Chapter 1

PROCEDURAL PROBLEMS IN THE CONDUCT OF ARBITRATION HEARINGS:
A DISCUSSION

Discussion Panel:
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RONALD W. HAUGHTON, Detroit, Michigan
HARRY H. PLATT, Detroit, Michigan
EMANUEL STEIN, New York, N. Y.
SAUL WALLEN, Boston, Mass.

(Editor's Note: This chapter is an abridged version of the transcript of an informal "workshop" at which the above topic was explored for an audience of arbitrators. Although not originally intended for publication, the Academy's Board of Governors deemed the discussion to be of sufficient general interest and significance to justify inclusion in these Proceedings. Each of the above-named participants has also authorized its publication.)

Mr. Gill: My first question deals with arbitrability. You are conducting a hearing; the company insists that it wants a ruling on arbitrability before it goes ahead with the merits of the case. The union says: "Nothing of the sort. We can't afford a long delay. We are here with our witnesses, and we want the merits of this dispute heard today. If you want to rule on arbitrability after you have heard the merits, that is all right with us, but we don't want to have another hearing." The company says: "That is not acceptable to us. We want to have a ruling on arbitrability before you hear the merits. We don't want your mind prejudiced by the merits." In such a situation, what do you do?

Mr. Haughton: Before the 1960 Steelworkers' Trilogy I would have considered the matter carefully, and then would have pressed to have heard the merits, reserving the decision on arbitrability.
If the company had continued to insist on a ruling, I would have recessed the hearing for consideration of the arbitrability issue. I would then have made a formal written award on the matter.

Since the Trilogy, however, I break my own long-standing rule of not issuing a decision of any importance at the hearing. I am now inclined to look at the way the grievance procedure is worded. If I find the kind of typical grievance procedure that was involved in the Steelworker cases, I would now announce right at the hearing that the issue is arbitrable.

Mr. Platt: Well, if the question were to come up at an umpire hearing under the Ford-UAW system, I think I would proceed notwithstanding the objection of one side. I would divide the presentation, however, and might announce my decision on arbitrability at the conclusion of the first phase, although I wouldn't commit myself to do so. The parties, of course, could agree and decide that arbitrability should be heard separately.

I would also take into consideration, I think, the reasons why the company should want it that way, assuming the company is the one that is insisting on it, and the type of case. If it were a matter that could be easily determinable, I might, for the sake of convenience, accommodate the company on that; but normally, unless they agreed jointly that only the first question would be heard, I would proceed to hear the merits upon the conclusion of the first presentation.

Mr. Stein: If possible, I would give them an answer immediately after hearing the argument on arbitrability. I make it a practice when one side says, "We don't want to go forward until we have had a decision on this issue of arbitrability," to take ten or fifteen minutes out, make up my mind, and give them the answer. I think they are entitled to an answer if it is something about which they feel strongly, and I think they should get the answer before they are required to go forward.

Mr. Wallen: I would generally hear the arbitrability arguments and then proceed directly to the hearing of the merits unless, in a particular case, I was impressed either by the complexity of the case or by the likelihood that a hearing on the merits would be an exercise of futility. In that particular and exceptional case,
I might defer hearing the merits, but that would not be the ordinary case.

Chairman Gill: I think probably the best way to proceed this afternoon, rather than opening these questions for discussion now, is to go on through my list. When we are finished with the performance of our panel, we will invite our audience to join in the discussion.

My next item raises the old question of who goes first, with a slight variation. Let us assume that the union finally says: "All right, to cut this short we will go first. As our first witness we call the foreman." The company, of course, objects and says, "You can't call the foreman. He is our witness." The union says, "That is what we are doing—we are calling the foreman." The company says, "We instruct the foreman not to answer any questions; we will put him on when it comes our turn, but the union cannot escape its obligation to go first by this device." The same problem may come up in the alternative fashion where the company says, "All right, we will go first, and we will call the grievant as our first witness." What do you do? Any volunteers?

Mr. Wallen: My experience has been to let them call the grievant as a first witness or the foreman as a first witness as the case may be. Eventually, the proceedings get so confused that nobody knows what he is doing and you get a sensible reversion to a logical presentation of the case.

In most cases the union, if it is the moving party, goes forward; in discipline or discharge cases the company proceeds with an explanation of its action and the union has a chance to rebut it.

I find this is scarcely a problem any longer. Managements that used to protest most severely have become much more docile and will now tell you what they did, and why, before the other fellow tells what he did or did not do.

Mr. Haughton: There is a little-known American Arbitration Association rule by which the grieving party moves first and the company goes next. In a disciplinary case, under AAA auspices, I have necessarily had to rule that the union move first.

Chairman Gill: I would like to exercise the chairman's prerogative by commenting that in my experience one side will often
say, "All right, we will go first." Then they take about a minute and a half to make a statement of their position and say: "That is our position and we rest, until we hear from the other side."

As Saul Wallen said, I think it is possible for a sophisticated party to get around this without any great difficulty.

Mr. Platt: I would indicate to the parties and try to persuade them—I don’t think I would have too much trouble—that it really doesn’t make too much difference who testifies first; that I am to hear all the relevant testimony, and irrelevant testimony will not be heard, and, therefore, anybody who has something helpful to contribute to a determination of the case will be heard anyway. So whether I hear them first, second, or last really doesn’t make any difference. Usually, the parties get the point and cooperate.

Mr. Stein: I would agree with Saul Wallen. I see no reason why the union cannot call the foreman as its first witness or why the company cannot call the grievant or a union man as its first witness. I don’t think this is a sensible move, but if they want to do it I don’t think we have the right to stop them.

Mr. Haughton: Now, the union wants to call the foreman first, the company instructs him not to speak; what would be your ruling on that one?

Mr. Stein: I think they have a right to subpoena him. If they ask for a subpoena, I would issue it; I think he would be required to answer whether the company instructed him to the contrary or not.

Chairman Gill: I thought a subpoena was to force someone to come to the hearing, but this witness is already there, is on the witness stand, and is just refusing to answer. The question is whether you instruct him to answer.

Mr. Stein: I would instruct him to answer. If he does not, I don’t know what I would do then, but I would tell him to answer.

