators

ORAL HISTORY PROJECT

William E. (Bill) Simkin

Interviewed by Edgar A. (Ted) Jones, Jr.

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ORAL HISTORY COMMITTEE  
NATIONAL ACADEMY OF ARBITRATORS

INTERVIEW WITH WILLIAM Z. (BILL) SIMKIN  
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WHEN DID YOU ARBITRATE YOUR FIRST CASE? DO YOU REMEMBER IT?

I don't remember the details of the first case. I remember the overall circumstances very well, however, because I had the unusual break of starting off as, in effect, an apprentice to George Taylor. I was an Instructor at the University of Pennsylvania and also taking full-time graduate work. One of my courses was George Taylor's labor course. Of course George always did some talking about arbitration and at the end of the term—he was a tough teacher, a very good teacher—we had a term paper. I went to have a conference with him about the term paper. At the end of that discussion, I said: "by the way Dr. Taylor, during the course of this year I've gotten some interest in arbitration, do you suppose there would be a chance of my sitting in on a couple of cases some time during the summer?" And he laughed with that infectious grin George had and said, "You know that's interesting, I'm ready to offer you a job." It so happened that as Impartial Chairman in the hosiery industry there was an unusually heavy load of work ahead, and they had agreed to hire an assistant to George. For some strange reason, George had picked me out as a candidate, had already tentatively cleared me with the parties. Within a week after that conversation, I had resigned my job as an Instructor for the following year and started in full-time.

WHAT YEAR WAS THIS?

This was on July 1, 1939, and so I started off full tilt.

AND YOU WERE GOING 60 MILES AN HOUR FROM THE OUTSET.

Curiously enough it was the biggest thing that ever happened to us financially. I jumped from \$1,800 a year as Instructor to \$4,000 a year as Associate Impartial Chairman. So I owe professionally a great deal to George Taylor in more ways than one. Not only did few of us ever get the chance to start in arbitrating on a full-time basis but that was a really precious experience to start under George. He was a wonderful teacher, as a class teacher, and more particularly a wonderful mentor in terms of training arbitrators. We started out on the basis that I would go with him to hearings, I would then write a draft opinion, a draft decision. Then we'd sit down and talk about it. Eventually, usually after revisions, he would sign it. Then very shortly thereafter he began to put me out

on cases on my own. I would suspect it would be, perhaps, maybe late August or early September of 1939 that I heard my first case on my own. Then for that first year when George was continuing as Impartial Chairman we worked jointly and I heard a lot of cases separately. Sometime late in 1940, I think, he moved to General Motors as the Umpire and they moved me up to Impartial Chairman in hosiery. My first cases were all in the hosiery industry, then shortly thereafter in men's clothing where I had the same relationship with George as Impartial Chairman and I was the Associate. So my first experiences were primarily in those two industries, plus, very quickly, a few ad hoc cases mostly through referral by George. Somebody would ask him to arbitrate a case and he didn't have time enough; he'd say will you take Bill Simkin. And so I got my start through George rather than through the AAA or the FMCS.

IN THOSE FIRST YEARS WHAT KIND OF A VOLUME OF CASES WOULD YOU HAVE HAD?

I do have a total for '39 through '46 which was 862. I began part time work with the War Labor Board in 1942. In 1943 I went full-time with the board and didn't do any arbitrating for a little over two years, and then went back to arbitration in '46. In terms of pre-World War II, that figure would probably have been something like five or six hundred cases before the war, primarily hosiery and men's clothing in the Philadelphia market.

DO YOU REMEMBER ANY OF THE AD HOC CASES?

The early ones?

YES.

Not off the cuff, no.

THEY'D BE IN THE PENNSYLVANIA AREA, NEW YORK AREA?

They'd be in the general area of Philadelphia. There weren't any that I recall that were far away. After World War II, I went into two primary industries, shipbuilding and tire and rubber. I was the Umpire at Goodyear Tire and Rubber beginning sometime in the Fall of 1945 and then a little before that I started as Impartial Chairman at Cramp Shipbuilding, a now defunct shipbuilding company in Philadelphia. Then I arbitrated for some time for Sun Ship in Chester, PA and then for Bethlehem Steel Shipbuilding Division on the East Coast. So those were, in the immediate post-war period, my principal jobs.

WE'LL COME BACK TO THOSE, NOW LET'S MOVE BACK BEFORE PEARL HARBOR TO GET SOME SENSE OF HOW YOU AND GEORGE, AND THEN YOU PARTICULARLY, HANDLED CASES AS THEY CAME ON.

Especially under the Impartial Chairman concept, you get well acquainted with the parties. The Impartial Chairman is on a friendly informal basis with everybody. It's well understood that there's

freedom to talk about cases after they're been heard, and even before they're heard.

EX PARTE?

Ex parte or, more commonly with representatives of both parties. You are expected to do some mediation whenever appropriate.

AND NOT WORRY IF YOU EAT LUNCH WITH ONE AND NOT THE OTHER?

Oh, not only not worried but it would be strange if you didn't.' Well, take the hosiery thing for example. That manufacturers' association covered plants in Philadelphia and various parts of the country. There were concentrations in Port Wayne and Minneapolis and Milwaukee and Indianapolis and Des Moines. When we would deliberately schedule a batch of hearings on a circuit, I would travel (and George when he was still there) with the top two or three people from the union and the top two or three people from the manufacturers' association. We'd take the same trains, stay at the same hotels, eat together, drink together and work together on hearings. And there was absolutely no question about that in the mind of anybody, and everybody knew about it. Even the people in the plants knew that we had this kind of relationship. So I started with that kind of a free relationship. The basic notion is that unless the parties have confidence in your integrity as an arbitrator the whole system's no damn good anyway. So this kind of relationship is expected.

Now in the prototype of the Umpire setup, however, you do not do most of these things. You don't normally talk about cases after the hearing with the parties. You work pretty much as you would as an ad hoc arbitrator. You work out your decision and mail it to the parties. But there are in many Umpire arrangements understood and clearly recognized deviations from that hands-off attitude. Where you get a particularly tough case, by prearrangement with the parties, usually you sit down with both of them jointly rather than use separate conferences. So the stereotype of the "Impartial Chairman" versus the "Umpire" gets into different kinds of mixes in real life. I have served in Umpireships where I had virtually no contact, except friendly social contacts for lunches and dinners; it's very strange indeed if those things are not accepted. But in some of the Umpireships the parties do not accept the notion of talking about cases. But even in some ad hoc cases you get some of the Impartial Chairman concept. For example, I've had ad hoc cases where, walking out of the hearing room on a discharge case which is obviously a lousy case for the union, the local union president will say, "Bill, sorry about this but you know we had to do it," that kind of off-hand comment.

THAT FELLOW COULD BE IN TROUBLE TODAY UNDER FAIR REPRESENTATION DOCTRINE.

Well, only if I squealed on him and I'll bet there are very few arbitrators that have a friendly relationship who haven't had that kind of an experience, and similar comments from the other side of

the table *on* occasion. So I don't think this Impartial Chairman versus Umpire concept is that clear-cut, and, to repeat, under all arrangements it was Taylor's philosophy--and I inherited it from him and tried my best to live up to it--that unless, repeat, unless the parties have confidence in the integrity of the arbitrator, you quit. If anything happens to destroy that integrity, the whole business is no good. Unless arbitration is a really viable alternative to the no-strike clause it just doesn't serve its function. Once anything happens so that it no longer is a viable alternative the parties had better change the system or change the arbitrator. We had another sort of rule of thumb in the Impartial Chairman concept: you might not talk after the hearing to the winner, but you must talk to the loser. You must talk to the loser. Now, this is born out of the basic notion that it's kind of cold and cruel to pick up a piece of paper, read that and that's your first notion as a party of what's going to happen with that case. George used to operate--and I've tried to--on the principle of as few surprises as possible. I didn't do this in most of my Umpireships; but in the Impartial Chairman relationships, you almost always talk to the loser some time or other. It might be a casual remark; or if it was a tough case, you'd sit down face to face, go over the whole business with the top representatives of one side and explain the reason for ruling against them orally in addition to trying to write an opinion which would help sell the notion.

As another aspect of it, particularly in the Impartial Chairman relationship, also in my own experience in most of the Umpireships, it was accepted that the arbitrator should play an active part in the hearing and shouldn't just sit there and listen, like a dummy. Now, of course, there are ways to do this and not to do it. You don't interfere with the presentations of the parties; but when they have pretty well finished, then you begin to ask pertinent questions. Maybe something has not been explored adequately to suit you and you want it explored further. Maybe you ought to ask a question that sort of tips your hand a little bit. Judges do this, you know, they ask questions and the parties get a notion from the questions asked as to the line of thinking. Now, I think, this is highly desirable for two reasons. One, it's not impossible that you may be going off on a tangent and you're getting an impression of this case that's wrong. Well, if you ask some of these questions you give the parties another crack at you to pull you back and put you on the right track. And the other reason is that this sort of tips off the parties so that they're not so surprised when they get the decision.

I'VE HAD A NUMBER OF CASES WHERE THEY'VE SETTLED ON THE BASIS OF THAT TYPE OF QUESTIONING. BUT I'VE NEVER HAD A CASE SUCH AS THE ONE I THINK YOU DESCRIBED IN YOUR BOOK WHERE THEY THEN CAME BACK IN ON OPPOSITE SIDES.

Oh, those two cases were beauts.' One, I don't think I had this in the book, was a hosiery case. There was a little German Superintendent of this small plant who knew absolutely nothing about

labor relations. The union brought a grievance and it was a stinking grievance. But the union was making the best of it at the beginning of the hearing, and this little Superintendent didn't know how to argue. He was messing it all up. So Taylor started asking questions. Well after a few of Taylor's questions, the people who knew Taylor, (I was sitting in as an apprentice in my early days and watching this performance) everybody in that room knew that the union was going to lose that case except one guy. That was the guy who was presenting the company case. After the hearing, he came up and pumped George Taylor's hand and he said, "Well Dr. Taylor, no hard feelings, no hard feelings, we all have our job to do." He just didn't understand that Taylor had in effect helped him out when it was a case the union must lose by all reason. But if you had been deciding that case on the basis of presentations it would have been a holocaust.

The other case that I referred to in the book was in the dress industry in Philadelphia which Taylor and I entered in 19<sup>7</sup> after the war. This was an Impartial Chairmanship, but it was a different one from the hosiery and men's clothing. The dress industry had been accustomed to have lawyers--not in every case but in most cases they had a more formal presentation. They happened to have lawyers on both sides who were very strong-willed buys who argued hot and heavy. They were arguing this case vigorously. After about a half hour, Taylor asked one question. I don't recall what the question was, but jaws dropped around the table because there was a relationship of this case to another important contract clause that they had just not thought about. Both sides said: "We better have a caucus." They had a caucus and they both came back arguing diametrically opposite to their earlier presentations and just as vigorously. That one question opened up a vista that they hadn't thought about.

There are lots of cases where you don't have to ask questions. The thing is pretty clear-cut. But certainly under the Impartial Chairman concept, if you have questions, you ought to ask them at the hearing--cutting questions, nasty questions sometimes.

WAS IT APPARENT THAT GEORGE SAW THIS OTHER CLAUSE AND SAW THE POSSIBILITY TO THAT?

Sure. He saw that if this case went one way a much more important series of principles would be cutting diametrically opposite.

HAVE YOU EVER HAD A CASE YOURSELF WHERE IN THE COURSE OF THE PRESENTATION IT BECOMES EVIDENT TO YOU THAT THE POSITION THAT THE PARTY IS ESPOUSING IS REALLY AGAINST THE SELF-INTEREST OF THE PARTY BUT DOESN'T SEEM TO REALIZE IT?

Oh yes. I've had numerous cases like that.

YOU WOULD MOVE IN ON THAT EVEN IN AN AD HOC?

Sure I would even in an ad hoc. Let's put it this way. In ad hoc, I think you have to feel your way because there are some parties that you meet for the first time, and if you've been around,

you'll know from little things whether they are amenable to an Informal procedure or not. You have to feel your way, you may try a question or a remark, and then, depending on their reaction to that, you may ask some more, or you may cut it off. It's absolutely clear to me over the years that arbitration systems differ tremendously in this country, there's just a tremendous spectrum of practices that the parties have and of what they expect. I think this is good. I think the system should be devised by each set of parties to meet its own needs. They may change their mind from time to time but the arbitrator should adapt himself to what the parties expect. If they expect a ball-and-strikes umpire, no discussion, no real participation of the arbitrator, formalistic proceedings, I think the arbitrator has to go along with that process, at least up to a point. And he shouldn't try to convert those people, they've got him for only once. But this is kind of an intuitive thing, you just have to feel your way. You can get some notion even at the very outset of the hearing. For example, do the parties want to swear witnesses? That's a little bit of a tipoff on formality. If they come in with a number of stipulations, that's a tipoff on relative informality even if they have lawyers. If on the other hand, they start off with this rigamarole of trying to develop a case entirely through witness testimony, which is a lot of damn nonsense in my opinion, you have to adapt to that or else get out.

YOU CAN'T GET OUT VERY WELL.

Well, you can't get out of that case but you can refuse to take another one even if they want you. You can, if you've got enough work. There's scuttlebut around, you know, about how the parties behave. For example, I deliberately avoided those railroad adjustment board cases because of the scuttlebut I heard about them. I just didn't want any part of it. I had a few opportunities to do it and said no.

LET'S LOOK BACK AT PRE-WAR STILL. ONE OF THE THINGS I WAS INTERESTED IN GETTING YOUR RECOLLECTIONS ON IS THE EXTENT TO WHICH YOU HAD CONTACT WITH OTHER ARBITRATORS. NOW, COMING INTO THIS WITH GEORGE, HE PROBABLY WAS SOME KIND OF A FOCAL POINT FOR PEOPLE ARBITRATING.

Oh yes. He was the principle focal point in Philadelphia. Allan Dash was starting, getting some assistance from George. Allan had actually heard a few cases before I ever did. Later on George, Allan and I shared an office for a good many years. It wasn't a partnership but we shared an office and divided up secretarial and other expenses. Then in Philadelphia back in those early days, there was a good deal of informal contact, having lunch with each other and that sort of thing. As part of his educational work with the University of Pennsylvania, George would occasionally run conferences. Long before the Academy started, we had a Philadelphia group of arbitrators who would meet periodically for dinner and an evening of discussion about something or another.

THINKING ABOUT PRE-PEARL HARBOR, WHO WOULD THE PEOPLE BE?

Oh, Allan Dash, Alex Fry, Tom Kennedy, Howard Teaf. I think Hazen Hardy and Perry Horlacher had done some work before the war. Lee Lichliter did while he was up in Harrisburg, but we'd see him occasionally.

HOW ABOUT THE PITTSBURGHIANS?

Well, that was too far away for them to join our little get-togethers.

WERE YOU AWARE OF THEM EVEN THEN, BEFORE THE WAR?

Well, really there weren't any to speak of. I guess Clair Duff probably did a little work pre-war. But, you see, the steel arbitration started during the war. There weren't any arbitrators of the steel industry pre-war. So the Pittsburgh development was during the war, immediately post-war and later.

HOW ABOUT THE PEOPLE IN NEW YORK?

We had virtually no contact in our Philadelphia group with the New York group. I don't know why but it was a lone profession back in those days. You have to remember that there weren't too many arbitrators or people used to arbitrations pre-Pearl Harbor. There were these Impartial Chairmanships in hosiery and men's clothing and there was a rather peculiar kind of arbitration in the coal industry, which was entirely different and I don't know too much about it. There'd been arbitration in the printing trades but as for mass-production industries, essentially no pre-world war.

THEY GOT ORGANIZED IN THE LATE '30S.

They were organized in the late '30s and after organization it took a while for the arbitration concept to catch hold. A big selling point, of course, for more arbitration in mass production was when General Motors and the UAW adopted it. Their first arbitrator was Harry Millis, who worked for a short period before Taylor went there in late '40. But the big boost in mass production arbitration of course occurred during World War II, partly as a result of War Labor Board activities.

YOU WERE INTO THAT, OBVIOUSLY, IN THE WAR LABOR BOARD.

Yes, I did a variety of things. I started out as what was called a Special Mediation Representative and then became an Alternate Public Member. My longest stint was as a Chairman of the Shipbuilding Commission which was one of the War Labor Board Commissions. We had jurisdiction nationwide of the shipbuilding industry. And, of course, it was partly as a result of that kind of contact with shipbuilding that I was asked to arbitrate in the shipbuilding industry after the war in those three places I mentioned earlier.

RIGHT. NOW LET'S SEE NOW. I WANT TO BE SURE THAT WE COVER THE PRE-WAR. I THINK YOU'VE PRETTY WELL DESCRIBED IT.

This business of selection, I think we've covered that.

RIGHT. HOW ABOUT THE CAREER, THE POSSIBILITY OF A CAREER? YOU BECAME FULL-TIME FROM THE SOUND OF THE GUN: RIGHT OUT OF THE BOX. YOU WERE IN THE MAJOR LEAGUES THE MINUTE THE GAME STARTED.

Right from July 1, 1939; I'd never heard a case; from that time on I was in it full-time. The only exceptions being the War Labor Board time out which totaled an equivalent of about three years and then the eight years in Washington as the FMCS Director, although, of course, slowing down in volume since I've moved out here to Tucson.

IN THE WAR LABOR BOARD, IF YOU KNOW, WHO WAS OR WHAT GROUP OF PEOPLE, WERE RESPONSIBLE FOR THE THRUST TOWARDS ARBITRATION?

Well, again, George Taylor was the leader along with Wayne Morse. They were by no means the only ones. The realistic problem was this: as you will recall the War Labor there was the no-strike pledge for the duration of the war.

I KNOW THIS AS A STUDENT. MY PART IN THE WAR LABOR BOARD ACTIVITY WAS TO BE A MARINE CORPS SECOND LIEUTENANT.

The Board was set up to decide disputes as an alternative to the strike. Because of no arbitration in the mass production industries, the Board began at a very early date to get flooded with grievance disputes. In addition to new-contract issues they got flooded with grievance disputes. It was just a physical impossibility, among other things, for the Board to handle that flood of grievances. They did handle some in the early days; but they saw--largely under Taylor's leadership--that the only way out of that morass of grievances was to get arbitration started in those various places so as to get rid of the cases before the Board. It was almost that simple, plus the fact that General Motors and the UAW acceptance of arbitration before Pearl Harbor--and a few others in mass production--had started the ball rolling. The industry guys on the War Labor Board became great sellers of arbitration to their friends, not only in their own companies. They became, most of them, strong exponents of arbitration and the whole business snowballed during the war. One illustration is Goodyear where I arbitrated after the war. They had a horrible mess, they had strikes, particularly at the Akron plants--they'd strike over almost anything--and it got so bad that this is one of the plants during the war that was taken over by the Navy. They flew the flag, and labor relations were taken over by the Navy. The Goodyear company people, out of contacts in the War Labor Board, became convinced that they had to have arbitration. So they had a contract negotiation. The company insisted on arbitration. The union would have no part of it in Akron. So that issue--should we or should we not have arbitration--went to the Cleveland Regional

Board. The Regional Board ordered the parties, against the union's vigorous opposition, to adopt an arbitration system with a permanent Umpire, and I came into that kind of an environment. Now that didn't happen too often. Most places it was the reverse; generally it was the unions in those days that were anxious for arbitrations and the companies that had to be sold. It was a voluntary adoption, however, in many areas.

WHEN YOU WERE ORDERED IN THERE, WHAT WERE YOU ORDERED IN TO DO?

They had agreed on a pretty typical arbitration clause. They would have an arbitrator for the life of the contract. The usual "may not add to or subtract from" and so forth. Then right at the end of the war I was called in for an interview to see whether they wanted to hire me and they asked me a lot of questions. But I think probably George and other War Labor Board people had recommended me. They had two or three other people they interviewed earlier. In any event after they interviewed me they got together in a separate huddle and decided they wanted to hire me. So they started talking about a retainer fee and so forth, and things went along free and easy with no hassles about retainer fee or per diem or whatever else the arrangement was, and then they sent their two attorneys to a separate room to write up a contract for me. Well, the rest of us were chewing the fat and the attorneys were in the other room, and after a half an hour or so, they said these attorneys hadn't got really started on writing up a simple contract on the terms which we had already agreed to orally. So the top company guy said that he was disgusted; he said, "Bill, you write it." So I sat down and on a piece of yellow paper I wrote out a short page and I read it off to them. They both looked at it and said, "sounds alright to us," so they had it typed up and signed it. By the time the lawyers came back into the room--still with no contract--we already had it finished.

WHAT KIND OF A STIPEND WOULD YOU GET AT THAT TIME AS A RETAINER?

The rubber industry is piecework and they wanted a piecework system for arbitration. So I got \$50 a case. But they could take three or four like grievances and it was still \$50 for the batch. The option was exercised frequently. If I needed more than two days of work time in writing up the opinion on a very complicated case, I could go to them and say, look this is more than one case and let's call it two or three cases, an option that I exercised about twice over a total of eight years. Now the ante was raised a little bit over the matter of eight years. Also, there was a \$5,000 per year retainer minimum; the \$50 would apply toward the retainer. They went well above the retainer in volume during most years. This started in '46, and, of course, I had other work besides Goodyear.

HOW BUSY WOULD YOU BE WITH GOODYEAR THOUGH, ABOUT HOW MUCH DEMAND ON YOUR TIME?

I'd say it was a third of a full-time job and full-time for me then was days, nights, Saturdays and Sundays.

DO YOU HAVE A HEAD COUNT ON THE NUMBER OF CASES IN THAT PERIOD?

In Goodyear, for example, there were 94 in '46; 44 in '47; 116 in '48; 154 in '49; the peak was 161 in 1950, and then it began to tail off a little. Then there's a gap because I got fired three times.

YOU GOT REHIRED TWICE?

I got rehired twice.

It was really post-war before I got into ad hoc cases of any consequence, and that ran about 20 percent of my caseload; permanent held at about 80 percent over the years.

I THINK THE EXPERIENCE TODAY IS THE OPPOSITE.

I think for most arbitrators it is the opposite, more ad hoc than permanent.

IT'S REALLY SUBSTANTIAL, ON THE ORDER OF 80 - 20 OR MAYBE 90 - 10.

Well, I've had a total--I had three years out during the war and, say, eight years out for the FMCS--11 years out from '39 to '77--leaving about twenty-seven years of arbitration, including recent years when I have been slowing down a little. My total cases during that period total approximately 5,000. With the 20%, that means roughly 1,000 ad hoc cases of one kind or another so I've had pretty good exposure to ad hoc. I do detect some changes, particularly in ad hoc arbitrations. The tendency toward formality that has emerged probably has been due to the lawyers getting into the act more heavily than they used to.

AS ARBITRATORS AS WELL AS ADVOCATES?

I'm talking about advocacy, representing the party. In my sample of ad hoc cases in the early years, well I'm just talking off the cuff, I would say in not more than 30% of those cases would lawyers represent the parties. Sometimes a lawyer on one side and none on the other. I think probably that's grown until in more recent years it is at least close to 50% in ad hoc.

HOW ABOUT BACK IN THOSE PRE-WAR SITUATIONS? DID YOU SEE LAWYERS THERE?

Well, in the Impartial Chairman concept almost never. There were perhaps two or three cases in hosiery where some real legal issue was involved where lawyers came in for both sides. In men's clothing, I never saw a lawyer. In the dress industry, they used lawyers extensively. The dress industry, in spite of its being an Impartial Chairman arrangement, tended to be more formal. The men's clothing was the least formal of all. I arbitrated either as an assistant to Taylor or on my own in men's clothing for two years before I ever saw the contract. It was sort of a "Mr. Anthony, we got a problem."

Most of them were discharge cases. After about two years we had a case on vacation pay. Right in the middle of the hearing, which was short, the manufacturer said "wait a minute, I think we got something in the contract about this." So we searched through my files, which were joint files with George, and we found a copy of the contract, and sure enough, the answer to this grievance was right in the contract, clear-cut, so the case was over. But George used to laugh about this. When he started, they didn't even have a contract. I'm sure this was a little bit overdone but George used to go around talking about what a wonderful relationship this was in the men's clothing industry in Philadelphia. They began to get inquiries from people who were interested who said we'd like to see a copy of your contract; it sort of shamed them into negotiating a contract. That early contract was a very skeletal kind of a contract. The same way in hosiery. It was another characteristic, at least in those early days of the Impartial Chairman concept, that there would be a very short contract, really skeleton contracts.

DID YOU SEE THE PHRASE "JUST CAUSE" IN THOSE DAYS?

Oh yes. I mean I think that was in there in case of discharge. Discharges mentioned "just cause," which is still around. But take a matter like seniority. There was just a little tiny sentence in the contract about seniority, and the real seniority principles were developed by Taylor's early decisions. And in hosiery they had a peculiar clause in the contract in those days which a lot of people would shudder about. The clause said "all decisions of the Impartial Chairman are hereby made a part of this contract," and it was an industry-wide concept for a while. We had three kinds of decisions: letter decisions which involved some kind of a principle.

YOU WOULD WRITE A LETTER EMBODYING A DECISION?

No, it was a regular full-blown decision, but they were numbered. For example, they were "A-10" and then the next contract would be "B-1" to so and so forth. Those were the cases that were important cases, normally involving some principle. Then the next group of cases were Memos. Memos either did not involve an industry-wide concept, involved some minor matter affecting that plant, or they were simply a repetition of something that had been in a previous letter decision. And then the third group were called "SWDS"--settled without decision--and were about a third of the total cases. Whenever you'd go into a plant and you'd mediate a settlement, you'd immediately sit down and write out the essence of the mediated settlement and that would go out as an "SWD," a very short thing.

SO IT WAS ONLY THE FIRST OF THE THREE THEN THAT WOULD BECOME A PART OF THE CONTRACT?

Yes, that's right; the others were not worthy of that much distinction.

NOW, RELATIVE TO PROCEDURAL MATTERS, I GATHER IN THESE IMPARTIAL CHAIRMAN SITUATIONS YOU REALLY WOULDN'T HAVE HANGUPS ABOUT OBJECTIONS.

Almost never a procedural objection. The general notion was that anybody could say anything they wanted to whether it was pertinent to the case or not. You would frequently say to some guy, "look, better cut it off, you're using too much time on this, this is not important," that kind of an offhand comment; but in terms of tough legalistic procedural questions, almost never.

IF YOU HAD A CLAIM, SAY, THAT LOOKED TO YOU TO BE TERRIBLY DELAYED, YOU WOULDN'T REALLY TALK ABOUT IT IN TERMS OF TIMELINESS, YOU'D JUST SAY IT WASN'T FAIR?

The company would say: "this is an old, stale issue." I mean they'd raise that point, and then if there was any valid defense for the time involvement, the union would give the reasons why it was valid. Practically no time would be spent discussing timeliness as a technical matter.

Maybe I've just been plain lucky but even in my ad hoc experience I've had very few hassles over procedural problems. The only ones of consequence are the occasional one where there's an honest to goodness question about the arbitrator's jurisdiction. Now those are important and they deserve more attention. I've had quite a number of those. Normally I've been able to kid the parties, saying "Well, look, I don't know whether I have jurisdiction or not. I understand your arguments but even to answer that question we have to know a little bit what this case is all about so we get into the merits." Then they'll usually wind up saying, "Okay, we'll put it all into one ball of wax and write one opinion." Of course if I denied jurisdiction, which I did occasionally, you just don't explore the merits. But very seldom, even in recent years, have I had two sets of hearings. I think it has happened two or three times. But when these legal niceties arise about whether a certain piece of alleged evidence should be introduced I usually say, "Well, look, I don't know whether it's pertinent or not. Let's hear it and if it has no relationship, we'll throw it out." Usually they go along, even the fairly stiff-necked lawyers will usually go along. Sometimes they object.

HOW ABOUT THE ADMISSIBILITY OF AFFIDAVITS?

I have no particular problem about affidavits. Oh, one side will say, "Well look, if you want to get this evidence in, bring the guy or gal in. But if there's some reasonable cause why they weren't there, I've never had any serious problem about letting affidavits in or signing subpoenas for that matter. I've had to sign subpoenas a couple of times where somebody was the witness, say a police officer, and they wasn't permitted to testify without a subpoena, I'd sign the subpoena.

To change the subject a bit, and it may sound like I'm a crazy kind of an operator, but I have to tell you one story that occurs to me. I better not mention the place. It was a permanent one. I'd

been around a long time, lawyers were used by the company almost always, by the union rarely. And they had had a long strike, and the union business agent made his opening statement in this first of several cases we had scheduled for the day. I turned to him and said, "Look Charlie, I know you guys are broke after the strike and it's going to cost you something if I write this up. I suggest you drop this, withdraw it, you don't have a case on your own story for two or three reasons." The union guy said, "Okay, Bill, we'll take your advice and withdraw it." You know this is something you wouldn't do unless you know everybody extremely well. The company had a brand new lawyer, very nice guy, but he was a stranger to labor and he had a sheaf of papers prepared for this case. The company lawyer said, "Oh no, we won't let the union withdraw." I tried to argue that boy around it and I couldn't. So I said, obviously disgusted, "Okay, go ahead, present your case." So we heard the case; it wasn't too long. But then I couldn't resist a nasty impulse. I turned to that lawyer and I said, "You know, now that I've heard the company case I kinda think I made a mistake about the union withdrawing." (laughter) I couldn't resist it. The union guys were hilarious. They knew I was kidding, but he didn't. He was in a state of shock. So the general manager said, "We better have a caucus." They came back and allowed the union to withdraw its case.

Now I'm not suggesting that this is my typical line of behavior; it isn't. Obviously this is an extreme kind of a situation. But I am mentioning it only because here was one of the Umpire types of permanent situations where you get to know the parties so well that you can do things—whether I was right or not is arguable—or at least think of doing them that you wouldn't even dream of in an ad hoc case. But when you work with the same people, essentially the same contract with occasional changes, you've been into the plants and, most important, you know the people and you can look at a written grievance and, except for a few facts, you could go and argue the union case and could go over and argue the company case on the contractual issues. These factors add up to a tremendous timesaver in contrast to ad hoc.

DO YOU REMEMBER, DID YOU EVER BREAK YOUR PICK? YOU KNOW I NEVER RAN ACROSS THAT EXPRESSION UNTIL I READ IT IN YOUR BOOK.

Oh, that's a mediation phrase picked up out of the coal mines, "you break your pick." Oh sure, like most of us, I have had plenty of cases where I've served as an ad hoc arbitrator on one case and never been asked back again. In a few of those instances I've been advised why, made somebody mad; then too, as evidenced by Good-year where I was fired three times, I've been fired as an Umpire. I have resigned too. There are two types of resignations. One is an entirely optional act by the arbitrator. For example, I resigned everything when I became Director of the PMCS. The other is a resignation in anticipation of a firing. I've always figured that this is a part of the game. I think we talked about this a little bit ago. Unless the arbitrator is really accepted by the parties, he ought not to be there. They better try somebody else.

AND IT DOESN'T REALLY MAKE MUCH DIFFERENCE WHAT LANGUAGE THEY USE IN THE PROCESS OF INDICATING THAT.

No, whether it's a resignation or whether it's a firing.

THIS LEADS INTO A QUESTION: HOW MUCH FEEDBACK DID YOU EXPERIENCE IN THOSE EARLIER YEARS, SAY AFTER THE WAR OR BEFORE IT?

Well, it's an integral part of the Impartial Chairman concept that you get the feedback immediately. Perhaps I ought to correct one possible notion about mediation in those Impartial Chairmanships. This was not just free and easy mediation to get any kind of an answer that the parties would agree to. In those Impartial Chairman situations, unless it was a case that could be mediated right on the spot, normally we would go back and write up that decision, a rough draft. I have found over the years that when I walk out of a hearing in 90\* of the cases I have a pretty good notion of what the ruling's going to be before I leave the room. There are a few cases that are so tight that you don't know. I've had the experience of coming to a tentative decision, then of sitting down and writing it out, and get about half way through the opinion and find I can't write anymore and I say, "Wait a minute, Bill, this doesn't hold water." You sometimes get off on a tangent and the requirement of putting it in writing, so that it makes sense in writing, gets you back on the track. So in most of these Impartial Chairmanship relationships the way the so-called mediation thing would operate, we'd write a rough draft, we'd call the parties in for a conference. Usually we wouldn't show them the rough draft right off the bat, we'd talk about the case and then indicate what the decision's going to be and why, all orally. Then depending on how much fireworks there were from the losing party, you would drag out the rough draft and have them look it over. Curiously enough, very few decisions were ever changed as a result of that mediation process. But they were sold, which is the real essence of and virtue of the process. In a good many cases they were accepted by everybody there with reasonably good grace, including the loser. One reason for showing them the rough draft was, you know, we can write things to try to explain one case that'll stir up a hornet's nest someplace else. And every once in awhile when the parties have a chance to see a draft they can pick out those things that we don't recognize to be potential troublemakers. Now that doesn't change the decision but it avoids a hell of a lot of trouble on numerous occasions.

HAVE YOU EVER USED THAT TECHNIQUE IN AN AD HOC SITUATION? LIKE, "HERE'S THE DRAFT OF MY DECISION?"

I'm not sure. I think I have in a few, well, I know I have in a few cases because I've had a few relationships over the years which are technically ad hoc. I mean I'm not retained for any period of time but they keep asking me back over and over again. Frequently in those relationships this kind of a working arrangement gradually develops. There have been perhaps a few straight ad hoc cases where I never knew the parties where this has occurred.

PROBABLY WHEN YOU MIGHT HAVE SENSED THAT THERE MAY BE THINGS HIDDEN IN THE BRAMBLE BUSH.

Yes. That may have been but it would be most unusual in ad hoc and it's really unusual in most of the Umpireships to go over drafts.

WE HAVE BEEN TALKING ABOUT THE SELF-DISCIPLINE OF WRITING OPINIONS, AND THAT LEADS ME TO ASK ABOUT YOUR EXPERIENCE IN EARLIER YEARS-- AND THEN PRESENTLY--RELATIVE TO ISSUING BENCH AWARDS.

Actually, I don't have any statistics but the number of bench awards I've issued out of these 5,000 is miniscule.