Mr. Wallen: In a situation like that I usually tell the hearing reporter to take the man personally to the rack until he talks. (Laughter) As to the other question you asked, I would draw such inference from his failure to speak that seems to be appropriate
under the circumstances. The best way to avoid such a circumstance is to warn the parties of your intentions.

Mr. Platt: Suppose later on in the proceedings he offers to speak. You would listen to him then, wouldn't you?

Mr. Wallen: I suppose I would listen to him, but I wouldn't like him. (Laughter)

Mr. Platt: For that very reason I think the company or the objecting party would recognize that fact in the first instance and would not really push the matter of not answering.

Chairman Gill: I knew it was a mistake to let Wallen back on this panel. (Laughter) Let me get to another question. We have a fairly long list of them here. The next subject has to do with offers of settlement before the case gets to arbitration. You are sailing along in good style and one side says, "Why, during the third step of the grievance procedure they offered to settle this without back pay" or some other kind of offer. The other side objects, saying, "This is highly irregular. Offers of settlement have no part here. I move that be stricken." The other side may reply, "It is standard procedure. We always introduce discussions in the grievance procedure leading up to arbitration. This is just part of it." In such a situation what do you do?

Mr. Haughton: I would strike it and give a very short talk about the importance of not inhibiting the grievance procedure and encouraging people to make settlement offers during the procedure.

Mr. Wallen: I would generally agree with that and try to point out the importance of having free exchange in the grievance procedure. What you talked about would come in in the form of a document, and I would exclude it. Once you have heard it, striking does not help. You strike it from everything but memory.

Mr. Platt: You could merely give them assurance in that case that you will not consider it in determining the case.

Mr. Stein: Of course, as a practical matter, you have this problem: If there has been an offer of settlement, I suggest it would be a very difficult thing for an arbitrator to find something which would be less generous than the offer of settlement was in the first place.
To say, then, that you are striking it, seems to me to be double talk or something of the sort. I suggest if you think there is a possibility of offers of settlement being thrown into the discussion the thing to do is to get rid of it in the first place. That is to tell the parties, before there has been such an offer, you will not want to hear about it and will not take it. Perhaps you may scare them off that way, but it seems to me silly to say you will disregard it, because I don't see how you can.

**Chairman Gill:** That is a very good point. When you say you strike it from the record, it is usually meaningless. The only record that means anything is the record in your own mind; it is already there. What good does it do to strike it?

**Mr. Haughton:** I would be inclined to disagree with Manny Stein, because I think perhaps a large portion of the group here has found itself in the position of issuing a decision and perhaps subsequently being told, "Well, this isn't as good as we were offered earlier." It doesn't really bother me when I am told that and, by striking it, I make it clear that it will not be weighted or considered.

**Mr. Stein:** Suppose you had a discharge case and the union says the company offered to reinstate the man without back pay. Query: Now that the arbitrator has stricken it, does he ignore it and sustain the discharge?

**Mr. Haughton:** What if it were an issue of theft and over a period of ten years they had consistently discharged for proved theft? Would you still reinstate him?

**Mr. Stein:** I don't know if I would or not, but I suspect that an offer—

**Chairman Gill:** We are not discussing the merits of the case here, just the procedure.

**Mr. Platt:** I would second what Ron Haughton said. I think it can be disregarded, and we have all done that. Just pay no attention to it. It is true it might make a difference in some types of cases. If it is a wage dispute and you hear that the company has offered eight cents, while the union is asking for ten cents, I suppose it might have some effect on you and it will be that much
harder to disregard it. But in most other cases I think this can be done easily and is being done.

**Chairman Gill:** As I say, we can come back to any or all of these subjects in the free-for-all session. Let us move now to the next one, which is related. One side starts to introduce a line of testimony or exhibits. The other says: “You can't do that now. This was never brought up in the grievance procedure. This is not the time to bring up a totally new line of evidence that you had in your possession all the time.” What do you do with that one? Do you exclude it or let it in?

**Mr. Platt:** I approach that one from the umpire's standpoint, for the reason that there are different ways of handling it in the umpireships at General Motors and Ford. At General Motors they are very strict about presenting or hearing only such matters that have been introduced in the earlier steps of the procedure. In that case I would imagine, unless it was something quite immaterial, that the umpire would probably say, “We won't hear it.”

In the Ford umpireship, on the other hand, I would hear it, unless it were of such significance as to materially deviate from the entire theory propounded in the earlier steps of the procedure. In that case I would then offer to the objecting party—in fact our agreement carries some such language—the opportunity of a choice of either going ahead or taking the matter back to the next lower step of the procedure to reargue it there.

In other words, the case would not be resolved, but the parties would have an opportunity to present the matter in the earlier procedure as they should have done in the first place.

**Mr. Stein:** I think that the arbitrator listens to the parties, regardless of whether they discussed it earlier in the grievance procedure. It seems to me the arbitrator has no proper concern, as an arbitrator, with whether the grievance procedure is working properly or not. He has an issue and should decide it.

Now, if the other party is not prepared to meet it because it was taken by surprise, I think it is entitled to time to prepare itself. I don't think it is proper for the arbitrator, at least the *ad hoc* man,
to say, "Well, your grievance procedure did not work properly. Take it back and have another crack at it."

**Mr. Haughton:** That is substantially the approach I have taken. I have noticed frequently that the objection to new evidence comes from somebody used to an umpire procedure. I explain that while it is an ad hoc procedure, they have a right to go back and consider the evidence in the grievance procedure. I think I would grant all the time that is needed. But I do explain that it is expensive to come back, and that I am interested in all the facts related to the case.

The kind of problem that might arise could involve a man accused of theft, and with the union holding an undisclosed hospital bill showing that he was in the hospital during the period that the theft was supposed to have taken place. In such circumstances it would be a terrible injustice to brand the grievant as a thief just because new evidence is involved. On the other hand, his chances of getting back pay would be nil.

**Mr. Wallen:** I would say that the answer to the problem really depends on how well structured the parties' relationship is. In a sense, it divides them into this umpire or *ad hoc* situation. Even in certain *ad hoc* situations, the parties have been very careful how grievances were brought up to their *ad hoc* arbitrator. If that were the situation, I would handle it as Harry Platt does under the UAW-Ford umpire system, by the alternative of reference back to the next lower step at the request of the objecting party.

In the more casual type of *ad hoc* relationship I would be inclined to go ahead and accept the additional evidence, unless one party claimed surprise and wanted time to investigate the allegation of fact then being made, in which case continuance would be granted but the case would be returned to the arbitration-step level.

**Chairman Gill:** Suppose we move on to the next one, a somewhat unrelated matter. During cross-examination, counsel or spokesman for the other side objects and says, "You cannot go into this area of questioning; I didn't go into that on my direct examination. I did not call the witness for this purpose. I object." The other fellow says, "I thought this was an arbitration proceeding,
not a court. I thought I could ask him anything I wanted to."
What do you do, gentlemen?

Mr. Haughton: I would tell him that technically it is correct that one cannot cross-examine on what he has not testified to; but I would give him an opportunity to call the man as an adverse or hostile witness.

Mr. Wallen: That one has been bugging me for years. I don't quite know what I would do, except sort of bump it around somehow. Eventually everybody says what he wants to say and is supposed to say.

I will make one exception to that, however, and that is if you have what in its essential character is a trial, a legal proceeding with counsel on both sides taking themselves seriously. On occasions I have said, "Well, this was not inquired into on direct examination so we won't have it on cross. If you want it, you can develop it through some other witness." In the more typical arbitration case, as I know them, I don't quite know what I would do.

Chairman Gill: A couple of clichés could apply to any of these questions: One is, that if you can double talk your way through it you will do it; the second is, it depends on the kind of parties you are dealing with. Now, having disposed of those clichés, what do you do when nothing else works?

Mr. Platt: Whether or not there are counsel who consider themselves important or whatever, if the matter proposed to be offered in evidence is relevant, in my opinion, I will hear it. I will try to explain to the objector and the others that I am here for the purpose of hearing this case to decide it, and I want to hear everything that is helpful to me to decide it. I will go back to what I said before: I am not too much concerned about the order. I like order, of course, but if this is relevant testimony he is going to present, I will hear it.

Mr. Stein: I agree with Haughton. If there is insistence on proper procedure, I would say, "Call him as your witness" and get it in that way.

Chairman Gill: All right, let us move ahead. Here is a sort of general question. It is not too easy to answer, perhaps, but the question is this: How far should the arbitrator go in cutting off, either
on his own motion or at the request of one of the parties, what seems to be irrelevant or unimportant testimony? Does he have a responsibility for speeding up the hearing and keeping it moving, or should he sit back and let nature take its course and wander along without his guidance?

**Mr. Wallen:** I am inclined to think that most of us, including myself, are remiss in this area and probably should take more initiative in cutting off irrelevancies than we tend to do. In most cases, I believe, you gain the respect of the parties for conducting a more business-like proceeding than if you allow the proceeding to wander off in bypaths.

So far as getting a clean-cut case which you can then decide more easily is concerned, it has a considerable advantage. I'm afraid we don't do enough of it.

**Chairman Gill:** The immortal Jim Hill sent in a general letter on the subject, saying that he heard one of our members was commended by the company for running a tight hearing as distinguished from the loose hearing Jim Hill runs, and he added that, oddly enough, he finds he is most loose when he is tight. *(Laughter)*

**Mr. Stein:** My feeling is that we ought to eliminate or exclude what is clearly irrelevant. I think we ought to give some scope to the parties to demonstrate the relevance of that which they are offering, but I don't think an arbitration ought to be an occasion for a general discussion of all sorts of matters, whether or not they are connected with the issue in dispute.

**Mr. Haughton:** I think that is probably what the parties themselves understand and if somebody really wanders, there can be strong pressure from the arbitrator. But suppose that the man feels he is going to lose the case and starts in with the gamesmanship ploy of saying, "You are applying a gag rule. I can't speak. You are biased." I submit most people here would say, "Tell me a little more about this." Especially if there are indications that he is going to lose the case.

**Mr. Platt:** I agree with Saul Wallen that we are probably remiss in not cutting off some testimony; but, on the other hand, I think it is an extremely difficult thing to do and I know there have been
times when, either shortly before the close of the hearing or after the close of the hearing, I wished I had closed off the testimony. On the other hand, I think I have had as many experiences where I was quite satisfied and glad, in fact, by the time I came to write my decision, that I did permit some so-called irrelevant testimony to come in. You can't tell. Sometimes you will get a clue, even from "irrelevant" testimony, that will be very helpful to you; and if you accomplish nothing more, you have at least permitted the grievant—in most cases it is the grievant—to tell his story.

Now I know that that has limits; you should not carry it too far. But I frankly don't know what I would do in the next case that came before me, as to whether I would cut it off immediately, as soon as I realized it was irrelevant, or not. It is one of those things you have to play by ear.

Mr. Stein: I have a little difficulty at this point, because if the testimony does have a bearing on the issue, then I would suppose it is not irrelevant. If it has no bearing on the issue, then it is irrelevant and I don't see any reason why you should hear it, unless, as a permanent umpire, you take the power to double as a psychiatrist.

Mr. Platt: Well, the problem is, of course, to determine very quickly whether or not something is absolutely irrelevant. That is not an easy task.

Chairman Gill: I suppose most of us have had the embarrassing experience of having the other side say, "I don't think I have to answer this stuff. It seems irrelevant to me. I ask the arbitrator if he feels it is necessary for me to send out for witnesses to answer this." I suppose we all duck, but that puts it up to us rather squarely whether we can give an off-the-cuff opinion as to whether it is relevant. Is there any comment on that?

Mr. Stein: When a party asks me, "Do I have to answer this?" My standard answer is that I cannot really tell him because if I did I would feel obliged to split my fee with him, which is against the rules of the Academy; it is up to him. He has to meet it or take the risk of not meeting it.

Mr. Wallen: If you are not sure whether or not it is relevant, you hear it, then decide if you are going to throw it out later on.
If you are comfortable with your immediate reaction, you can rule it immediately irrelevant at that point.

**Chairman Gill:** I think there is an in-between stage that we Philadelphians like to seek, whereby we can seem to be giving a ruling but not quite. In such a situation you say, "My tentative reaction is this.” Sometimes that satisfies them.