THAT WOULD INCLUDE EVEN THOSE IMPARTIAL CHAIRMANSHIPS?

Right, because in those Impartial Chairmanships one of the tricks of an arbitrator's active participating in questions and so forth is to do it without a firm commitment. I mean you obviously don't say, "Look, I think this case ought to be decided this way." You get at it indirectly and, in most circumstances, you don't make positive statements. You let the parties use their imagination; you leave enough rope so that if you find that you're on the wrong track you can retreat. Now this is easier said than done.

THIS SEEMS TO BE ONE OF THE SKILLS THAT DEVELOPS.

If you use those tactics, you develop it various ways. Now there have been instances, notably in discharge cases, where I have had one of the parties say at the end of the hearing, usually on the record whether there's a transcript or not, "Look, this guy's out of work, if you write it up it's going to take a couple weeks and if you put him back it may be more back pay. How about giving us an award now?" If both parties agree, I have done that on a number of occasions, but the total number is small. Now going back to the Impartial Chairmanships, those in effect were mediated awards where the parties themselves agreed—with a little stimulus and a little prodding—the parties themselves agreed and said: "Look, we're agreed on this, just you write it up. You write it up later." Those were SWD's in hosiery which is a different thing from a bench award as I would understand the term.

RIGHT.

I don't have any strong feelings adverse to a bench award. I don't think the arbitrator should press for a bench award. If the parties suggest it, and both sides are agreeable, I don't see anything wrong with it.

YOU USED THE WORD "RECORD" AND REFERRED TO THE FACT THAT THERE WERE NO TRANSCRIPTS. THERE'S BEEN SOME DISCUSSION ABOUT WHAT IS THE "RECORD." IS THERE SUCH A THING AS A "RECORD" WHEN YOU DON'T HAVE A TRANSCRIPT? I GUESS THE ONLY TIME THAT SEEMS TO COME INTO FOCUS IS THE ARBITRATOR BEING CALLED INTO SOME KIND OF A JUDICIAL

PROCEEDING TO TESTIFY AS TO WHAT HAPPENED IN FRONT OF HIM BECAUSE THEY DON'T HAVE ANY OTHER KIND OF A RECORD. HAVE YOU EVER HAD ANY EXPERIENCE LIKE THAT?

Well, you really have two questions there. I suppose the "record" is the long hand notes I always take at a hearing plus whatever papers the parties hand me. As for being called to testify in court, that never happened to me. Thank goodness.

WELL, WOULD YOU GO? WOULD YOU TESTIFY?

Not if I could avoid it. I'd do my damndest to get out of it.

SUPPOSE A SUBPOENA WERE ISSUED TO COMPEL IT FROM YOU?

Well, as an arbitrator, I don't know. I've never had to face that, but I supposed if you were subpoenaed you probably would have to go but I would have reservations as to what I would say.

WOULD YOU EVER THINK THAT IT WOULD BE WITHIN THE PURVIEW OF PROPRIETY TO SAY TO THE JUDGE "I'M SORRY, I'M UNDER SUBPOENA, BUT I DECLINE TO TESTIFY TO THIS BECAUSE THIS IS NOT SOMETHING THAT I SHOULD PROPERLY TESTIFY TO?"

Well, I don't think I can answer that question without knowing what the circumstances are. Let me digress into mediation where this is a much more difficult question than it is in arbitration. After all, arbitration, however you characterize it, is quasi-judicial and you presumably have issued an award. If questions arise in connection with what was said or not said in negotiations, or what evidence was or was not produced, mediators are sometimes subpoenaed, or attempts are made to subpoena mediators, to testify in court as to what happened. And I sort of jocularly told our FMCS mediators, "Look, just don't go, we'll visit you in jail." A major function of the General Counsel of the FMCS was in fighting off those subpoenas. Almost always we were able to convince the judge by explaining the reasons why it was not appropriate for the mediator to testify.

NOW THE MEDIATOR CAN FALL BACK ON THE GENERAL COUNSEL BUT THE ARBITRATOR HE'S OUT THERE BY HIMSELF ON THAT LIMB.

Well, but, does this occur very often? It's never occurred to me.

IT HAS COME UP: APPARENTLY IT HAS OCCURRED SEVERAL TIMES THAT I KNOW OF IN THE PAST SEVERAL YEARS.

Well, I would think the only real circumstance would be where an award was challenged, somebody didn't comply with the award and the case got into court.

RIGHT. IN THE CASES I'M THINKING OF, ONE IN PARTICULAR, ONE OF THE PARTIES WAS OUTRAGED BY THE DECISION OF THE ARBITRATOR. THE PARTY SOUGHT TO VACATE THE AWARD AND IN THE PROCESS SUBPOENAED THE ARBITRATOR.

THE SUBPOENA ISSUED AND THE ARBITRATOR SHOWED UP AND SAID, "YOU KNOW, I SHOULDN'T REALLY BE COMPELLED TO TESTIFY AS AN ARBITRATOR." THE TRIAL JUDGE SAID, "ANSWER THE QUESTIONS." SO THE ARBITRATOR WAS ASKED QUESTIONS LIKE: WHAT WAS HIS NORMAL PRACTICE IN DECIDING A CASE; DID HE READ THE BRIEFS OF THE PARTIES AS SUBMITTED; DID HE READ BRIEFS IN THIS SPECIFIC CASE; WHAT'S THE NAME OF HIS SECRETARY; WHERE IS THE EVIDENCE FILED; WHAT DOES HE NORMALLY RETAIN IN HIS FILES? AN INCREDIBLY INTRUSIVE LINE OF QUESTIONING. I THOUGHT AT THE TIME THAT WERE THAT TO HAPPEN TO ME, I BELIEVE I WOULD HAVE TO SAY I'M SORRY.

Well, I would certainly reserve the right not to answer some questions even if I had been subpoenaed. But to repeat, fortunately I've never been stuck with this problem.

In this connection, and this is not unusual, way back in those early hosiery contracts, as a further evidence of a trade-off for the no strike clause, there's one exception. The union could strike if the company failed to abide by an award. Normally of course the union has no alternative but to accept. But if the company thumbed their nose at an award, that was a stated exception in the contract as it is in some other contracts.

SOME TEAMSTERS LOCALS HAVE THAT WRITTEN IN. WELL, HOW ABOUT THE RANGE OF SUBJECTS NOW? WHAT WERE THE MOST DIFFICULT SUBSTANTIVE PROBLEMS THAT YOU CAN RECALL ENCOUNTERING?

That's a tough one to answer. Some of them can always be difficult. When I started arbitration I used to think, well, these seniority disputes are not too difficult. But the longer I've arbitrated, the more concern I have about a seniority dispute because, as you know, in most elaborate seniority systems these days, if you start tinkering with the system, it's like tinkering with a wrist watch. You may think you're fixing one balance wheel, and you throw the whole thing out of kilter. So I think seniority cases are among the toughest, even some that superficially look simple. You always have to be aware of the ramifications of not only what you decide, but maybe more importantly, what you say in the opinion. Other types of cases are very difficult for quite different reasons. In that early experience in hosiery, which was a piecework industry, we got a lot of piecework disputes, which are very technical. Even in a non-technical environment, they're tough cases and the toughest aspect of those piecework cases is: how much are the people holding back until the rate is set? Unless you're just a time study bug and would look at nothing but the time study, this is a critical issue. And for that reason, among others, almost as an infallible rule, I will not decide a piecework case without looking at the job. I just have to get at least that much knowledge. But piecework cases are tough. I had an awful lot of them in the rubber industry. In the rubber industry, at least in those days, they were complicated further by the fact that, in many plants, the employees set production quotas. In tire building, for example, you build so many tires and then you quit, even if it's not at the end of the shift. So when you

get a change in the construction of a tire, you have certain elements that have been changed, but in terms of whether people are at what they can produce, it's a question of can you build as many of these tires in five hours as you build of the others in five hours even though it's a six-hour day. Those piecework cases are tough.

HAVE YOU EVER HAD CHALLENGED THE RIGHT OF THE EMPLOYEES TO LIMIT THE PRODUCTION?

Oh yes, the companies would gripe about it.

NO, I MEAN IN THE GRIEVANCE CONTEXT.

Well, oh yes, I've had those--frequently--in the rubber companies. Once an established quota got established, people didn't produce above that quota. Which, of course, is totally anathema to the theory of piecework. But, in most of the plants where that existed, the practice was so well entrenched that the companies knuckled under on the concept. But they were not adverse to saying that, while this rate's in dispute, the guys are slowing down well below their rate of effort and proficiency just before this job was changed. Almost invariably, the company claim of a slow down below customary pace was at least partially correct.

FROM THE GROUP.PRESSURE?

For example, I had in one plant of one of the larger companies a very critical dispute when tubeless tires came in. Nov/, up until that time most of my tire-building piecework cases had been cases where there were relatively small changes made. Maybe 95% or 90% of the job is what it used to be, and you were only looking at a 0% or maybe a maximum of 10% of the total job that was really in dispute. The rest were fixed--whether they were right or wrong--by time study; theory was immaterial; they were recognized times. You never changed a time unless the element itself was changed. But when tubeless tires came in, a substantial part of the total job was in dispute. Just for rough purposes, say 60% of the job was the same as on a regular tire and 40% was changed over. Now we were dealing in that case with 40% of the total time violently in dispute as to the element times involved. Fortunately, it was a tripartite board. I say fortunately. I had to get a majority opinion and we had a stalemate. In the course of our meetings over the thing, I had to stick my neck out as to what I would believe to be a feasible answer. But I couldn't get either one of them to vote with me. Thousands of dollars were involved. That rate was much more important to a tire builder than whether he got 15 cents an hour in the next negotiation. We had time studies, a union time study, a company time study, and they were quite diverse. So when we got stuck I said, "Let's get an impartial time study." I knew a guy I thought I could count on, and he used this micromotion time study method. Well, he came in and made his time study and I set up the conditions. He would not just time-study the disputed tire. He would also time-study

the regular tire which was not in dispute. With the same people. Do you know what we found with that? Those so-and-so's were so clever that on the like elements the two time studies were almost on the nose. But on the disputed elements the guys were slowing down like nobody's business. Some time-study experts will tell you, you can't do this in a continuous operation; but they did. In any event, when I got the results of the impartial time study, the figures that I had used in trying to get a vote in earlier sessions, I was convinced, were too high; not much too high fortunately, but they were a little bit too high. I had to decide that case by clubbing the union guy, almost literally clubbing him, to vote with me on a slightly lower rate than he could have signed for before the time study. Well, that was kind of a heavy-handed business and I think the poor guy lost out in the next election. Fortunately he wasn't the President. But I only mention this story to indicate the complexity in some of these time study cases. They're very, very tough cases, and you know that you can go wrong. The only consolation you have is that the parties themselves also make mistakes. Incidentally, we were talking a while ago about "breaking your pick." I was never asked to go back to that plant again. But I continued to work elsewhere at plants of the same company and I found out indirectly later that that piece rate we had set on the tubeless tire worked out to be satisfactory to both parties.

YOU SURVIVED COLLISIONS LIKE THAT OFTEN?

I had a number of relationships over a fairly long period of years where I wasn't fired. I had to resign several of them; for example, when I went to the FMCS as Director. But I was able to last seven years, ten years, that kind of thing.

THAT'S AN ETERNITY ON THAT SCALE. WELL, LET'S SHIFT A BIT ALONG THE RANGE OF SUBJECTS. HAVE YOU HAD CLAIMS INVOLVING, LET'S SAY, THE BILL OF RIGHTS?

Not really.

FREEDOM OF SPEECH?

Not really.

SEARCH AND SEIZURE?

No, not really where it was a major issue..Thank goodness, I haven't been thrust into those situations.

HAVE YOU EVER HAD, FOR INSTANCE, SOMEBODY WHOSE LOCKER WAS OPENED BY THE COMPANY TO CHECK OUT THE CONTENTS OF THE LOCKER? THAT TYPE OF SITUATION?

I don't recall that when any serious questions were raised about it.

HOW ABOUT DOUBLE JEOPARDY? I'VE RUN INTO THAT.

I've had a few of those. Off hand I don't think I can recall the specifics, but I've had a few of those.

WHERE A GUY IS CALLED IN AND HE'S GIVEN A THREE DAY SUSPENSION, AND WHILE HE'S ON THE SUSPENSION A HIGHER OFFICIAL IN THE COMPANY SAYS "SUSPEND HIM? THE HELL WITH THAT! WE'RE GOING TO TERMINATE HIM!" AND HE TERMINATES HIM.

Yeah, I've had a few of those.

THE ARGUMENT BEING MADE THAT THIS IS SOMEHOW DOUBLE JEOPARDY.

Yeah.

WELL, HOW DO YOU REACT TO THAT?

Well, not knowing anything else about the case, my reaction would be that the first penalty ought to stick. The second thought ought not to stick.

WHY THOUGH?

Well, I assume that it went through the grievance procedure.

NO, HERE'S WHAT YOU HAVE. A GUY DOES WHATEVER IT IS HE'S BEING DISCIPLINES FOR AND HE'S METED OUT A 3 DAY SUSPENSION BY THE SUPERVISOR, AND HE'S GONE HOME ON FRIDAY, SUSPENDED FOR MONDAY, TUESDAY AND WEDNESDAY. THEN ON MONDAY, IT GETS UP TO THE UPPER ECHELONS OF THE COMPANY AND THE PRESIDENT RUNS ACROSS THIS AND HE SAYS, "FIRE THAT GUY!"

Well, if that's the circumstance, I would be inclined to say you have to decide that on the merits.

OF WHETHER HE WAS PROPERLY SUBJECT TO DISCHARGE?

Yeah.

SURE. DOUBLE JEOPARDY DOESN'T HAVE VERY MUCH TO DO WITH IT.

No. You get a somewhat related problem very frequently. That is, during the course of the grievance procedure the company makes a compromise offer. The union will not accept the compromise offer, and then it comes to you de novo and the company tries to ignore the compromise offer and says, "Look, the union didn't buy that, so we're now back to stage one." I'm sure you've had those.

SURE.

And they're not easy cases.

DO YOU LET IN EVIDENCE OF THAT?

Oh sure, sure I let it in.

THERE'S AN ARGUMENT THAT YOU ...

...An argument that you shouldn't even let it in. But if you get a chance to rule on the argument, you let it in. I mean, you know what happens.

WELL, YOU CAN'T ALWAYS UNRING THE BELL.

I'm not enough of a lawyer to hear something and forget it. I know I guess that's a cardinal principle in law that you...

...STRIKE THAT...

Strike that and it's really struck. But It's never struck with me. If I hear it, I hear it.

I MUST HAVE MISSED SOMETHING SOMEPLACE IN LAW SCHOOL BECAUSE I SHARE YOUR BELIEF. I DIDN'T LEARN HOW TO UNSTRIKE. IT'S REALLY NOT LIKE THE REPLAY TV SITUATIONS ON THE DODGERS' GAME YESTERDAY WHERE THE BALL COMES BACK TO THE PITCHER SO YOU CAN SEE HIM THROW IT AGAIN.

You get another double-jeopardy type of argument. That is the case where a guy is convicted of some crime having nothing whatever to do with his work in the plant, and then he's fired. And these are, I think, rather difficult cases. Usually there is a past practice, at least pretty good evidence of past practice, at a particular plant as to whether these factors are considered as relevant to a guy's job rights or whether they're not. But if there's no clear past practice, this is a tough question. And I suppose I've decided various ways.

SURE, THE CIRCUMSTANCES ARE SO CRITICAL.

And frankly, depending on what the crime is. I mean, well this is not double jeopardy but you get the proverbial case, and I've heard plenty of them, where a guy steals five cents worth of stuff. No question that he took it and you know the union argument. The union will say to the company, didn't you ever take a pencil out of the box? And they fire some guy. Well, these are not easy cases. After all, where do you draw the line?

HAVE YOU PUT THEM BACK ON OCCASION?

Oh yeah, I have. Usually when I put them back it's been a long service person with an otherwise good record, no evidence of this being a repetitive kind of a thing. I've even put them back in situations where at least the allegation was that It had been past practice at that particular plant not to make any exceptions.

WSLL, ULTIMATELY YOU'RE LOOKING AT THAT PHRASE "JUST CAUSE." I GUESS IMPLICIT IN WHAT YOU'RE SAYING IS IT'S NOT JUST SIMPLY CONTRACTUAL CONTENT THAT RIDES ON THAT CLAUSE, AS WITH YOUR PAST PRACTICE NOT TO MAKE ANY EXCEPTIONS.

We normally--nothing is normal in arbitration--but normally if the contract clause is ambiguous, you then look to clear evidence of past practice as the way the parties themselves have effectuated this clause in similar circumstances. And normally, assuming again that the contract clause is ambiguous, normally you rely on past practice regardless of what you personally think about that.

SURE.

I had a case of an old guy with twenty-three years seniority and he took home from the rubber plant a little piece of canvas, a scrap of canvas about a yard square which was worthless for all practical purposes. But he was caught. I put him back to work.

THERE'S A CERTAIN ELEMENT OF OUTRAGEOUSNESS WITH PEOPLE REACTING TO THAT KIND OF A SITUATION WITH A DISCHARGE. HM?

Yeah. And I think within reason we have a right to exercise some discretion.