A somewhat related question comes next, about how actively the arbitrator should participate in the hearing. Should he shore up the case for an inept party who seems to have a bona fide or a sincere belief in his case but doesn't know how to present it? There is no articulate spokesman. He is just fumbling around. Should the arbitrator let him be murdered by the opposition or step in with some helpful questions?

**Mr. Stein:** I think the arbitrator has an obligation to decide the issue according to the best of his ability. He therefore has an obligation to himself and to the parties to make sure that he understands the case and if this requires that he ask questions, I think he should feel free to do so; but whether he should or not, I do, as a regular thing, make sure that by the time the hearing is over I feel I know what is involved in the dispute between the parties.

**Mr. Haughton:** I think there is a high degree of skill involved. This atmosphere of wanting all the facts can rather easily be communicated to the parties, but the questions themselves have to be put very skillfully so as not to give an impression that one is fighting the case for the poorly prepared party. With care, I ask questions. But I think I lean toward the parties making their own case.

**Mr. Wallen:** I would agree with Haughton. There is a qualitative difference between “shoring up” one party’s case and finding out what the case is really about because of the inept presentation of one of the parties. The difference is developed by the way in which you ply such questions as are necessary. For myself, I am of the school that wants to find out what the case is about, even if I am courting the risk of appearing to make out a case for one of the parties. I have been criticized for this in some cases, and my response is that my feeling about the arbitration process is that I am not a referee in a prize fight; I am trying to find the facts to make an intelligent decision.
Mr. Platt: As Saul Wallen suggested, what we want to do is find out what the case is about and if there is any evidence lacking that we think should be in the record most of us—I think—will ask questions.

Chairman Gill: A couple of minutes ago I noticed a character slinking into the meeting. I think he should take a bow, since he was not here this morning, for his part in the arrangement of this dubious program. I see James C. Hill of New York City. Jim, in honor of your arrival I will read from a letter that you left for me, raising a question somewhat related to this general area. Jim writes:

A union representative, probably a member of the negotiating committee, is called as a witness. He should know about the contract. He is then grilled on the contract. At some point in the colloquy, usually when the union witness begins to falter, the union attorney or spokesman objects that the union witness is no lawyer and says, “I am here to argue the meaning of the contract.”

The same question arises when the personnel manager of the company is the fall guy.

I suppose the question there is that if one side objects, should the witness be stopped from giving expressions as to meaning of the contract.

What would you do—declare open season on opinions or cut them off?

Mr. Wallen: I would generally tend to cut them off, usually on the ground that I am the arbitrator, and I will have to decide what the meaning of the contract is. The one caveat I would make is that you may get into an area where you are really talking about the negotiating history of an ambiguous clause. This is a little bit different from the meaning of the contract, although they shade into one or another. I make that distinction, but, short of that, I would press my first position.

Mr. Stein: I agree with Saul Wallen about that.

Mr. Haughton: The negotiating history goes also into the history of the application, and they could testify as to how it has been applied, but I would cut off the opinion part.
Mr. Platt: Where that question usually comes up in my experience is where the case in arbitration is being presented by a lawyer who has had an opportunity to go over the file and realizes all of a sudden, "Here is an answer which can be given in this case which I have not been given before"; so he is, in effect, trying to shore up his position. In that circumstance, if it were purely a question addressed to the witness as to what the meaning of the contract is in his opinion, I certainly would rule that out. If it were a matter of determining how an ambiguous provision has been applied over the years, and what his actions were, to that extent, certainly, I would listen.

Chairman Gill: This is a somewhat different matter from the general run of things today, but my panel members thought it would be worth bringing up:

When you have a tripartite panel, does the chairman, in the absence of any established practice, start off by announcing his views on the case? Does he sit back and say nothing and just listen to a re-hash of the hearing? Does he send up trial balloons? Does he proceed to a vote on the case while the panel is meeting? How do you run a panel meeting, anyway, when you have a tripartite panel?

Mr. Stein: My procedure is to start the tripartite meeting with a summary of the facts. I summarize the facts as best I know them and ask my colleagues whether they have anything to add or whether my statement of the facts is correct. After that I simply turn the meeting over to them, in the hope of developing a consensus. Whether or not we take a vote after the discussion of the issue depends on whether the answer is clear enough in my own mind. Most of the time we vote then and there. In those cases where I am not yet clear, I simply record the votes of my colleagues, and tell them that in due course I will make up my own mind and inform them, together with a statement of my reasons for the answer.

Mr. Haughton: In extremely difficult cases I insist on a face-to-face panel meeting. However, I do raise questions as to procedure at the hearing, before the final adjournment, and ask if they want a meeting. However, I reserve the right to call one if I want one, and I give either one of the two board members the right to call a meet-
ing without reason. Then, if we happen to live in different cities, just on the plain matter of my time and their expense, I suggest the possibility, which has really worked out well in my case, of doing exactly what Manny Stein has established as a procedure, but doing it in writing. I set up the facts in as uncontroversial a way as possible, and, from these facts, really prepare a draft opinion of my own. I mail the findings of facts to the board members, then get on a conference telephone call and ask them if my findings coincide with their understanding. In most cases they do. If they argue about a point, I try to resolve the question. If that is not possible, I say: "All right, I will include that matter in the company or union position." We then have a document that we can start from. At that point, like Manny Stein, I ask for discussion. Normally, at the finish of the discussion, I give my conclusions, using the previously prepared draft as a guide.

The same procedure can be followed in face-to-face meetings, but when the questions are very sticky, just an open discussion of the many features of the case is preferable to working from a prepared draft.

Mr. Platt: Unless the parties have waived their right to appear in executive session, I hold one. If the case involves a case of wages, for example, or perhaps some manning problem or any other which the parties expect to do a little negotiating about, then, in that case, I will wait for that meeting to occur and we will discuss this thing fully and broadly to arrive at a decision.

In practically all other matters my practice has been based on my experience, which is: as the third man, you won't get much help from the parties; you might just as well decide the case and have your decision ready for them. That is what I do. I decide it, I prepare the award and the opinion, and when we meet I will ask them if they would like to add anything new, something not already heard. I will hear them out, and at the end of that discussion I will indicate to them that, of course, I have given some thought to this matter, too, have arrived at this decision, this is it, and let them look it over. If they wish to agree, fine; if not, they dissent.

Mr. Wallen: I hold panel meetings in all cases except where the parties specifically waive them. I start out in virtually all of them
with what amounts to half of the opinion, my summary of the facts in the record, and ask for their verification. That is usually forthcoming. Then, after that, my procedure would very much depend upon the personalities and the attitudes of the individual members involved. There are some types who, if offered a tentative opinion on a case, will regard this as an assault on their position and they tell you that they are not there as judges, but as a continuation of the advocacy part of the proceedings. If I sense that these are the people I am dealing with, even though I have some tentative or fixed judgment, my tendency is not to advance it at that point but to send them a written decision.

If, however, you are involved, as in many relationships I am, with panel members who have a sense of independence and who can reason about the problem, then I advance tentative judgments and conclusions frankly and, in many cases, find that my judgments are modified by virtue of such discussions in camera. In that kind of relationship, I believe I am using the tripartite panel in its best sense and in the sense for which it was originally intended.

Chairman Gill: We have perhaps reached the point where it might be a good idea to throw this open to the floor. I detect a certain restlessness in the crowd.

Why don't we turn it loose now on any or all of these subjects? Remember the two-minute rule for speeches, and please do not recount your own dull cases.

Question: I would like to ask an Eastern arbitrator whether he would raise with the parties at the hearing, or rely on in his award, a provision in the collective bargaining agreement which appears pertinent to him but which has been ignored by both parties.

Chairman Gill: Professor Stein, you are as Eastern as you can get.

Mr. Stein: The answer is, yes, I would.

Mr. Wallen: As far as I am concerned, I certainly would raise it in the executive session. I would be less inclined to put it into the award if it was not raised in executive session or by the parties.
Chairman Gill: You are talking about a panel. Suppose you are a single arbitrator which is usually the case? What do you do then? If you see something that looks important but was not raised at the hearing, what do you do?

Mr. Wallen: I would be inclined to stay away from it, not raise it to the parties.

Mr. Platt: Suppose your result would be altogether different if you did consider it?

Mr. Wallen: If I felt very strongly about it, I would convene the parties again and throw it to them for their comments, but I don't think it would be proper to pick it up without having been presented or argued before you.

Mr. Stein: The question was whether you should raise the question at this hearing.

Mr. Wallen: Then I would ask, "What do you think about this?" Certainly, I would have no inhibition about that. In the problem I was previously talking about, I assumed that I had not seen this provision until after the hearing was concluded.

Question: My understanding is that where the contract provides for a three-man board of arbitration, in the absence of a waiver, an executive session should be held as a matter of decision. Is that executive session requirement satisfied if the impartial arbitrator or the chairman does not announce his decision in that closed executive session?

Chairman Gill: Speaking for myself, I don't know the answer.

Mr. Platt: Do you mean he was present, he deliberated with the rest in arriving at a decision, but the decision was not announced at that time?

Question: The chairman at the executive session merely listens and says to his colleagues on the board: "I have to think about this a little further and I will mail you my views on it," instead of taking the cold-turkey approach and saying this is it.

Chairman Gill: Has this ever come up in court?

Mr. Stein: We had a case in New Jersey many years ago, under the compulsory arbitration statutes, in which the courts held the
requirements were not satisfied unless the panel as a whole had met and exchanged views. The issue never came up about whether they all actually had to vote at that time. I don't think that this in itself would invalidate the procedure. I don't know why it should.

Question: That kind of case was brought in the New York courts recently and involved a prominent newspaper where the chairman of a tripartite board convened the meeting; there may have been some defective notice in the first place. Every member of the panel was not present, and the award was therefore set aside. In its rationale, as I recall it, the court naively presumed that the chairman could not decide.

Chairman Gill: There is also a question of whether the parties want to waive the panel altogether. Very often they waive it, thus eliminating all these problems.

Question: I would like to know to what extent the members of the panel accept documentary evidence in the form of affidavits or doctor's certificates, where the person making the affidavit or the doctor is not present at the time of the hearing; and, if they accept any such evidence, what are the conditions under which such evidence is accepted? Is it sufficient if the doctor or affiant lives at a great distance, or unless it is shown that the person making the affidavit is ill or deceased or incapable of appearing? Or do you accept any such evidence at all under any circumstances?

Mr. Haughton: Like most arbitrators, I accept them; but, since they are not subject to cross-examination, I don't give them a great deal of weight.

Chairman Gill: The question is whether you accept it in evidence at all. Let us assume it is a doctor's report, the doctor is in town sitting in his office, and whoever is offering it says, "I don't think it is necessary to call the doctor."

Question: Suppose the man makes the affidavit and he is 1900 miles away from the place of hearing but could otherwise come if he had been given sufficient time or notice.

Mr. Haughton: This man makes the affidavit, he lives a hundred miles away, and he says he saw Joe Blow smoking around behind the tool shed at the back of the plant at 12 o'clock noon on
such and such a day. Joe Blow testifies, and he is not upset on cross-examination, that he was not there. I guess there is not much question on it then, is there?

Chairman Gill: I suggest saying that you will accept it but pointing out that live testimony, other things being equal, is more persuasive than paper testimony. If they want to take their chances on a decision on that basis, all right.

Mr. Stein: I wouldn't take the affidavit at all if it is a matter of real significance to the case. For example, I have refused to take depositions from company agents who ride buses to find out whether the drivers are cheating the company on fares. I have insisted that if the company is going to rest its action upon a report made by a so-called "spotter" that they produce him, even though the consequence would be to destroy his usefulness to the company. So, too, in department stores, where it is alleged that a professional shopper has detected a sales girl failing to ring up a sale on the cash register.

If, however, the statement or affidavit pertains to a purely factual matter about which there could be no real argument—for example, if a doctor should testify that he examined a person on such and such a date and made such and such a finding—I would think this is not the kind of matter that should require the doctor to appear because I think the likelihood of his being upset on cross-examination would be substantially zero.

As a further example: if it is the case of a lower-back injury, and the doctor said he examined this man and found he was ill on such and such a day and that he treated him for something, I don't see how that would be upset on cross-examination.

Mr. Platt: I don't get the significance of the man being a hundred miles away. I don't know that that would make any difference with me. It would make a difference with me, for example, if the witness were now deceased.