I SOMETIMES HAVE BEEN ASKED, AND IT OCCURS TO ME TO ASK YOU ABOUT IT, IF I WERE TO CHARACTERIZE MY EXPERIENCE AS AN ARBITRATOR JUST IN TERMS OF WHAT HAS HAPPENED IN FRONT OF ME OVER THE YEARS, I THINK ONE IMMEDIATE RESPONSE WOULD BE THE WORD "CALLOUSNESS" ON THE PART OF MANY PEOPLE THAT SHOW UP IN ARBITRATION HEARINGS. THE WAY YOUR MAN GOT TERMINATED FOR TAKING A PIECE OF CANVAS NOW, AN UTTERLY CALLOUS ACT ON THE PART OF THE PERSON WHO TERMINATED HIM, THOUGHTLESS OF THE HUMAN ELEMENT IN IT.

Not necessarily.

NO?

I mean, stealing, a company can't tolerate stealing. If stealing gets epidemic, you can't tolerate stealing. So you can justify even that extreme circumstance by saying that if you bend it, bend a rule just a little, then the next time you bend it a little more and so forth, and finally the rule doesn't mean anything. I don't, I don't think it's necessarily just outright callousness.

YEAH.

Usually, in a taking situation, I've felt sure that the guy who did the firing was not happy about what he did under this particular set of circumstances. But he was faced with a clear-cut past practice and he felt that he had no alternative but to go along even though he didn't like what he did. Well, I think frankly, I took him off

the hook. I don't know, I never talked to him about it, but I would suspect that I took him off the hook by making the exception.

(OFF THE RECORD FOR A BREAK) WE STARTED TO TALK ABOUT SOMETHING IN THE KITCHEN AND MY CONSCIENCE BOTHERED ME TO GET US BACK ON THE RECORD BEFORE WE TALKED FURTHER ABOUT IT, A PHILOSOPHICAL DIFFERENCE IN APPROACH THAT YOU WERE STARTING TO REMARK ON.

The essential question is: "how much should go to arbitration and how little?" I suppose as good an example of one school as you can think of is General Motors and the UAW where for a number of years both sides have deliberately tried to avoid any sizeable number of arbitration cases. It's probably the largest collective bargaining relationship in the country. To accomplish that, they have a fairly elaborate screening procedure and a relatively very small number of cases do ever get to the Umpire. In contrast to that, you have situations where parties undoubtedly take too many cases to arbitration, a lot of picayune cases that aren't really worth it, cases that they realistically ought to settle. Somewhere in between those extremes I think is a happy medium. If you're too tight, take too few arbitrations, then the people in the plants don't understand the system, they don't know what it's all about, they lose personal contact with this notion that it's the alternative to the strike. Frequently you get a piling up of grievances just before negotiations, where the union comes in with a mountain of grievances, or in effect they've boycotted arbitration and said, "Look, we're gonna have to settle all these grievances before we get into the basic negotiation issues." And there have been no small number of strikes that have occurred just for that reason alone.

Those who think in the opposite direction work on the principle "we want to get grievances out of our hair as quickly and expeditiously as possible." Get 'em settled! We don't want these things coming up to interfere with the negotiation of a wage increase, or pensions, or the more important things that happen in negotiations. And they succeed in many cases--not invariably--but they succeed in accomplishing that objective. But the result is you get a lot of trashy cases into arbitration. Now these people that overdo it also say, "We want our people to know what the process is about. We want them to come in and meet the arbitrator and have a chance to have their say, and have their say even if it's a lousy case." Sometimes too it's promoted by the unwillingness of the union officials to say "no!"

SPURRED ON THESE DAYS BY THE LEGAL DUTY OF FAIR REPRESENTATION!

That's probably been accentuated in recent years in discharge cases. A lot of unions almost tell you that they feel they have to arbitrate a discharge case whether it has any merit or not, to protect themselves from charges of not representing their people. I think that's gone too far. But one illustration of this fundamental notion of arbitration was in the men's clothing market. I told you about

how In Philadelphia, when George Taylor and I were both involved in the National War Labor Board and tied up fulltime in Washington, so we went to the parties and said, "Look, you better make arrangements for replacements for us 'cause we can't handle the cases." And they said, maybe not exactly, but they said essentially, "Ah, don't worry, we'll settle 'em! You got more important things to do for a while and we'll settle 'em." Then when the war was over, George didn't go back to that but I did. They came around and said, "Bill, we think we better have a few cases." They said, "The people have almost forgotten about arbitration, and this is our insurance policy, and the people ought to know that it still exists. So don't be surprised if we bring a few cases." So we had a few cases.

JUST TO CRANK UP THE ENGINE.

The people knew that we were back in the office and it was there. Now under that set-up they had a few cases over the years that they couldn't settle, cases that had to be arbitrated or a strike. They had a few but not too many of those. They had a few of those where one single case would've been a strike case. That's the last thing they wanted, a strike. But some union and company people say, "We want our people to know that this process is available to them. We want our people, stewards and other people, even workers without any special union responsibilities, to get some exposure to this thing so that when they're tempted to strike they know what the alternative is, they've got some personal experience with it. Maybe I'm an optimist by nature, but the ordinary guy in the plant isn't too worried if he loses his case even though there will be cases where he'll be genuinely upset. Where he realizes it's realistically a borderline case, he's not so concerned that he loses the case; it's how he loses it. I mean, whether he has had a sense of input, whether his union is properly representing him and, and frequently, if he gets his chance to have his little say, even if it's only for two minutes In the arbitration, that is a big psychological help to him. It's over but at least somebody heard him. And now you'll get the occasional person who won't accept that; either the issue was so strong or they're so biased that no matter what happens they're still going to be unhappy; but even with those people they feel better in the long run if they've had this outlet than if they just get shut off completely. And speaking about being an optimist, people change, you know. I had one experience at a company where I worked for a number of years. A guy appeared in a case early In my tenure there-- and you don't often think this, but I couldn't help but think this is about the worst specimen of humanity that I've seen in a long time; he was vulgar, he was biased, he was loud--. Well, something happened to that guy. He was a hard hitter and got to be a Steward. Well, he got to be a Steward and he began to see the other side of the picture a little bit. And so I saw him a little more frequently. Then he got elected Chairman of the Grievance Committee in this large plant and this guy, well, he went up to Wisconsin to a short term labor school. He deliberately tried to improve himself. I used to have lunch with him occasionally because I was interested in the guy after he began to turn. When he was Chairman of the Grievance Committee

the company liked him because he was a hard hitter but he developed a sense of fairness. The climax of the story is that I went to that plant—I've forgotten what year—and I heard a batch of cases and went back home; the phone rang at 3:00 o'clock in the morning, I answered the phone very sleepily, and he said, "Bill, this is George." He said, "I'm awful sorry to call you at this time of the night but I can't sleep." He said, "I tried to sleep but I can't sleep." And he said, "Do you remember that case," and he mentioned *one* specific case. He said, "I didn't come clean with you on that case Bill, and I can't sleep."

AND HE CAME CLEAN AT 3:00 A.M.

Sure. Well he didn't need to come clean. The case was clear-cut really. But I was disturbed, frankly, about the way George had presented that case. Normally, if he had a lousy case he'd go through the formalities but he wouldn't put his heart in it. This time he had had a lousy case and he put his heart in it. He didn't have to say to me, in the open hearing—"This case stinks,"—but he knew that I recognized certain different approaches to cases depending on how he acted. "But I can't sleep, I just had to call you."

WHAT HAS HAPPENED TO HIM SINCE?

Well he's done alright in the union. I've pretty much lost touch with him in recent years. I don't know exactly what's happened to him.

YOU KNOW, I THOUGHT YOU WERE FIXING TO TELL ME, AS I'VE OBSERVED OVER THE YEARS HAPPENS NOT INFREQUENTLY, THAT THE COMPANY WAS SO IMPRESSED WITH HIM THAT HE ENDED UP AS DIRECTOR OF INDUSTRIAL RELATIONS.

Well I don't think that happened 'cause George still had some rough spots. But he turned out to do a very competent job. And over a span of maybe four or five years this was a gradual change. Well, you can't say this kind of progress happens to everybody.

NO.

It's comforting when it happens to some.

SOME PEOPLE GO THE OTHER DIRECTION.

Yeah, that happens. Yeah, or the opposite side of the coin, you are distressed at an occasional representative—doesn't have to be union, it can be company—who backtracks, who becomes unreliable and basically dishonest and so forth. I mean, when this sort of thing happens, you're really distressed.

BUT YOU'RE SITTING ON THE GLOBE INHABITED BY HUMANS.

Yeah, but you get to know these people so well in these continuing relationships that you can detect these changes. At least, you think you can. I suppose you can be wrong. Of course we said we weren't going to talk about mediation but there is, there is a difference in mediation. You know, as a mediator you get in a difficult dispute, as I got into a good many of them in the Washington days, the stress and strain on the people in those hours before the crisis when a strike is pending is terrific, and on yourself too, in a sense, if you're head over heels in the case. But you see the different kinds of reaction of people. The relationship is so intimate when you spend thirty-six hours straight with somebody--wrestling with them--you get to know those people a hell of a lot better at the end of thirty-six hours even if you've never met them before than people that you meet socially in occasional social contracts over a period of years. You really get to know those people; they get to know you; it's much more so than in arbitration. Now sure, with this Impartial Chairman kind of relationship, you get a great deal of that; but never, never quite the same as in some mediation cases.

I DIDN'T WANT TO TURN YOU OFF IN TALKING ABOUT MEDIATION RELATIVE TO ARBITRATION BECAUSE YOU'RE THE PREEMINENT PERSONIFICATION.

Well, I have a reputation, deserving or otherwise, of doing too much mediation in arbitration; and maybe I do, I don't know. But contrary to the reputation, I don't function as a mediator in arbitration in the same way as I function as a mediator when I'm in real mediation.

HOW WOULD YOU DESCRIBE THE DIFFERENCE?

Well, number one, you don't try to mediate an arbitration unless you have a feel or the knowledge that the parties want you to. You don't thrust yourself, you don't say, "Come now, let us mediate."

YOU DON'T TAKE THE BILLY GRAHAM APPROACH.

There has to be some kind of a tipoff. Now maybe you can do something that will engineer the tipoff; but there has to be some kind of a tipoff. And then secondly, it's quite different because, after all, you have the reserve power to decide, and you have got to be very careful about mediation in arbitration because you've got quite a club. Since you have that reserve power you don't want to wield that club too heavily in trying to mediate, even when the parties are susceptible to it, because you can overdo it. Now you know Sam Kagel has made a big thing in recent years, and rightly so, over Med-Arb. I think Sam's promotion of this is great. The only thing that I've ever ribbed Sam about is he, at times, thinks he's done something entirely new.

THIRTY YEARS OLD AT LEAST.

George Taylor used Med-Arb, as I've already indicated, and really developed it, probably as much as Sam has, in terms of the extent. So,

well, it's simply another piece of evidence of nothing really new in this world. And George was not the only one. There have been others who used these techniques.

WHO?

Well, one of his contemporaries, Billy Leiserson, did some of it. Most of us, certainly including me, who are in the so-called "Taylor School" have used it to some extent.. I don't know anything about the details of the business of a guy like Lew Gill, but Lew got the Taylor message.

HOW DID HE GET THE MESSAGE?

I'd be very much surprised if Lew has not used these techniques.

HE GOT THE MESSAGE BEING IN PHILADELPHIA?

Yes, and through the War Labor Board experience. Allan Dash does some of it too, not as extensively as I do probably. But I'm sure there are a lot of guys around that if we knew their real operating techniques, it would not be drastically different.

SURE.

But I just don't know enough about the details of their work to know who to name.

YEAH, WHEN YOU SAY "AS EXTENSIVELY AS I DO," COULD YOU GIVE US A FOR INSTANCE? I'VE NEVER ASSOCIATED YOU WITH THIS, "COME NOW LET US MEDIATE," BUT WITH GRADUALLY EASING INTO A FRANK KIND OF A DISCUSSION THAT MAY LEAD TO A SETTLEMENT. THIS DOESN'T HAPPEN REALLY TOO OFTEN EVEN WITH ME BUT IT DOES HAPPEN. DO YOU USE THE WORD SETTLEMENT? INSTEAD OF SAYING "COME NOW LET US MEDIATE" DO YOU SAY: "YOU FELLOWS THOUGHT ABOUT SETTLING THIS?"

Well, I might say something like this—I'm not sure that I would use the word settlement--! might say "Look, we've now heard the guts of this case and, frankly, it seems to me that this ought to be amenable to a little negotiation. I don't think this is a critical case that needs my decision and, if we can talk about it a little bit and you can agree, you'll save some money. I won't have to write it up." I mean something of that kind and if they say okay, well, then you take off and spend a little time and see whether it's productive; and if it's not productive you say, "well, I guess this won't work, I'll have to write it up." So no, it's not a formalized kind of a thing. Now the aspect of the Impartial Chairman concept, where you sit down with the parties after the hearing and talk about the case, possibly even get a settlement after the hearing so they'll say, "well don't write this up." This happens once in a while. Much more common, they will agree informally with you when you're meeting with them and say "well, you go ahead and write it up, but we want you

to know that this is alright with us." Well so what? I mean an agreed-upon disposition is, in my judgment, always better than an imposed decision. So that, if you can get them to say privately to you "we agree," that's fine. Maybe they won't say that, but maybe the next gradation is this business that I talk so much about, you try to sell it. Your personal discussion, personal contact, should be infinitely superior to just the written word. So if you can convince a guy that, well, maybe he didn't like this, but it's not too bad, you've really accomplished something in contrast with picking that thing up out of the mail and reading it and probably blowing his top, at least until he's had time to think about it. So all of these things are, as I see it, a part of what you might call mediation, but which most people would not consider. Too many, I think, of our own colleagues would say about mediation in arbitration, well, the only way you can do that is to cast off your arbitrator's hat and adopt a mediator's hat. Of course, the criticism--and there's some danger--of those who object to this sort of thing is that, suppose you do get parties who are susceptible to mediation, and you get going hot and heavy as a mediator, and then it doesn't work and you have to write it up. Well you may have made what the parties consider to be a commitment during your discussion or which you may then have to back-track when you have to write a decision? And that could happen, you see. This is the danger.

THERE'S ANOTHER PROBLEM OR HAZARD, I SUPPOSE. YOU REMEMBER SOME YEARS AGO BILL WIRTZ WAS HOLDING FORTH ON THE SUBJECT OF AGREED DECISIONS. HE WAS TALKING ABOUT DECISIONS AFFECTING INDIVIDUAL RIGHTS, AS I RECALL. HOW, HOW DO YOU HANDLE THAT?

Well, this is a very ticklish thing. I mean, let's take a specific illustration. In the Impartial Chairman kind of relationship, and frankly in a few others, I've had a union representative say to me, "this so-and-so should have been fired, but we had to take it to arbitration." Now I, for one, never buy that at face value. I want to know as best I can at least what the internal union politics are. Is this guy running against the local union president in the next election, or has he run against him? Is there a railroad job here, a combination of company and union getting together or is it not that bad but just a situation of a guy who is not very popular and a little bit rough and ready and who just doesn't quite get a fair deal? So, in other words, I think you always have to be suspicious. And this is why, really, in ad hoc arbitration you can't do much of it because you don't know the people well enough. Now in these continuing relationships you get to know the people well enough, you know, you have an appraisal of their integrity. So that makes it more permissible to do these things where you really know the people and the set-up.

LET'S MOVE ONTO SOMETHING ELSE. HOW HAS ARBITRATION CHANGED OVER THE YEARS?

Well, I'm not sure I'm in the best position to answer that question.

AS YOU'VE WITNESSED IT.

Well, as you have already found out, the mere fact that something like 80% of my cases have been the permanent setups, even though they vary tremendously, and only about 20% ad hoc, means I'm probably not in as good a position as many other people to indicate changes.

BUT YOU'VE HAD ABOUT A THOUSAND AD HOC DECISIONS.

I think there has been, to me, distressing change toward more formality, longer hearings, more legal participation. The guy in the shop who attends an arbitration hearing, which is dominated 100% by lawyers who speak in legal terms instead of shop terms, the guy doesn't get the same favorable reaction to the process, in my judgment. I have no aversion to lawyers; a good lawyer in this business can be a tremendous help. I mean, he can cut down the volume of needless testimony and in a whole host of ways a good lawyer can be a great help. But it's the formality that sometimes creeps in. For example, there's been a trend toward more transcripts.

THE FMCS STATISTICS SHOW THIS.

Which I think is a lot of nonsense. There's an occasional grievance case where you ought to have a transcript; but I think for most cases it's a waste of money. Maybe I'm biased; I learned the hard way to make my own notes. When I have a transcript I read it, but frankly I don't read it from stem to stern. I make my own notes anyway. Then what I will do is when I am at the critical points I refer first to my notes then to the transcript for the critical points. But I don't pretend to read it verbatim.

WHAT ABOUT TIME PROBLEMS?

Right now I'm an arbitrator in two different places. One place (an Umpireship that has lasted 8 years), a case will take a half hour for a hearing, and the other place (technically ad hoc), the same case might take a day and a half. Now, this doesn't make sense to me. I think frankly the half hour is too short. I wouldn't recommend it to anybody except those people who like it. I wouldn't personally recommend it, it's too short. But a day and a half for an ordinary grievance just doesn't make any sense. Ordinarily, even an ad hoc grievance should be presented and concluded in half a day.