In general, I would point out to the party offering this evidence that the other side is, of course, entitled to cross-examine the affiant, and if he is not at the hearing they cannot do that. I would suggest that the party try to get different evidence or other evidence.
I have not met the situation too often, I will confess to that; but, normally, my inclination would be that the right of cross-examination is an important one and if you don't give the other side that right, then you should not receive the evidence.

**Question:** Would the panel change its mind, depending upon the character of the document? Suppose it was an entry made in the regular course of business? There, of course, you would be adopting a harsher rule and I don't think you would want to impose a harsher rule than usually obtains in a court of law.

Secondly, suppose the questioned document had been actually disclosed in penultimate or earlier steps of the grievance procedure, so that the party now objecting could be thoroughly apprised of the document and has had opportunity to meet it in opposition.

**Mr. Platt:** That would make a difference with me.

**Question:** What would you do in the case of a witness who is reading from a document and the cross-examiner says, "Let me see the document you have in your hand." And the witness or his counsel refuses to turn it over, whereupon, the cross-examiner says, "I demand to see the document that he is reading from."

**Mr. Stein:** Not being a lawyer, I would say he has a right to see it.

**Mr. Wallen:** Me, too—not being a lawyer.

**Mr. Platt:** Being a lawyer, I would also say yes, he should see it.

**Mr. Haughton:** I would like him to see it.

**Mr. Wallen:** Mr. Chairman, I would like to comment on the previous question a little bit, if I may.

First, as to a doctor's certificate, I think the realities of just the way people and doctors live dictates our acceptance of doctor's certificates in the ordinary course. The matter of weighting the thing is different. Unless the medical evidence is sharply in conflict, the necessity of having a doctor called in is ordinarily not great. With respect to affidavits, unless the witness is not producible, I would be inclined to exclude affidavits. Then there is the third technique which I have used at times, something you lawyers call depositions, which is different from the affidavit or the
statement. Both parties can go out and interview the guy and have
an opportunity to cross-examine, and then introduce his statement
into evidence. I have had cases where witnesses were not easily
available at the time of hearing but would have been at a later
date. I suggested and got the parties to agree—and I presume I
would have the right to order—that a deposition be taken under
those circumstances and supplied to me at a later date.

Chairman Gill: Let me get back to the question that Manny
Stein raised about having sleuths appear and testify that they
cought the grievant in particular misconduct, and whether their
reports should be received without the detectives appearing in per-
son, the question being whether the effectiveness of the detectives
would be destroyed if they were observed and identified. The sug-
gestion has been made in a number of cases that they appear and
testify but that everybody except counsel be excluded from the
room so that the rank and filers could not memorize their faces,
and so on. Has that come up in your experience?

Mr. Stein: Yes, but my feeling is he ought to testify. If he turns
out thereafter to be useless to the company, this is part of the
cost of industrial relations. I don’t see why one needs to go so far
as to exclude everybody from the courtroom, because I think the
principle then becomes a dangerous one. It may very well be, to
take an extreme case, that there might be somebody else in the
room who might testify to the contrary and whose memory might
be refreshed by the man who is giving the testimony.

Mr. Haughton: I agree. I think it has generally been cate-
gorized as secret testimony. Many of us have had experiences
where the possibility of presentation of certain evidence was put on
a confidential basis: “We would be glad to let the arbitrator look
at the documents and see the people.” My answer has been no.

Question: On the question of arbitrability—the company says it
is not arbitrable, the union says it is. The company won’t go ahead
on the merits and says it will leave if the merits are taken up.
Query: What would you gentlemen do in such a situation?

Mr. Haughton: I am allergic to ex-parte hearings, and I would
find some way of wiggling out of it so that I could hear them both.
If a gun were put to my head, this could involve recessing the
hearing before going into the merits.
Mr. Wallen: I don't know what I would do. I think probably, as a purely theoretical matter, I would be inclined to go ahead on the merits, even ex-parte. This, of course, could be modified by certain circumstances—the relationship of the parties, how hostile they are to one another, and so forth—but, just as a hypothetical matter, I think we would have the right, perhaps even the obligation, to go ahead.

Mr. Platt: I wouldn't go ahead with it. I would do as Ron Haughton suggests and find some way of smoothing out the feathers. The parties create that problem. There is some reason for it. It is not just that the company wants to insist on orderly process and believes that arbitration should be this and that. There is some reason for it. It is their problem and I would do everything to keep away from accommodating one side or the other side. I am assuming that you are suggesting that the decision be given that very day. I would not proceed immediately.

Question: Here is a question I would like to pose: The hearing has commenced on a grievance raised by the union. Now the union wants to withdraw the grievance, without prejudice. The company objects and wants a decision denying the grievance. What would the panel do?

Mr. Platt: The Ford agreement provides that the grievance, if it has reached the umpire level, cannot be withdrawn without the consent of the other side.

Chairman Gill: Suppose it is a silent contract?

Mr. Platt: I think I would require consent or else decide it.

Mr. Wallen: I would too.

Mr. Stein: How can you make them go forward if they don't want to? I don't think they should have another bite of the apple, however, if their purpose is to save the grievance for another time or another arbitrator.

Mr. Platt: Then they have lost the case.

Mr. Stein: One of the things that bothers me in some of the questions or some of the responses, is the implication that one party or the other should be free to take charge of the proceedings and to determine whether it will go forward on the merits without a
decision on arbitrability, or go forward with a second case if there
is more than one grievant. It seems to me that is carrying some-
what too far the notion that arbitration is to be what the parties
make it. The arbitrator has a positive duty to decide and, having
decided, then to move with firmness—right or wrong. The arbi-
trator ought not be in doubt.

Chairman Gill: That disqualifies a lot of us.

Question: Different arbitrators have ruled differently on per-
mitting the union to withdraw grievances. I suggest that it should
make quite a bit of difference as to whether the hearing has started.
If the hearing has not started, I permit withdrawal without
prejudice. I know, however, that arbitrators here have decided
both ways.

Mr. Haughton: If they withdraw without prejudice, there is
some implication that they get a better break than if they drop it
within the time limits.

Question: Is that the law, that anybody can unilaterally with-
draw a grievance in arbitration as long as the decision has not been
rendered? You had better look that up.

Question: Can we go back to the question of parties walking
out, the question of arbitrability having been argued, and leaving
the other side to go forth ex-parte? In the courts of the State of
New York, the arbitrator has the right to go ahead and render a
decision. On the matter of arbitrability, however, don't you have
to make a distinction concerning whether the union has waived its
right to bring the case to arbitration, in contrast to the kind of arbi-
trability which involves whether or not the issues are properly
raised under the arbitration law? These are two separate problems.
It seems to me that in the former case you have to make a ruling.

The latest question on which I would like this august panel's
judgment is this: What do you do when you are presented with a
signed stipulation by the parties submitting to you an issue which
you can see, on its face, is not arbitrable. One party has boxed the
other into the stipulation, but you immediately know that you
cannot answer it except in one direction. In light of your knowl-
dge of the contract it is not properly arbitrable, but the question
is not being put that way.
Mr. Wallen: On your first point, I would agree that the pro-
cedural case may create a special situation, especially if the presen-
tation on the merits is likely to be an extensive one and you have
some conviction or feeling that it may be completely unnecessary,
having heard the procedural argument. In that case, you might
well defer proceeding on the merits.

Same Questioner: An illustration of my second case is where
the arbitrability of a discharge case is involved and the company
argued that there is no reference in the contract to discharge cases,
so this case is not arbitrable. The union has been innocently in-
duced to sign a stipulation of submission which says: "Does the
company under the contract have to reinstate so and so?" instead
of simply, "Whether or not the man was properly discharged."

Mr. Wallen: This is a point of the stipulation; I cannot change
it. I might point out the fallacy of the position to the parties, but
I would have no right to change the stipulation to get to the true
question.

Chairman Gill: You have a union claiming that certain work
comes within its scope, within the bargaining unit, but the com-
pany has improperly assigned it to members of a different bargain-
ing unit. At the hearing the other union does one of a variety of
things: (a) it doesn't show up, it sends a wire saying it will strike
if you go ahead with the case and decide against them, or else it
will take you to court; (b) the other union shows up and insists
on participating; (c) the other union shows up and says it just
wants to sit there and observe the proceedings.

The company and the union that is a party to the case may not
object. If they do not object, I suppose you have no great issue.
But if one of them does object violently and says, "We want these
other fellows thrown out, this is our arbitration, under our con-
tract, not theirs," the question is: What do you do? One of our
colleagues, Professor Edgar A. Jones, Jr., has had an interesting
experience in this field. I would like to ask him to comment on it.

Mr. Jones: Actually, I am in the middle of a second interesting
experience regarding this.¹ The first experience to which you
referred was a case involving a subsidiary of a shipyard in San

¹ See Mayfair Markets, Inc., and Retail Clerks Int'l Association, Local No. 770,
42 LA 14 and 42 LA 702.
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Diego. The Iron Workers had a collective bargaining agreement with the National Steel and Shipbuilding Company and the Machinists also had a collective bargaining contract with this company. Each collective bargaining agreement contained in it an arbitration provision. The Iron Workers filed a grievance. The company and the Iron Workers selected me to arbitrate it.

The company argued non-arbitrability, basing the argument on a Federal case. The First Circuit Court had said that the N. L. R. B. has exclusive jurisdiction and, therefore, that the arbitrator could not touch it because it involved a Section Nine matter. I had the feeling, happily borne out at a later date, that it was pretty clear that the N. L. R. B. did not have exclusive jurisdiction over this Section Nine matter, and I said: "I am not really persuaded that I am bound by the Federal Circuit Court decision to that effect. You cannot go forward with the arbitration unless you move to join the Machinists, so that we can proceed as a tri-lateral hearing." That is all I said at that point.

At the last moment the Iron Workers moved to join the Machinists. I then very graciously said to the Machinists; "There is an arbitration going on over here; won't you come in?"

I picked myself off the floor after having received the resounding rejoinder: "We will come in only if the Court tells us to come in." I then had the feeling that this was still something which was tri-lateral. I had been listening to Russell A. Smith last year talking about innovation and I had echoes in my mind about that. I said, "Well, what seems to me to be the situation here is that this is an interpleader case, not in the strict old Federal Rule 22 sense, but in the sense that here is a device in the Federal sphere to which arbitrators can legitimately turn—and the Courts have told us this—in order to fashion something that was usable in arbitration.

I therefore said that since all of these three parties had indicated their consent to go into arbitration, I would issue what I would

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2 National Steel & Shipbuilding Co. and Ironworkers Local Union 627, 40 LA 625.
3 Electrical Workers Local 1501 v. Machinists Local Lodge No. 1836, 304 F.2d 365, 50 LRRM 2337 (1962).
5 40 LA 632.
6 Labor Arbitration and Industrial Change (Washington: BNA Incorporated, 1963), Ch. 4.
call an arbitral interpleader order, enforceable in the appropriate court. The import of this order was solely to say that I believed, as a matter of sound procedure, that this ought to proceed as a tri-lateral hearing and be resolved in that manner. I did not contemplate going forward ex-parte, and I indicated that I would not go forward ex-parte if the interpleader was not sought or was not granted.

This problem is discussed in fifty-two pages of the UCLA Law Review, Volume 10; 7 but the basic problem is the problem of consent.

I think the stickiest aspect—I don't mean the most important, but perhaps the stickiest for the arbitrator—is the problem of the arbitrator foisting himself on the Machinists. My solution to that was simply to say, "I am willing to get out of this. All I am doing is telling you you should proceed tri-laterally; but if you want another arbitrator, select him and I will withdraw. Assuming you have not selected another arbitrator within the next few days, we will proceed." That sums up my interesting experience.

**Question:** I want to put a hypothetical problem to the panel: Suppose a union files a grievance against a new company policy of compulsory retirement; this goes to arbitration. The company drafts the following submission agreement, and the union signs it: "Is the policy of requiring all employees to retire at 65 a violation of Article 10?" You look at Article 10 and find it has to do with unjustified discharge. You don't consider retirement to be discharge; although it might be a violation of seniority rights. Do you discuss this with the parties, go into it, or take it as you get it?