HOW ABOUT THE OTHER ELEMENTS?

Well, we had a dimension in the earlier years which is a little unusual in connection with the Impartial Chairman notion. This applied only to hosiery; it did not apply to men's clothing or dress. The parties wanted the Impartial Chairman to be at the negotiating sessions. So the Impartial Chairman attended the contract negotiations and chaired the meetings. And the parties' reasoning for this was twofold. One, the most important reason was that since the intent

of the negotiators is such an important factor, they wanted the Impartial Chairman to be present to hear all the discussion. So that if something came up in the way of a grievance that involved intent, they wouldn't have to go into elaborate detail to explain what had happened when that clause was negotiated. The other reason, which was probably lesser, was that they wanted him there on occasion to do some mediation. I know once I made a mistake. I had come into the situation too late to sit in on negotiations before George Taylor went to General Motors. So I understood in theory what the role was, and I went to the first negotiation meeting, and they weren't getting anywhere. So I decided that I ought to stick my neck in and do some mediation. And I don't remember exactly what I did, but one of the manufacturers called me aside and said, "Look Bill, there may come a time when we want you to mediate but if so, we're going to tell you; you just haven't been in these negotiations. You don't know our format." And he said, "this meeting is a pro forma meeting and we don't intend to do any real business here anyway." So I got called to task and I understood it. But I think that too was illustrative of the basic notion of what the parties wanted. They wanted a Chairman, generally, over their entire relationship.

IT ALSO ILLUSTRATES THE PERENNIAL PROBLEM OF THE ARBITRATOR PERCEIVING WHAT IT IS THEY REALLY WANT.

Yeah. I mean if you sit in on negotiations you, you really get a clue as to intent. Now; so much for that.

WE'VE BEEN REFERRING TO GEORGE TAYLOR'S VIEWS, HIS PHILOSOPHY AND YOURS. BUT THERE IS SOME KIND OF CONTRAST WHICH HAS FREQUENTLY BEEN MADE BETWEEN THE GEORGE TAYLOR SCHOOL AND THE NOBLE BRADEN SCHOOL.

Well, there was quite a hot debate, within the Academy between these two concepts. George read a paper at *one* of the Academy meetings which does better than what I've tried to say here about the concept of the overall aspects of what we've been referring to as various kinds of mediation functions in connection with arbitration. And Noble Braden of the AAA espoused a very contrary view, an arbitrator should not do any mediation at all, and particularly should not have any discussions of any kind regarding the case outside the hearing. He took a very doctrinaire position on this, which a lot of our fellow arbitrators would still take, on the ground that it was not ethical, et cetera, et cetera. And, incidentally, as you know, the AAA has softened its position on that. The AAA is by no means as doctrinaire in this connection now as they used to be, although I think they still, at least in some of the branch offices, would tend to follow the Noble Braden notion.

WELL, LET'S TALK SOME ABOUT ETHICAL PROBLEMS.

In terms of this terrific spectrum between the so-called Impartial Chairman concept and the very rigid ad hoc concept, with all the gradations in between, I think there are still greater differences between the Impartial Chairman concept and this strict business than there are changes. But if you separate that out, I think it's fair to say that there have been some changes over the

years even in the Impartial Chairman relationships. I think there is a tendency, in spite of exceptions, for hearings to take more time for a variety of reasons. As far as quality of representation, frankly I don't think that's changed too much, although in terms of sophistication versus quality, I think there's greater sophistication now. Particularly in those early days, a lot of the parties didn't have any idea what arbitration was about at all, and they'd go into an ad hoc arbitration without any notion of what they were getting into. Now although you don't often run into that anymore, you do occasionally.

YOU SAID THAT THE STRETCHING OUT OF THE TIME THAT IT TAKES IS DUE TO A VARIETY OF REASONS.

Some are due to the methods of presentation. I think the lawyers are in the act more than they used to be and, while this is not inevitable or not certain, I think that tendency tends to lengthen the hearings, to make them somewhat more formal. I think even when lawyers are not in, that there is a tendency now to be a little more formal, particularly in the ad hoc cases.

PERRY MASONS.

As far as mediation opportunities go, I frankly have not discerned a major difference in my own personal experience. I think mediation opportunities—let's forget the Impartial Chairman thing for a time—in ad hoc arbitration do not arise anywhere nearly as often as a lot of people think. Even in my own practice I'm not sure that I see much of a change, plus or minus, as the years have gone by. Perhaps, and this may be due to the fact that I have a little bit of a reputation by now, perhaps, if anything they've increased. But I would say that that's because if people don't want any possibility of mediation, they may say, "The hell with Simkin. We don't want him." And if they have some notion that they might use it, they might be tempted to take me. So I think that's more of a personal situation than an overall picture. I would speculate that in the overall, in the entire range, that there's less mediation today than there was in the early days, but that's pure speculation.

BECAUSE OF THE TENDENCY TOWARDS PROCEEDING MORE FORMALLY.

Well, I think probably there's been a tendency toward getting more transcripts, but I've noticed a little trend in the opposite direction these days as costs have been going up.

THE FMCS STATISTICS ON IT ALMOST EXACTLY DUPLICATE MY OWN EXPERIENCE, THAT IS, ABOUT 25% OF THE CASES HAVE TRANSCRIPTS. NOW IN SAN FRANCISCO, IN CONTRAST, IT'S BEEN ABOUT 90% OF THE CASES.

Well I'd say out of my total experience, this is a guess, I've had transcripts in considerably less than 10% of all the cases, possibly 5%. I did have one relationship which lasted from 19<sup>7</sup>

until I went to Washington in 1961 where they had had the custom of transcripts. They didn't really need them, but they liked them because it was a multi-plant company and, on the company side, they liked to reproduce these things and send them around to all their labor relations guys, so that they could peruse the transcript and the opinion, and they thought that was educational, so they kept it up. Briefs, I don't know frankly whether there's a tendency or not. Probably a tendency toward briefs in connection with more lawyer participation.

SURE.

Very candidly, I've always tried to discourage briefs. I tell the parties, even in ad hoc cases, "well, if you want to file a brief, I'll read it but I don't see any point in it." In spite of that, there have been times I've asked for briefs, numerous times to supplement the evidence by statistical material or some other kind of a supplement because my note taking is not sufficient to get a lot of detailed stuff. So if we come to some detailed figures, for instance, on a piece work case or a seniority case that are not in shape to hand me at the hearing, I say, "Look, why don't you just put this in a letter and send it to me, and send a copy to the other side and let them comment, so I won't have to write down all this stuff." But that obviously is not a formal brief; it's a very useful device in many cases when you take your own notes.

WHAT ABOUT CHANGES OF SUBSTANTIVE ISSUES?

Well, I suppose there's been some change. Frankly I don't know. I haven't analyzed my own opinions enough to know. You do get certain characteristics in a particular relationship and you'll get changes over a period of time. For example, a company is laying off people. There are very sharp reductions in personnel. Well obviously, you're going to get a lot of layoff seniority cases; you're likely to get a lot of work-jurisdictional cases, not only maintenance versus production people, but within maintenance and within production. When work gets scarce, people get tighter as to their work. I mean they want to keep a job as much as possible. When the reverse is the case, and production is expanding, you obviously tend to get more promotion cases. So you get that kind of cyclical affect in industry in general. Then of course there is the tendency these days for a union to take any discharge case to arbitration. That was not true when I started. Sure, a lot of cases were taken, even in the early days, that the Union had little hope for. But, by and large, the union guys would stand up and say "no" when they thought somebody had a lousy case. They didn't want to spend the money to process a lousy case. I would suspect there's been an increase in discharge cases, even though the chances are--I have no statistics--there's been a decline in the number of discharges. Collective bargaining has come along. I think companies, by and large, are a little easier on the infliction of discipline than they used to be when unions were new. But there is still some holdover from the nonunion days when they'd fire people for little or nothing.

WHAT ABOUT OPINION WRITING?

My own personal experience is a decline in requests for opinions. In one set up at a rubber plant, I sold an idea of two types of decisions: full opinions and memos. At the end of a set of hearings we'd go over the cases with the top people, say a dozen cases. We'd mention each one and I'd say, "do you want an opinion?" The rule was that an opinion would be written if either side asked for it or if I wanted it. I had suggested that we have a different rate, a piece rate for opinions, and a lower rate for memos. Strangely enough, they didn't want different piece rates. They said, "Don't; make it the same. Well, in spite of the fact that there was no difference in cost, about half those cases resulted in memos. In one of my current relationships, the one where we have the half hour cases, I've developed a new opinion form. It's crazy, but it has the grievance number, the plant, the date of the hearing and other minimal identification, then a one line statement of the issue and then comments. The comments are numbered 1, 2, 3, 4, 5, and they may include anything. They include facts where I think it's important, positions of the parties if I think it's necessary to say anything about it, and opinion. But there's no distinction, it's just 1, 2, 3, 4, 5, winding up with a summary award to close it out. Now on an important case, some of those have run as many as 4 or 5 typewritten pages, even though that's the format while in many other cases, it's all on one page. The average is probably less than two pages. And they seem to like that. They want some record other than just the award. But when you don't have to be formalistic about the background of the case, and positions of the parties, and comments and opinion and so forth, you can just put a number there and not characterize it. So what, at least they get the drift of it.

THEY GET THE SKELETON AND MAYBE SOME OF THE MEAT. WHAT ABOUT SOPHISTICATION OF THE PARTIES?

I think there's not much doubt that they're more sophisticated.

HOW ABOUT THE ARBITRATORS?

Frankly, I don't know. I just don't know. I keep referring to George Taylor. I can't imagine anybody being today more sophisticated than George Taylor in the better use of the word sophisticated. He was really a terrific guy, I can't imagine anybody being more sophisticated than George but he was exceptional in his own time. Now what is the picture in the overall group of arbitrators, for example in even the total membership of the Academy today, let alone all the others out there? Frankly, I don't know. During my tenure in Washington, I saw some opinions and, frankly, I shuddered, just shuddered.

I HOPE NONE OF 'EM WAS MINE.

No. But an ordinary person who thinks he understands the English language would read those things, sometimes page after page after page, and you would wonder what the heck is this guy trying to say.

OFF THE FMCS LIST?

Yes. Some of 'em we tried to get off and were successful. Yeah, but I'm not going to mention names.

NO. YOU MIGHT THINK OF NUMBERS THOUGH.

Well, I would hesitate to venture any opinion on numbers because in that job, even though technically I was supervising the arbitration function, actually Morrie Myers or his predecessors as Legal Counsel in those days was running the arbitration section. About the only time I ever saw an opinion or had time to read it was when it was due to some crisis from the parties about it, so I didn't get a fair sample. Secondly, I've not been a reader of any of the publications of arbitration opinions, so frankly I'm not qualified to answer that question.

BUT YOU'RE VERY WELL QUALIFIED TO LEAP OVER AND TALK ABOUT ETHICAL PROBLEMS.

Well, as you know we wrestled with the ethical problems in connection with that committee on the Code of Professional Conduct.

I THINK ONE THING CAME THROUGH, BILL. WHENEVER THAT COMMITTEE MADE ANY PUBLIC PRESENTATION TO THE BOARD OF GOVERNORS OR ELSEWHERE, I GOT THE DISTINCT FEELING THAT YOU PERHAPS MORE THAN ANYBODY ELSE HAD HAD MORE EXPOSURE TO THE EXTENT TO WHICH ETHICAL PROBLEMS MAY EXIST AMONG ARBITRATORS. THAT'S WHY I THINK THIS IS ONE OF THE MORE IMPORTANT THINGS TO TALK ABOUT.

Well, I would differ from that, I don't think I had more exposure to the ethical problems because I only got the real horror stories, not often the borderline cases.

BUT YOU HAD ENOUGH TO GENERATE A SENSE OF WHAT TYPES OF PROBLEMS EXIST.

Well, if you try to summarize, I think the number of arbitrators that I at least know about who were just plain dishonest is miniscule. I don't think arbitrators are a bunch of skunks and scoundrels who are dishonest and taking bribes, etc. That kind of ethical problem I think is minimal. Sure there's a little bit of it that exists. We've had some exposure in the Academy in connection with who you take in as member. One character who will be unnamed hired a union lawyer to, mind you, write his opinions for him, sub rosa. Nobody knew that this was going on. Now to me this is not ethical. I personally think if anybody is writing your opinions for you, the parties ought to know. But certainly you shouldn't hire a union lawyer or a well-known corporate representative to do that job. I guess you can't call incompetence unethical.

CONGENITAL MAYBE.

But I think that it almost is. I mean for somebody to represent himself as an arbitrator and accept cases when he really is just totally incompetent--and there are a few of them, thank God, not too many. As you know, we had a hot debate in the Academy about whether fee charging borders on the unethical or is unethical. I personally think it can be, at least to the extent that we came out in the Code of Ethics. I think at a minimum the parties ought to know what your charges are and you shouldn't surprise them. I got into some difficulty and we weakened the clause a little bit. I don't think it's ethical for a beginning arbitrator, or an old arbitrator, to spend 7 or 8 or 10 days researching in the library and the, when he's without any request from the parties to do so, charge the parties for all that time. That just doesn't seem right to me.

I SHARE THAT.

Then you get the very questionable charging tactics. You know, during the course of that committee we had several guys write us, fortunately they were newcomers, and they said in substance; "What's a fair ratio of study days to hearing days? We think we ought to have a universal flat rule, charge 3 to 1, or 2 to 1, or what not." Well, I don't think this makes sense. Those cases are not that kind of cases. I mean, you occasionally will get a case where you need to spend maybe 5 to 1. On the other hand, there are a lot of cases where your writing time should be half the hearing time if the parties are longwinded; but whether that's an ethical problem I don't know. Oh, we had a horror story, came up in the FMCS days, of of some guy who got a case a thousand miles or so from home. So he decided to take his wife with him and they got in the car and took a leisurely trip to and from the hearing. The hearing lasted a half day and his charge was a day of hearing and something like 8 days of travel and then, to cap it, X days of study time...

THAT'S GOT TO GET THE CHUTZPAH AWARD!

And the case was a stinking little case that could very well have been a bench decision. In fact, the parties asked him for a bench decision and he refused to give it. By the way, have you heard this famous story, I don't know whether there's any truth to it, about the guy who was asked for a bench decision and he said right in the hearing room, "well if that is what you want, I'll be glad to do that, but I need a recess." And he said, "I always talk these cases over with *my* wife, and she's up in the hotel room." That has nothing to do with ethics.

THAT'S A LITTLE UNWITTING CANDOR.

Well, we don't want to try to repeat in here all the debate that went on in the Academy in connection with the new Code. There were some tough problems there. Probably I was more insistent than anybody else on a code with some teeth in it rather than some praise-of-motherhood clauses. There's a very honest difference of

opinion in the Academy about that which I respect. After all we're all entitled to our own opinions.

LET ME FOCUS YOU UPON ONE THING WHICH I THINK IS GOING INCREASINGLY TO CONCERN US, AND THAT'S THE PROBLEM OF THE ESCALATION OF COSTS. IT WASN'T VERY LONG AGO THAT THE PER DIEM IN OUR AREA WAS \$125, \$150. TODAY THAT HAS, I WOULD SAY, TRIPLED.

Tripled?

TRIPLED FOR SOME PERSONS, CERTAINLY AT LEAST DOUBLED FOR MANY.

Well, the last I knew a fairly typical per diem charge was \$250.

NO, I THINK IT'S UP ABOVE THAT.

It's above that on the west co'ast now?

I THINK IT'S UP AROUND \$400.

Well, to the extent that the FMCS statistics are valid, the increase in cost per case has not been as much as I had feared when you consider the amount of inflation that's occurred over the years. But you get the horror stories which of course are not typical, the case where somebody hears a discharge case in a day's time or 2 days' time and you wind up with a bill of \$2,000 or something like that, which I think is ridiculous. In fact, there was one worse than that, a discharge case back 15 years ago in the 60s where the hearings stretched out over a year's time with a hearing about one day a month. They'd hold the hearing, and then they'd analyze the transcript, and then they'd come back again. The hearings ran a total of 12 days and the charge was 18 days of study time plus some amount of travel time. A per diem charge then was about \$150 per day, but here was a total arbitrator's bill of almost \$6,000 for a discharge case plus transcript costs and plus legal fees to both parties. Now this is outrageous and destroys the notion that arbitration is a strike alternative. I mean, few unions can afford that kind of cost at all. I'm sure, as I looked into that case, that the parties contributed to that; but I'm also sure that the arbitrator didn't do anything to try to cut it down, you know. You can be tough with the parties and say, "Look, we're not going to do this damn nonsense!" But we shouldn't look at this cost thing on the basis of the extremes. I just don't know. In fact, I'm concerned sometimes about my own bills. I think I always have been a modest charger in terms of study time and so forth. But when I look at some bills that I have sent out, and contrast them to bills that I sent out in '39 and '40, I shudder myself a little bit. I think the delay problem is even worse than the cost problem. Now I don't know how much, if any, our Code has helped in this, but some of our real, real headaches were with guys, including unfortunately some of our fairly well known arbitrators, who would stew over a case for a year, possibly a year and a half.

THE PROBLEM IS THEY DIDN'T STEW OVER IT.

Well...

THEY PUT IT ON THE BACK BURNER UNTIL IT SIMMERED COOL.

They put it on the back burner and sometimes these would include discharge cases or cases which have some kind of a time liability. I think this is frightful because of this basic concept that I keep repeating, it being an alternative to the strike. If you don't get reasonably quick answers, you don't satisfy that; a long-delayed affirmative answer to a grievance is sometimes worse than a quick no. And I shuddered frankly, not only at those horror stories that we get frequently in Washington in the 60s, but even at the way the averages have crept up. So, going back to the old hosiery days for example, the contract in a very brief little note said the Impartial Chairman shall render his decision within 10 days unless the parties agreed to a longer time. Ten days! Now if we get one of these very tough piece-rate cases, sometimes it'd take a couple months, you know. We never had trouble getting an extension of time whenever there was a legitimate reason for it. Buy by damn in an ordinary case, unless those decisions were in their hands within 10 days, we heard about it! And as long as you gear yourself to that kind of a requirement, you do it. I mean there's no reason why you can't do it, if you plan accordingly. Sure, you may have to inconvenience yourself on occasion to work nights or something now and then, but frankly, these guys who get so hopelessly behind, they're never going to catch up, as long as they keep on taking cases, unless they work longer than the normal work hours. It just gets worse instead of better. So, I think that delay problem is doing more to defeat the real purposes of arbitration than probably any of these other things that we've talked about, formality and all the rest of it, even cost. Now some of this is delay on the part of the parties. I heard an ad hoc discharge case in June of this year. The gal was fired something like 14 months before that. The case had stewed around in the grievance procedure for well over a year. The parties insisted on briefs. I tried to kid 'em out of it but to no avail. I've gotten one brief, here it is October, I got one brief. I don't have the second brief. Then under their procedure, they have one more reply brief after that. I may get those briefs in by December. Then even if I sit down the next day and write the decision, that poor gal, whether she deserved the discharge or not—and it's a borderline case—, it would have been two years since she was fired. Now this just doesn't make any sense. You can't have a good decision in a case of that kind.

NO MATTER WHAT IT IS.

And you're tempted when, you get a case like that—particularly if it's borderline—to fall back on the old business of reinstatement with no back pay. Well, maybe that's worse than no reinstatement, you know. On the other hand, if she goes back with almost two years of back pay, that's a bonanza that she doesn't really deserve because

she had major faults and the reasons for reinstatement are not too strong.

IT'S A TOUGH PROBLEM.

So delay, I think very realistically, is the worst change since the early days as I remember them. Now I'm sure there were delays back in the early days that were longer than they should have been. But we never had these real horror stories about delay. They wouldn't stand for it. And by and large the arbitrators thought back in those days, "Thirty days! Gee, that's a lot of time. Why do I need 30 days?"

IT'S 60 NOW UNDER FMCS, AND THEY FIGURE THE AVERAGE IS 45.

In most of my Umpire arrangements since those early days there has been no specified time stated in the contract. I try to get 'em out within 30 days, and usually succeed, not always. On discharge cases, I try to get 'em out within a week after the hearing. In a current "permanent" relationship, the last time I went there, I was there on a Monday and a Tuesday and I heard a discharge that had occurred Friday. They didn't even have the grievance minutes typed up yet. They'd accelerated the grievance procedure so they'd get all the steps in before I got to town. Even though it was over a weekend, they wanted to get this out of the way. Now that's most unusual. But that was not unusual in the old days in men's clothing for example. Somebody would be fired and I'd get a phone call, "We got a discharge. Can you hear the case tomorrow? The day after tomorrow?" Once in a while they'd call and say "We got a discharge case that's been appealed to arbitration, but don't be in such a big hurry to schedule it." Now they meant by that, "Give us a couple of weeks to work it out, we think we'll be able to settle it." And too quick a hearing was disadvantageous to a settlement.

HOW ABOUT AWARDS, YOU MENTIONED EARLIER, IN DISCHARGE CASES OF REINSTATEMENT WITHOUT BACK PAY. THAT PHENOMENON HAS ALWAYS BOTHERED ME AS AN ARBITRATOR. THE GUY IS OUT FOR 6 MONTHS AND HE'S SORT OF GUILTY.

It bothers me too. And I have done it on a lot of cases. It's not an infallible rule by any means, but the almost inevitable problem is that any honest-to-goodness discharge case that you get is not open-and-shut. I mean, the person involved rightfully should have had some disciplinary action. If it's a clear-cut case for the union, then obviously you give back pay. But you get these borderline cases, and you're greatly tempted to resort to this form of no back pay. If you put 'em back with back pay and they really deserved a serious spanking, then the tendency is that they think they've had a hell of a victory and they go back with a chip on their shoulder and the chances are they'll be fired again. Also, I happen to think that a supervisor deserves some consideration. If too many people are reinstated with large sums of back pay when they deserved a severe penalty, the supervisor's opportunity to run his department productively is in jeopardy. Now the alternative, of course,

irrespective of how long it's been in the grievance procedure and irrespective of how long you take to handle it, and probably the best answer, is to say "reinstatement with a disciplinary layoff of 10 days, or 2 weeks, or 6 days, or whatever you decide, in view of the severity of the discipline, and back pay for the balance of the time." But it's not an easy question.

NO, BECAUSE HERE COMES AN EMPLOYER IN ONE OF THESE CLOSE CASES YOU'RE TALKING ABOUT, AND YOU SAY 10 DAYS WOULD HAVE BEEN THE APPROPRIATE WAY TO RESPOND TO THIS, AND NOW HE'S GOT TO PAY 6 MONTHS BACK PAY.

It's also complicated by the fact that it's not always possible to assess who's most responsible for the delay.

TO CHANGE THE SUBJECT, WHO ARBITRATES IN THE PERMANENT RELATIONSHIPS? AND, WILL ARBITRATION CONTINUE TO GROW?

A fair percentage of the guys in the Academy have one or more so-called permanent jobs varying all the way from just a few cases a year up to the jobs that are full-time in one industry.

I HAVE AN IMPRESSION, I DON'T KNOW THE ACCURACY OF IT, THAT THOSE THAT HAVE THAT TYPE OF THING ARE FULL-TIME ARBITRATORS AND THAT IT'S PRETTY RARE FOR ACADEMICS WHO ARE PART-TIME ARBITRATORS TO FILL THOSE POSTS.

Well, I don't think it's that rare. I think in general you're right. I don't know the West Coast picture, but I think in the East you'll find a lot of professors who will have maybe one permanent relationship, it won't be a heavy volume of cases, but nevertheless it will be a continuing relationship over a period of years, then they'll fill out with ad hoc. But, but on the basic question--and I keep repeating--the process will grow or not grow, or even maintain its volume depending on how we perform our job, and whether it continues to fulfill that function as the alternative to the strike, in its larger aspects.

WHAT WOULD YOU ADVISE AN ARBITRATOR'S DAUGHTER OR SON. I HAVE A SON WHO IS A FIRST YEAR LAW STUDENT WHO THINKS THAT HE WANTS TO ARBITRATE. THEN, I'VE GOT ANOTHER SON WHO IS A JUNIOR IN COLLEGE AND HE SAYS THAT HE WANTS TO ARBITRATE EVEN MORE STRONGLY THAN THE OTHER.

I'd tell 'em, "All the power to you!" Of course in my experience, there's only one profession that I think is more interesting, and that's mediation! (laughter) But as for arbitration, I literally love the work. Unlike some of my colleagues, it doesn't get old to me. You go in, you've heard several hundred discharge cases, you get a discharge case, and I'm interested in it. There's always something different. Sure, it may have very great similarities to other cases you've heard but there's always something different. If nothing else, a different person. There are certain types of cases, I admit, that frankly I get a little bit edgy about hearing. I have

less and less enthusiasm about work jurisdictional disputes. I mean there are so many of them that are so obviously selfish on the part of somebody or other. Sure, they may have some valid reasons, but I can't get very enthused about those cases although I hear quite a lot of them. But most any other kind of case, say, factors affecting seniority, realistically the factors change. Industry changes and it's contracts change. So, well, neither one of our sons had any interest in arbitration so I never had to answer that question. One of them's a doctor and the other is a geologist. But I would, if somebody had a real interest in it, I'd encourage them. Like everybody else in this business, I get would-be arbitrators talking to me: "how do I get in the business?" I always encourage them; but I also tell them some of the facts of life about how you get started in this business and that, no matter how good potentially you are, unless you get some kind of a break like I got, or unless you've got some particular reason to get a foothold, you sure as the devil better have some other source of income while you're trying to get started! 'Cause I've seen, and I'm sure you've seen, some very fine people killed off by a combination of circumstances which is just unfortunate. I mean, maybe they issued a wrong decision, or maybe they issued a right decision to the wrong people, you know. And if an arbitrator starts off and gets, for good or bad reasons, an adverse reaction from labor and industry people, he's dead. The chances are he's dead and it may not be his fault at all. On the other hand somebody may have a lucky break and get going and do much better than he deserves. Certainly I had the luckiest break of all, and of course there's a few others, quite a few others, like the people that Ralph Seward has broken in at Bethlehem and the Steelworkers and Syl Garrett breaks in at U.S. Steel and the Union in the same general set-up. Way back years ago I had a couple of people who worked with me and I got them started.

WHO WERE THEY?

Two Kennedys. Van Kennedy up at University of California who then decided that he had chalk in his veins and wanted to teach primarily and decided in effect to quit; he's done a bit of arbitration. The other is Tom Kennedy who is now at Harvard and Tom has done quite a lot of arbitration in addition to his teaching. But those were the two primary ones.

I READ YOUR LETTER TO BYRON ABERNATHY ABOUT THE "FOUNDING FATHERS" OF THE ACADEMY.

If you got that letter you can rely on that for whatever it's worth. My recollection is a little fuzzy. Ralph Seward and several others of us were very active in the formation of the Academy but we cannot say that we were the promoters. I don't think so really. There may have been some desultory talk about an organization. But good old Al Colby was the real promoter. He was a promoter type; Al was a first class promoter and Al went to work with Ed Warren who was then head of the Conciliation Service and Whit McCoy and a few others. They dragged some of the rest of us in and promoted the notion. And once somebody like Al was willing to take the leadership and the promotion, we fell in line and we had a couple of meetings in Washington. And I think Byron and I are in general agreement as to who were at those meetings. The group was picked just by hit or

rniss, you know. Al and Ed Warren and a few others decided, well, maybe we ought to have so and so. Then we got to the point of having the initial meeting in Chicago and the question was who should be invited? I don't remember the details but several of us got together and, on the basis of the FMCS list and our own knowledge of arbitrators around the country, we just by hit or miss in a very real sense picked a bunch of people who we thought were doing enough arbitration to invite to that opening meeting. And when we got there everybody was enthusiastic about it and the thing was started. It was just about that simple. And then as you know, Ralph was president for the first couple of years roughly and then I came after him and then we've had the yearly succession ever since. But now your question about whether there were two camps as to the possible uses of the Academy, yes there were. I would say we were not "fighting" camps, but there was a clear difference from the very outset and it still persists today. I give Al a great deal of credit for this 'cause, while some people questioned Al's motives, he was a selfless guy, he's spend days and days and days getting this thing started, and money, his own personal money. I don't know how much, and I don't think Al was a rich man, to get this thing going, but Al had the "blue ribbon" promotion concept; perhaps you also get McCoy in here. There were from the very beginning one group of arbitrators who looked on it, not as a union shop quite, but pretty much that notion. A blue-ribbon list. If you had an Academy, and if you made it a little bit tough to get in, once you got in you get business one way or another and therefore it was financially attractive to have an organization. Well, I guess Ralph and I were leaders in the opposing camp who said no, that's not the reason. The real reason we need an Academy is that this is a lone wolf kind of a profession where we don't get enough opportunity to share our mutual problems and where we ought to have a dual purpose of exchange of information and ideas among the people who are already in, and an educational process for people who are getting in. So that those of us who have been around a while can help share our experiences with the newcomers so that they won't have to learn everything the hard way. And those two competing notions have persisted to this day. Do you agree they're still there?

OH YES, AND I'M IN YOUR CAMP. I HAVE TO ADD THIS, HOWEVER. I MAY BE NAIVE ABOUT THIS AND I'M NOT SAYING IT IN ANY FALSE MODESTY BUT IN MY OWN ARBITRATING, I DON'T EVER REMEMBER OBSERVING ANY SYMPTOM THAT I WAS FINANCIALLY ADVANTAGED BY BEING A MEMBER OF THE ACADEMY. I KNOW THAT THERE ARE SITUATIONS ON THE EAST COAST WHERE IT'S A PREREQUISITE FOR SELECTION AS AN ARBITRATOR BUT I HAVEN'T SEEN THAT ON THE WEST COAST, AT LEAST IN SOUTHERN CALIFORNIA.

Well, I think it varies. I think, realistically, most everybody who is a member of the Academy has obtained some benefit from having his name on the list. 'Cause there are lots of people, and we don't kid ourselves, lots of people who when they're looking around for an arbitrator they say "Where's the Academy list?" And they look over that list. Direct appointments by the parties is very substantial, without resorting to the FMCS or the Triple A. For example, in all

of the cases I have heard, I don't think I ever in my total work lifetime got more than about ten cases from the FMCS and maybe as many as twenty or twenty five from the triple A. All the other ad hoes, and of course the permanents, were by direct appointment. Initially I got most of those ad hoc cases through George Taylor. Then after the War Labor Board experience, a lot of us as, the War Labor Board crowd, got exposure to labor and industry people as a result of our War Labor Board work so they didn't bother with asking the FMCS or the triple A. If they wanted an arbitrator, they came to somebody they had met in the War Labor Board days. So out of my 5,000 cases, certainly not more than 40 came from the appointive agencies, 50 at the outside by all appointive agencies of any character, National Mediation Board and all the rest of them.

MINE IS THE OPPOSITE, DIRECT OPPOSITE.

Well, you're much more typical. Now I would suspect that Ralph Seward would present essentially the same picture as I 'cause the bulk of his work has been in the so-called permanents. But in terms of most of our brothers in the Academy who have been predominately ad hoc, the FMCS and the triple A have been dominant factors. As for a direct appointment by the FMCS, I think there's a tendency to say, "Well, look, if we're going to stick our neck out with a direct appointment we better get somebody that at least has the sanction of the Academy." We made exceptions, I know. But when the parties get together, not bothering with the triple A or FMCS, I think the Academy membership is significant. I've had a lot of people for instance who come to me and said, "Look, Bill, we're looking for an arbitrator in such and such a part of the country and we can't get hold of an Academy list. Will you send us a list of the Academy?" Well, I was initially opposed to publishing our list of members for this reason, but I've lost that battle long since; and it wasn't a very important battle.

HOW ABOUT PUBLICATION OF AWARDS?

Well, I'm a cynic about that. I think publication of awards is as likely to lose cases for you as to win cases.

I'M WITH YOU, I TOTALLY AGREE WITH THAT.

I think these people that pore over published opinions and try to find somebody who will be favorable to their point of view are wasting their time.

THEY'RE NAIVE.

They're naive in the first place because the cases aren't similar and they may get disappointed even if they get the guy they look for. But a lot of people have been turned down because of this, some of them, incidently, justly so due to some of these crazy, some of these lousy, poorly written decisions.

MAYBE 20 YEARS AGO, I WALKED INTO A HEARING ROOM IN A SUBCONTRACT CASE, A HOTLY CONTESTED CASE IN THE AEROSPACE INDUSTRY, AND AS I SAT THERE LISTENING TO THE LAWYER FOR THE COMPANY, I WAS THINKING, "GOSH, THAT'S WELL SAID, VERY WELL SAID." AND THEN I BEGAN TO REALIZE THE REASON I THOUGHT IT WAS SO WELL SAID WAS BECAUSE I HAD WORKED SO HARD ON WRITING IT. IT WAS AN UNPUBLISHED DECISION, AND HE WAS LEADING ME RIGHT DOWN THE PATH TO THE DECISION THAT I HAD MADE IN THAT EARLIER CASE, AND IT WAS NOT KNOWN TO THE UNION BECAUSE THE UNION HADN'T READ IT BECAUSE IT WAS NOT PUBLISHED. NOW THAT BOTHERED ME AT THE TIME. WHAT DO YOU THINK ABOUT THAT? I HAVE SINCE COME TO THINK, ALTHOUGH I'M A MINORITY OF ONE SO FAR AS I KNOW, THAT THERE OUGHT TO BE SOME KIND OF A PUBLIC REGISTRY OF ALL AWARDS.

That sort of thing has happened to me two or three times.

IN ALL THOSE CASES JUST TWO OR THREE TIMES?

Yeah. I don't think more than two or three. Whenever that has come out, where they try to lead you into a trap that way, I say, "Well, look, this is a different case, don't count *on* anything." You know, some kind of a casual remark to set him off base. When I say two or three, I am not including, of course, the decisions in "permanent" relationships where your prior decisions are available to both parties and are quoted back to you very often.

I did have one illustration of an indication of the thoroughness of the Navy Intelligence Service. I was Chairman of the Shipbuilding Commission and because all of the work in the war was for the Navy or the Army or the Maritime Commission, we had Navy and Maritime Commission and Army observers, a *very* interesting arrangement, who sat with us in all of our deliberations. We invited them in and if they insisted on saying something, we'd listen. We didn't pay too much attention to them but they were there. 'Cause the government was paying the bill, after all, so it seemed to be sensible. But I said something in one of these private meetings and the Navy guy spoke up and he said, "Bill, that's not what you said in case number so and so at such and such a place." And he was right.

THEY PUT SOMEBODY TO RESEARCH ALL THE DECISIONS THEY COULD FIND OF BILL SIMKIN TO SEE IF THEY COULD PUT HIM ON THE SPOT. OR KEEP HIM ON THE LINE.

Yeah.

THAT'S PRETTY GOOD.

Well, I don't know, I may be cynical about published decisions but, apparently you agree with me, I don't think it's a major source of business.

OH NO. I FEEL THIS WAY ABOUT IT. I THINK AN ACADEMIC LIKE MYSELF HAS REALLY AN OBLIGATION TO WRITE AND TO EXPRESS HIMSELF FAR MORE THAN THE FULLTIME ARBITRATOR BECAUSE MY LIVELIHOOD DOES NOT DEPEND

UPON ACCEPTABILITY AND MY CORE PROFESSIONAL COMMITMENT IS BASICALLY TO THE ADVANCEMENT OF PROCEDURES LIKE COLLECTIVE BARGAINING AND ARBITRATION. BUT I KNOW ONE THING, AND I'VE SEEN THIS REPEATEDLY, FOR EVERY ARTICLE I WRITE, I'M CUT OFF LISTS. I LOSE ACCEPTABILITY TO THE EXTENT THAT I EXPRESS MYSELF IN PRINT.

This gets us on another subject that we've discussed ad nauseam in Academy meetings. You know some of us are greatly disturbed about the huge coterie of people from labor and industry who come and sit and watch us at these Academy meetings.

OUR ZOO.

And there is no question whatever but that one of the reasons that these people come is to look over the crop. Well, I guess that's understandable but it has had, I think, a stifling effect on discussion because the guys that are fearful, the guys that don't have enough business, are almost certain to either get up and talk when they shouldn't say anything, so that their presence will become known, or to try to figure out what will be most appropriate to put themselves in good graces with the majority of people that come to our meetings. I think this is a horrible effect; maybe I overdo it. Of course, I have the background that you don't of our early meetings and in our early meetings we even overdid the thing in the other direction; wives were not even there you know; and no outsiders were permitted. So we got together for the equivalent of our present annual meetings for just a bullfest among arbitrators, with no outsiders at all.

WHEN WAS THAT DISCONTINUED?

Well, frankly I don't know. The first move, as I recall, was to invite the wives and then it was not very long thereafter before we began inviting people from outside. And it's snowballed to the present situation where our guests outnumber our arbitrators by two to one at least.

OH, MORE THAN THAT, THREE OR FOUR TO ONE.

Well, maybe I'm overconcerned about this but I don't think there's any doubt that there is this tendency to stifle really good discussion.

WELL DO YOU AGREE WITH ME THAT THOSE PEOPLE WHO ARE NOT STIFLED DEFINITELY ARE CUTTING THEIR ACCEPTABILITY?

The people who talk?

SURE. IF THEY'RE TALKING CANDIDLY.

Well, well I don't know. Of course I'm a maverick, as you know, and I never had any hesitation to say what was on my mind. And I must admit with candor that probably my freedom to talk, I don't

know how much it would have been inhibited if I'd been struggling. But during all those, most all those years I had more business than I wanted, as evidenced by the fact that I wasn't on the triple A and FMCS lists except for rare occasions, had more business than I wanted, and so the hell with that, I say what's on my mind. And I'm sure there are a lot of other members of the Academy who do the same thing and do it today. But there are a lot of others who are struggling who I think just can't bring themselves to quite that frankness. Well, that's beside the point.

NO, IT'S PART OF THE POINT.

I don't think that any differences in the Academy are necessarily limited to the, shall we say to oversimplify it, the educational versus the get-business, union-shop notion. I don't think that it would be fair to say that those are the only differences. Lord knows that was not the origin of a lot of the differences, honest and legitimate differences of opinion that crept up in our ethics thing. Some of those differences cut clear across this kind of thing. And by and large those differences are healthy because arbitrators should be individuals and have their own ideas. But I think it would be hard to, aside from that one difference, which I think you can pick out, because it has its effect on, well most specifically on admissions policy. I've always been a maverick and wanted to be more liberal on admissions than almost anybody else in the Academy because of this educational thing and because I don't think having your name on the list ought to be a factor for getting business.

WE'VE HAD SEVERAL CASES, I'M THINKING OF ONE WHO SHALL REMAIN NAMELESS WHO I THINK PROBABLY WILL BECOME A MEMBER OF THE ACADEMY. BUT OUT IN OUR AREA OF THE WORLD A FELLOW DEALING WITH 150 OR 200 CASES A YEAR BUT WHO IS SITTING AS A MANAGING PARTNER OF A LAW FIRM IN WHICH OTHER LAWYERS AD HGC HAVE REPRESENTED MANAGEMENT, YET ALL OF THIS WAS WELL KNOWN IN THE COMMUNITY AND STILL HE HAS HAD THIS IMMENSE WIDE ACCEPTABILITY. I WAS AT A LOSS TO UNDERSTAND THE RATIONALE FOR HIS GETTING REJECTED FOR MEMBERSHIP.

You may remember now, I got up and spoke against this. I just don't think that you ought to limit arbitrators, including Academy members, to a so-called neutral. I think it's much deeper than that. The real question is, has the guy got integrity? And is he knowledgeable? But the number one question is, has he got integrity? I don't think you can say that somebody who represents management or somebody who represents unions is incompetent to act in an impartial capacity. If they've got what I consider basic integrity, they act according to their job.

DO YOU THINK WIDESPREAD ACCEPTABILITY IS AN ACID TEST?

Yeah. It fails sometimes, too. Sometimes people are widely accepted and they aren't so hot. (laughter)

THEY'VE GOT TO HAVE SOMETHING!

And sometimes—fortunately rarely—I have seen at least limited evidence of wide acceptability tied in with what I would consider unethical practices. So I don't think it's an infallible rule. But it's as good a one as we've got. I mean, not only as good a one as you've got, but after all, it's the acid test. The arbitration process is for the parties, not for any Academy or for any academic circle, it's for the parties. So the people they like for their particular process, so what? I mean, their judgment is better than ours. If they like them, and take them back time after time, they must be what they want. Now you can find an unethical connotation to this. There are—without mentioning any identity particularly—there are a few places in this country, fortunately very few, where the parties are joint connivers. Real connivers. And where they not only connive between the union and the company and do things to employees sometimes that are unfair, but they connive to defeat the applicable laws and a whole lot of other things. And there are a few situations that I suspect of this, where those people select an arbitrator who they know will accommodate himself to that kind of monkey business.

DONE UNWITTINGLY OR WITTINGLY?

Sometimes both ways. But sometimes wittingly. I know, for example, of a few instances during the War Labor Board when stabilization was in effect, and you may or may not remember this, but there was an administrative rule that was set up which said on any wage issue that is submitted to arbitration, the arbitration award will be filed with the War Labor Board, and if it's not rejected or modified within I think it was sixty days, or something like that, it can go into effect. Well, those awards piled up in Washington and because of the pressure of time, many of them weren't looked at. Well, there were a few parties, and again I did know of the specifics but I wouldn't repeat 'em here for anyone, there were a few parties who got together where there would be some wage increase they would want to put into effect. The parties would write the decision, they'd find an arbitrator conducive to this thing and say, "Look, we got a case, and it's not a real dispute, you won't have to worry about this but all you need to do is put your signature *on* the line." And there'd be a nominal hearing. In a few cases that I know of the arbitrator didn't know what the hell the argument was all about, he didn't even know what he was signing. And so the award went into effect and if the time period lapsed, the Board didn't bother with them. This was a deliberate device to defeat stabilization by paying somebody for his signature to something which if he knew what he was signing was a deliberate evasion, that they couldn't get through any other way. Now, there were other less serious things than that where they would hold a hearing where they wouldn't present him with a decision to sign but where they would slant the evidence...

STACK THE DECK...

Stack the deck to a point where they would have every reason to expect a decision that would accomplish the same result, and they'd keep the arbitrator in the dark as to what their true purpose was.

Well, thank God those days are gone. But there's been a little monkey business of that kind.

I don't want to overemphasize what I've been talking about 'cause I think this is a very small minority of situations, and even in some of those, I think the arbitrators got involved, frankly, more out of stupidity than cupidity. But I think we started off on this tangent with the question of acceptability being the best criterion, and you do get an occasional extreme situation where somebody's acceptable for reasons like this.

IT JUST SHOWS YOU THAT THE NORMAL RULE OF ACCEPTABILITY MAY BE DECEPTIVE. NOTHING IS ABSOLUTELY FAIL-SAFE.

But another aspect of this acceptability has bewildered me and a lot of other people. We talked a lot about delay and a few of our worst offenders are the most acceptable and still continue to get cases and the parties suffer under this and gripe about it, but they still take 'em. Now the only way to kill the delay thing is to knock 'em off the list. But the parties don't do that. So what it boils down to in many cases is that these guys guilty of delay are basically good arbitrators in every other respect, and that reality, compared to their competition, outweighs the delay factor.

THE JUDGMENT OF THE MARKETPLACE.

This is a marketplace judgment; but it's still a problem.

THAT'S RIGHT. IT'S STILL DISTURBING BECAUSE IT DOES, AS YOU EMPHASIZE, UNDERCUT THE ACCEPTABILITY OF THE PROCESS, QUITE ASIDE FROM THE INDIVIDUAL.

Well, I keep talking about this fundamental precept of the viable alternative to the strike. And we talk about it a little bit at virtually every Academy meeting. I think, frankly, and without being nasty about it, I think there's some of our fellow arbitrators who don't understand it at all. I think there are a few of 'em who, and I'm not naming names, I'm not even thinking of individuals, I think there's a certain group who think this is a pretty good business. If you're lucky enough to get business, fairly rewarding financially, it's quasi-judicial and we're deciding things, and our ego is inflated because we decide other people's problems, but without a real deep insight into what the hell we are deciding. I mean, why are we deciding these things and why is this system in effect? And if you ever lose sight of that, or never catch sight of it, then I don't think you're a very good arbitrator.

DO YOU THINK THERE'S ENOUGH CANDID CRITICISM AMONG US IN OUR MEETINGS NOW?

Probably not. But I don't know that it's serious. I think in our private meetings, our closed meetings, people by and large get up and say what they think. The discussion is not always, from my

point of view, too enlightening. (laughter) But part of my problem is that strangely enough although I have never really lost my zeal to hear arbitration cases, I frankly have lost my zeal to attend conferences.

TO LISTEN TO ARBITRATORS TALK.

Not only arbitrators, but labor relations people.

CONFEREES.

Conferees. I've been to so many over the years that it's getting a little stale. Once in a while you'll get a germ of wisdom that's worth the effort; but frankly I go to National Academy meetings almost solely to see old friends. The hell with the discussion!

THERE SEEMS TO BE A SIGNIFICANT DEVELOPMENT, I THINK, TOWARDS LESS EMPHASIS ON THE ANNUAL MEETING AND MORE ON INTERIM REGIONAL MEETINGS THAT ARE OF A PRIVATE CLOSED-DOOR NATURE. WHAT DO YOU THINK ABOUT THIS AS A VIABLE ALTERNATIVE TO THE PROBLEM OF BEING ABLE CANDIDLY TO EXPRESS YOURSELF?

Well, I think there are problems in making regional meetings effective in terms of getting the people there and so forth. But I think the objective is good if the regional meeting could stay away from this coterie of clients hanging around. I'm not saying we shouldn't have the wives there. And if somebody would put enough effort into a really good agenda I think it might be well worth while because one of our real problems in the Academy is that too small a proportion of the membership get a chance to go to the annual meeting, quite aside from any problems at the annual meeting. I got up in San Francisco and made that nasty crack, you know, even though I was opposed to the \$200 dues, that anybody who comes to San Francisco and could stay at the Fairmont could afford \$200 a year dues. (laughter) There are a lot of our members who do only a limited amount of work, the ones who in terms of the educational objective need it most, don't get to go for financial reasons, or because they're teaching and can't get away, or for whatever reasons. So we tend to get the guys at the annual meeting--and the gals now--who need it the least, in terms of the educational objective, rather than the ones who need it the most. Now if regional meetings would fill that gap, all power to 'em! For example, those Philadelphia meetings that have been held from long before the Academy was formed are still being held. Now these are one night affairs; you have a couple of cocktails, then dinner, and then you sit down and shoot the bull on some subject for a couple of hours and go home. Well, I think these are great. They obviously will vary in terms of value of their subjective content from time to time but they have, by and large, succeeded in attracting, not everybody in Philadelphia who arbitrates, but a high proportion of the arbitrators in Philadelphia and this has been a real educational development.

SINCE THE ACADEMY'S BEEN IN EXISTENCE DO YOU KNOW IF THEY'VE BROADENED THAT TO INCLUDE NONMEMBER ARBITRATORS?

Well, it's always included nonmembers, to my knowledge. Of course, I haven't been around since '61. The original idea was to mix 'em before the Academy was formed, and afterwards it was a deliberate decision not to limit it to Academy members, to invite anybody who does any appreciable amount of arbitration, whether he's Academy or not. I think that still prevails.

THAT MAKES SENSE.

Now, aside from Philadelphia, I don't really know what our practice is in the various regions. I get an invitation occasionally to go out to California to some weekend confab. I haven't gone, not because I wouldn't like to go, but frankly I'm just a little fed up...

CONFABBED OUT...

...with conferences. I don't have an inexhaustible amount of money and I just don't figure it's worth the expense to bother to travel. I'm sure if I lived in Los Angeles, I'd go. Maybe not everytime, but I'd go most of the time.

IF YOU HAD YOUR DRUTHERS ABOUT THE ACADEMY, WHAT DIRECTIONS OR IDEAS DO YOU THINK WOULD BE SOMETHING THAT YOU WOULD LIKE TO SEE FOR THE NEXT 5 OR 10 YEARS?

I don't know that I have anything really specific. I don't think at this late date that it's possible to backtrack on the annual meeting and get rid of our visitors. I just think it's gone too far, realistically, to do that. Maybe I'm wrong, maybe it could be. I think they'd be better meetings if we did that but I don't think it would be enough better to warrant all the fuss and furor. There'd be quite a fuss externally as well as internally. Our outside friends like to go. I think the majority of members would probably oppose it. Well, while I'm willing to fight for causes, I'm not willing to fight for a certain defeat. I think we made a little progress in discouraging Academy members from paying the expenses of the parties...

I WAS FLABBERGASTED WHEN THAT CAME OUT!

But maybe I've done things just as bad. I have thrown a dinner for some of my friends for whom I work when we're at an Academy meeting and picked up the tab. I don't know, maybe there's not much difference.

WELL, AT LEAST A DIFFERENCE IN DEGREE.

And at least they were not prospective clients, they were existing clients.

I NOTICE THAT THERE SEEMS TO BE A DIFFERENCE IN THE USE OF THAT WORD AND I HAVE WONDERED IF THERE'S ANY SIGNIFICANCE TO IT. THOSE OF YOU WHO REALLY LAUNCHED ARBITRATION IN THE LABOR MANAGEMENT AREA AS WELL AS THE ACADEMY, TALK ABOUT "CLIENTS."

I don't use the term too much, but I have used it several times.

THE WORD ALWAYS JARS ME.

Yeah, I don't like it myself. I guess I've fallen into the trap of using it primarily because of my so-called permanent relationships. I would never use that word in terms of anybody that I've dealt with in an ad hoc relationship. But with the so-called permanent relation, you work with these people all through the year. And take this business of throwing a dinner occasionally, I mean, they entertain us, pick up the tab numerous and sundry times, and I just feel it's a little too one sided, and it would be nice for us to do something, at least once a year or so. It's just that simple.

I DON'T QUARREL WITH THAT. I THINK THE YOUNGER MORE RECENT MEMBERS IN THE ACADEMY JUST HAVEN'T FALLEN INTO TALKING ABOUT THE PARTIES AS "CLIENTS." AND I SUSPECT THAT IT MAY ACTUALLY REFLECT THIS DEVELOPMENT THAT WE WERE TALKING ABOUT EARLIER TOWARDS MORE QUASI-JUDICIAL FORMALITIES AND ATMOSPHERE AND WHAT NOT.

Well I agree with you; I don't like the connotation of the name even though I use it. "Friends" is a lot better. And they are real friends. In these continuing relationships you develop life-long friendships. As I've indicated to you, even when they fire you, that doesn't disturb the lifelong friendship.

IS THERE ANYTHING YOU WANT TO TALK ABOUT THAT WE HAVEN'T TOUCHED ON?

One thing is tripartite arbitration, both in grievances and in interest arbitrations. I'm one of the Academy mavericks, I think; I love tripartite arbitration, the process. It has a few obvious disadvantages, such as it tends to increase the cost. But what I like about it is the opportunity to sit down and go over a decision, and to develop a decision with representatives of the parties sitting right with you while you do it. Now formal tripartite arbitration when it's conducted that way is the same notion, even in ad hoc cases, as Taylor's concept of freedom to talk to the parties. His tripartite boards were informal, instead of formal, you see. But especially where you don't have the opportunity for that Impartial Chairman concept, and perhaps more particularly in interest cases, I think tripartite is the only kind of arbitration I really like. I learned a painful lesson *one* time. I had a tripartite board, it was a grievance case, way back, and I don't know why I did it 'cause I should have been imbued with some of Taylor's thinking by that time, But I called the parties in and we had a desultory conversation for a few minutes, then I handed them a complete draft of a decision. One of the guys hit the roof. He called me all kinds of names, in more or less a nice way but not very nice. He said, "What the hell is the purpose of this Board? You, in effect, throw something at us and say sign or else. That's not the function of this Board.

The function of this Board is, if we possibly can, to work out a solution that's reasonably agreeable to all of us, in any event so that we'll have our input before you write something." Well, I learned from that and to my best recollection never since have I handed the parties an opinion. I frequently will hand them a decision down to the opinion. You know, the background of the case, the positions of the parties, however you write it up. Then we start talking. I may have a rough draft hidden away somewhere, but I don't show it. But that tripartite method does give full play, full opportunity for feedback from and to the parties and then when your decision is finalized, then the opportunities of the parties to look it over for bugs, quite aside from the decision, that will cause trouble, I think is a very valuable function. So I'd like personally to see it in grievance arbitration, even simple cases.

But I don't think it's feasible costwise.

IT REQUIRES A MEETING. WAHT ABOUT THIS DEVELOPMENT IN USING THE TELEPHONE IN A CONFERENCE CALL?

That can be done and I've done it, frankly, in an informal arbitration board rather than a formal arbitration board.

THERE'S A FELLOW IN DETROIT WHO CONDUCTS HEARINGS ON THE TELEPHONE.

I know about this, but I don't know how he does that. But it would be possible with the proper telephone connections to get a good deal done without the expense of a joint meeting. In any event, this really follows from my bias for the Impartial Chairman concept, this injects something of that into it. I think that by and large it's better when you don't have to get a majority decision because you will occasionally run into a case where you can't. I've never had real serious troubles except that one I told you about, the tire case. I've never had any real serious troubles in getting a majority opinion. I don't think I've ever had to bend my own opinions unduly in order to get a vote. And another aspect of tripartite arbitration which a lot of people don't understand—I'm sure you do—is that you frequently get dissents which are strictly dissents for the record. If you know how to write those awards, you break the decision up, whatever it is, into three or four parts, and you may get a realistically unanimous decision, the union guy dissents on point one., the company dissents on point two, they agree, or don't dissent, on point three. Well, nobody knows except the tripartite board, and this is good, but a lot of those things are really unanimous. Now, of course, I got my break-in on tripartite functioning, as a lot of us did, in the War Labor Board which operated on a tripartite basis. So that's one thing I'd like to add to this potpourri of stuff.

BEFORE YOU GO TO THE NEXT THING, I WAS QUITE SURPRISED AT A TABLE YOU HAD IN YOUR BOOK, IN APPENDIX A6, WHICH HAD 423 ARBITRATORS OF WHOM 68 HAD HAD MEDIATION EXPERIENCE BUT ONLY 63 HAD HAD WAR LABOR BOARD EXPERIENCE. THAT REALLY SURPRISED ME.

We're way past the War Labor Board alumni days. Now there was a time...

PRACTICALLY A 100\$ THEN?

Well, it never was that much.

NOT THAT MUCH?

No, never was. But we're way past that now. I was surprised myself at the results of that study, and you remember that I got amazing cooperation from the Academy members, and from non-Academy members that I contacted.

YOU HAD ABOUT 350 ACADEMY MEMBERS.

I had something like a 90% response to the questionnaire, which is almost unheard of.

RIGHT.

Well, in any event, a lot of my friends would not agree with me on this tripartite board thing, but my reasons I think are obvious from the context of our entire discussion.

YEAH, WELL IT SHOULD BE POSSIBLE TO JUST DRAFT FINDINGS OF FACT.

Typically the decision itself is not any different than if you wrote it yourself. I'd say that's the typical result. It's quite common to get some change in language to avoid this problem of stirring up trouble where you have no intention of stirring it. It's quite common to get that. Very seldom do you get any basic change in the award. I might cite one case where, rightly or wrongly, I did change my award entirely in an ad hoc case. A guy was fired for excessive absenteeism. It was known that he had two jobs. And at the company where I was arbitrating, he phoned the company and said he would be gone a couple of weeks on a family matter, his father was seriously ill. So the company knew he had this other job and they knew there were some complexities in running two jobs. So they phoned the other company and that company said "oh, he's working." So at the hearing, the guy insisted he had been away to visit his sick father and he said, "Sure my foreman told them I was working. The reason why my foreman told them I was working is that he turned me in for time and we split the proceeds." (laughter) Well, in any event, I was completely convinced that the guy was just not telling the truth, although the foreman turning him in could have happened. So I didn't have an opinion written, but my own mind was made up. I brought the parties in for a tripartite meeting and the company guy spoke up first, He said, "you know," he said, "I think maybe we'd better put this guy back to work." He said, I don't want to give him any back pay, or I don't want to boost his ego, but he said, "this guy's a damn good worker." And he said, "I think maybe he's learned his lesson. I'd like to put him back." Well, the Union guy of course went along immediately. So we had an unanimous award. Totally different from what I would've decided! But this is the rare case and I had no qualms of conscience in going along with them when they both wanted this. We fussed around with the award. I've forgotten what we did with the language.

YOU MIGHT VERY WELL HAVE LEFT HIM DROPPED OFF AT THE DEEP END OF THE PIER.

He might have lost both jobs. But, in any event, so much within the time limitations here for tripartitism. But I think this is one of the most valid basic concepts in arbitration, especially for new contract cases, interest arbitration.

ASIDE FROM INTEREST CASES, I THINK IT'S FAIR TO SAY IT'S FALLEN OFF SEVERELY.

Probably fallen off severely for grievances, except in these informal or sometimes formal situations where they follow the Impartial Chairman concept.

THE AIRLINE INDUSTRY HAS SYSTEM BOARDS OF ADJUSTMENT WHERE YOU HAVE THE TRIPARTITE FUNCTION. IT USED TO BE THAT I HAD THAT IN THE AEROSPACE INDUSTRY, BUT THAT'S JUST EFFECTIVELY DEAD.

Of course, the rationale is that over the long stretch of time you get more acceptable decisions, decisions that the parties can live with much better than otherwise.

YEAH.

Now, there is a question here which we haven't really explored about limited arbitration. What do you mean by "limited arbitration?"

I PICKED IT OUT OF YOUR BOOK.

What? Out of my book?

RIGHT OUT OF YOUR BOOK!

What did I mean by it? (laughter)

YOU WERE TALKING ABOUT MEDIATION AND ARBITRATION, ESSENTIALLY INTEREST DISPUTES WHERE YOU FELT THAT THE PROCESS HAD NOT REALLY BEEN EFFECTIVELY UTILIZED, AND SHOULD BE, TO MARK OUT LIMITED ISSUES WHICH COULD BE LIFTED OUT AND REFERRED TO ARBITRATION WHILE THE BASIC MEDIATION GOES FORWARD.

Yeah, or where you will, in essence, agree to arbitrate certain issues and specifically not arbitrate others. An illustration is the current steel deal where they will arbitrate almost all new contract issues, including wages, but they will not arbitrate the union shop and a few other sacred cows on both, sides of the fence. They will not arbitrate, I think, the Management Rights Clause. Taylor was a great proponent of a limited arbitration notion and he always felt that the parties never really gave enough attention to the potentialities of this device, that it had great potential, particularly in interest disputes, to segregate out a few items and arbitrate them. I think it has grown, but I don't have any figures to support

Now, as far as expedited arbitration is concerned, I'm all for that. I think that's a very fine move even if not really entirely new.

I THINK IT REFLECTS AN UNDERSTANDABLE DESIRE TO GET AWAY FROM SOME OF THESE COST ASPECTS AND THE DELAY.

Of course I've kidded Ben Fisher a little bit, sort of half jocularly about this, I said, "What you really ought to do when you expedite arbitrations is to get the newcomers on the lengthy cases and get your experienced arbitrators on the expedited ones. But if you could convince the experienced arbitrators to do the expedited awards, then you get the judgment of years of experience, you get it fast and as for these other messy disputes on contract interpretation and so forth, let the youngsters wrestle with them!

WHAT DID HE SAY?

Well, I was half kidding. He kind of grinned, but he didn't entirely buy the notion.

WELL I WOULD SAY THAT YOU WOULD HAVE HAD TO HAVE BEEN HALF SERIOUS THERE TOO.

Yeah, I was half serious. The only thing I wasn't really serious about was putting the inexperienced guys on the really tough cases. Now we haven't really talked about interest arbitrations except this business about tripartitism. I have always felt, looking into the future, if arbitration continues to do its job fundamentally in grievances, that we were bound to get a growth of interest arbitrations in one form or another, either delimited or of full scope. Well, we've had some moves in that direction, the steel thing for example. The steel thing is not typical, but it is going to be an increasingly typical situation where the parties have to deal with the import thing. I was involved as you know in some of those steel negotiations and if you look at a chart of steel imports, it's fantastic. Imports will go on pretty much on a level and as you come to the next contract negotiation date, they'll jump up. Then they'll go on along at a level, at the higher level, then they'll jump up the next negotiation. This was what prompted them to make that deal. The foreign sellers are smart enough so that they won't just fill in the gap when there's a long strike; they insist on long term contracts. So this is just pure economics that prompted that move and of course some of the steel workers are unhappy about it. Whether it persists, we'll have to wait and see. I long since gave up any claim to be an economist, but I think as we look down the road, maybe not too many years away, we're increasingly going to find industries that are in trouble economically and that those industries that are in trouble economically are going to find that, even from a Union point of view, you just can't afford a strike, or can't afford a long strike, and I think we're bound to get some movement toward arbitration, and just like grievance arbitration that will grow, depending on what kind of a job we characters do when we get those jobs. If we do a workmanlike job in those Interest

arbitrations, it's going to grow. If we flub the works, everytime somebody makes a lousy decision in an interest arbitration, it tends to put it down for other people who know about it.

SOME OF THAT RECORD IS BEING MADE RIGHT NOW IN THE PUBLIC SECTOR.

For one illustration, what used to be called the street railway industry, now the city bus system, for many years had a commitment to arbitrate future contract disputes. Some of 'em have gotten rid of it, but some of 'em still have it. In theory there, strikes don't happen. It was something like the steel thing. I've had several of those cases, tough cases, very tough cases. They're tripartite, thank goodness, but they're very rough ones. There was one case that almost knocked that thing out of the box for a substantial area. They had negotiations and the company made an offer. Wages were the principal issue. It wasn't enough. The Union turned it down. They went to arbitration and there was a fixed fiction in that industry, which I understand the academic basis for, that they don't tell the arbitrator offers and counter-offers beyond certain positions. So this arbitrator wasn't told about this offer. He came down with a decision which was about half as much as the company had offered. (laughter) Now, I don't know, I don't know what the facts were in that case, but you don't need to know the facts. It was a strike! And you understand fully why you get a strike because everybody knew about that offer. I had a personal experience—I won't cite the case—that almost resulted in a similar mess. We debated this within the tripartite board, and I just couldn't get these guys off base very far. And I worked and I worked on 'em and worked on 'em and I couldn't get 'em out and I had tried to find out surreptitiously whether there'd been any secret offers that I didn't know about and they clammed up and wouldn't tell me. They were honor bound, they said, not to. So finally, I wasn't willing to spend the rest of my life on that case so I called a meeting one day and I said, "On this wage issue, as I analyze the evidence, it ought to be somewhere between these two figures"—and I always, when I did that kind of thing, I always put a little gap, you know, not a single figure. As soon as I opened my mouth, I saw the company guy grinning like he'd swallowed the canary and the union guy was obviously most unhappy. So I didn't say anything more, I said, "Well, I see this kind of hits an unfavorable reception," I said, "Let's talk about something else." The Board members had not left my room more than five minutes when I got a phone call. The guy introduced himself, and he said, "Mr. Simkin," he said, "maybe I shouldn't be doing this, but I think there's something you ought to know." He was with the union. I said, "Oh come on over." So he came over and he had not been in the arbitration. It turned out that there had been a secret company offer which nobody on the union side knew about except three or four individuals, and that secret offer was exactly at the top of my range. It happened, fortunately, not to be outside the range that I had stuck my neck out on. I said "that's very interesting." I said "let me handle this." I said "I don't know what I'll do about this but I appreciate your telling me." He was again very apologetic about breaking their alleged rules but he said, "I think you ought to know." So I immediately called the company man on the board. I said come *on* over, I want to talk

with you. He came over. I said I'm not going to tell you where I found this out, except I will tell you, and I'm very honest about it, it didn't come from your counterpart on this board and it didn't come from anybody in the union who was in these hearings. I said I heard a rumor that there was a secret company offer of x cents an hour and the union turned it down. I said, "Do you know anything about that?" He said "That's absolutely right." (laughter) So I called the board together, and I said "Under the circumstances, the wage award's going to be x cents," I said, "we've got a few other issues to decide, but the wage award's going to be x cents." And the union was unhappy a little, and the company wasn't too unhappy. But if I had come out with three cents below that figure, even though it was supposed to be secret, that would have gotten around and that would've been a hell of a mess.

THAT WAS NOT SMART, YOU KNOW, ON THE PART OF THE COMPANY.

Well, their notion, allegedly at least in the old days, I don't know whether they still do it, they swear themselves with a blood oath not to disclose. It's a beautiful theory, the theory of course being that an arbitration award ought to be on its merits. And if you make known last-minute efforts to settle, you will in the long run stifle these last-minute efforts to settle. And the other aspect of the notion which they once subscribed to, long since abandoned, was if the arbitrator comes down with something that's outside the range of the parties' expectations, well, maybe that's a good lesson. Well, there have been other instances in that industry where, I know for a fact that the arbitrator awarded more than the union was willing to settle for. Now when this happens you don't have a strike at least. But you got a mess because then obviously the union negotiators themselves are embarrassed with their own people. They've been willing to settle for less than this high-powered outsider says they are entitled to.

AN AFTERTHOUGHT?

I'm not sensitive about my alleged reputation as an arbitrator who occasionally mediates. I'm not sensitive about that. In any event, I'm too old for it to make any difference. I would want to make sure that the overall output of this conversation doesn't leave the wrong impression as to what I mean by mediation. I don't think it would.

IN WHAT WOULD THE HAZARD BE?

I think I said, for example, you obviously don't say, "come now let us mediate."

In terms of context, I think the notion ought to come out clear in whatever is used here that mediation is a multi-faceted thing if it's tied in with arbitration, with a whole lot of ramifications, and it's not comparable in many respects to straight mediation. And I think we already adequately covered the dangers to individual rights, of somebody ganging up on an individual, in terms of the use of mediation in the arbitration process.

RIGHT.

I'm not so worried about that. I think it's a potential danger. But there's just as great a potential danger of the parties ganging up on you by the way they present the case.

THE STACKED DECK.

Presenting a stacked deck and somebody gets rimmed. If you're a ball-and-strike arbitrator, and you go solely on the basis of the evidence, and don't read between the lines, I think that's just as great a danger, maybe more of a danger. In the Impartial Chairman kind of an operation where I get a discharge case, where I suspect somebody is being railroaded, what I do is I say to the union guy, face to face, I say "Look, this smells fishy to me. What's the matter, is he going to run against you next time?" And put him on the spot.

As another illustration, I had a men's clothing case where I got a tipoff in advance that they had two guys that should be fired. Well, we heard the case and I called a recess. I said, "Look, I understand you know how this thing works, and it'd be no surprise to the company to know that I got a tipoff from the union that these two guys were guilty." I said, "I cannot sustain the discharge on the basis of the evidence now before me. Now what cooks, what's wrong here?" And they kind of grimaced, and they said, "Well," they said, "the real reason is that these guys are making a big business selling numbers in the plant. And we didn't want to mention that."

'CAUSE THEY COULDN'T PROVE IT?

No. They had ample proof. I said to them, "Look," I said, "I'm simply telling you in this recess that as the case stands, as it is, I'm going to put those guys back to work. I don't care what you want. You don't have a sustainable discharge. But," I said, "if you got other evidence against them., get it on the record." So they came back after that recess and they laid it on the table. The guys were guilty as hell; I mean there was no question about it. They, in substance, admitted it. Well, then there was no problem. But they just didn't think they needed to use that.

MAYBE THEY HAD SOME OTHER PEOPLE THAT WEREN'T WITHIN THE TARGET AREA WHO HAD THEIR FINGERPRINTS ON THOSE TICKETS?

No. The real reason was much deeper than that. The mob which controlled this numbers business was at one time so strong that some of the union officials feared for their lives. And this is a pretty potent reason for not presenting this as an argument in the case.

MIGHT INTERRUPT YOUR SENIORITY ON THE PLANET.

Yeah. Well, I think as far as I'm concerned we probably could gas for another 10 hours, but I think that the guts of what I want to say are probably in the record.