**Mr. Haughton:** I would take it as I received it. It is their case, they signed it. I would let them argue it on that basis.

**Mr. Wallen:** I agree with Ron Haughton.

**Mr. Platt:** I would certainly point out the implication of that sort of thing and see, with this kind of understanding, whether this is really what they mean. I don't think it would be unfair or improper for the arbitrator to do that much. You are not deciding

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the case on the merits right then and there. You are merely pointing out some problems which might arise if you were compelled to proceed with that kind of submission. Aside from all of that, I might question your statement as to whether you could not consider that issue under the very Section that you speak of, the discharge section; but that is another matter.

Chairman Gill: The point I was going to make, if I may, is this: It seems to me it is entirely appropriate to consider that as a discharge. If a man is forced to retire, he is kicked out.

Question: Suppose you consider the submission agreement too narrow?

Mr. Wallen: I think you have answered your own question by saying that you get a signed submission agreement. We must assume it was not fraudulently induced. You cannot do anything about it. If there is no signed submission agreement and the company comes in and says: “This is not an unjust discharge,” then I would feel free to say, “Well, leaving that aside for the moment, what effect does the seniority clause have on your action?” In that case you raise the question and, in a sense, invite discussion of it. But once you get the submission, I think that’s it.

Question: Given a discharge case where the company has agreed to go forward and proceeds to call the grievant adversely, and then asks for eight or ten of the union’s prospective witnesses to be examined adversely, the union objects to the destruction of the orderly proceeding of its own case and now says, belatedly, “We will go forward ourselves.” What do you do?

Chairman Gill: I presume the company objects to that last suggestion, that they now want to go forward?

Question: Yes.

Mr. Stein: It seems to me that in a discharge case there is very real virtue in having the company go forward in the first place. We have the company go forward because this is the way we hope to get at the truth in a more orderly fashion. I would, therefore, not feel that the union has the right to opt that it will or will not go forward, although there is a slight bias in that direction since, as the moving party, it would normally be expected to go forward.
Question: The company goes forward by seeking to examine adversely all the prospective union witnesses.

Mr. Stein: I wouldn't care why they went forward.

Mr. Wallen: I disagree. I would say if the case got into that mixed-up posture, I would like to get off it, because this adverse witness proceeding becomes terribly involved and leaves me extremely uncomfortable. I say, let's have the case in the conventional way.

Mr. Haughton: I have read that if one calls a hostile witness he does it at his peril. If the company calls the grievant and four or five union witnesses, and these witnesses say the union is right all the way, and they are not upset on cross-examination, he is in trouble, isn't he? I would explain all that.

Mr. Platt: Having heard all the non-legal experts testify about the rule on adverse witnesses, I would say it doesn't mean a thing to me. I don't know what difference it makes whether you call somebody as an adverse witness or as a friendly witness. This is not a court proceeding.

Again, I say that we are here to find out the facts and to arrive at a result. I don't care whether union witnesses are unfriendly or the company thinks they are unfriendly; I would hear them.

Mr. Haughton: To me it makes a lot of sense, even if the rule is not in the books, because, if one calls a witness under normal circumstances and he testifies against you, he is testifying against interest. Arbitrators are probably inclined to think that it takes a brave man to testify. A party takes heavy chances if it calls a witness and he then testifies negatively.

Mr. Platt: That is all right in court. We understand that, but I don't agree with you. We understand that if one side calls a man as its witness and he testifies the other way, it weighs heavily against him. But in arbitration we are a little more realistic, we have gotten away from that rigmarole. Again, I say, we are interested and concerned with obtaining the facts. I wouldn't hold it against the fellow if he is somebody else's witness. If I believe him and what he is testifying, I will accept it.
**Question:** This situation tests the whole question of procedure and the arbitrator's decision to go forward in the face of opposition by one of the parties. Suppose you get this kind of an objection by an advocate before the arbitration begins. The lawyer for the union, for example, calls up or writes to you before the hearing and says: "The union official approved of your selection as arbitrator, but now I, as the attorney in this case, object to you because your last two awards against me were lousy. Don't you feel that you should withdraw because I have no faith in you and I am telling you so. If you decide for me, you may be thinking that you bent over backwards; and if you decide against me, it may be out of a feeling of hostility, or I may think so. Therefore, I request that you withdraw."

What do we owe to the arbitration process? Do you swallow your own vanity? Do you discipline yourself in your self-assurance that you can go ahead impartially? As a general rule, how do you feel about this? Do you think you should stay in?

**Chairman Gill:** It sounds like an improbable statement of facts to me.

**Mr. Stein:** I am not sure that I understand quite what the question is. I think, having been chosen, you have to recognize that you were chosen by two parties and you owe it to the other side to call the two of them together and thrash out expeditiously the matter of your ability to go forward and to hear the case impartially. It is important to avoid excessive delay in arbitration. I know of one union that does this as a matter of course, under a contract provision which says that no employee may be discharged until after an arbitration has taken place. In one case it was able to put off for fourteen months an arbitration hearing on a matter.

**Mr. Wallen:** It sounds like a New York case.

**Question:** I wonder if any member would say what he thinks an arbitrator should do when he has a hearing which takes all day on a single issue, and in the morning signed but unnotarized statements were offered in evidence, and double and triple hearsay testimony was given by both sides and no objection made. In the afternoon, however, in the course of rebuttal testimony, one side begins objecting to types of documents or triple hearsay which the
arbitrator himself would not have admitted in the morning had anybody objected. So the arbitrator says to the objecting party, "This morning you did not object to these," And the answer is, "I have a right to object now. The fact that I did not object in the morning does not foreclose me from objecting now." In effect, the party in question is trying to change the rules of evidence belatedly for this particular case.

Mr. Wallen: It seems to me that although the party did not object to this type of testimony or evidence in the morning, he is entitled in argument to characterize the testimony and urge upon you what weight you should give it; but, if he contended in the afternoon that you should exclude it, he was too late.

Chairman Gill: Let me just toss this out to complete my list here. I don't know how often you have had this: When the attorney gets through questioning the witness, he then turns to this committee of five or six fellows and says, "Do any of you fellows want to ask the witness any questions?" And, one at a time, each committeeman has a crack at him. The attorney on the other side objects and says that there should be a single spokesman and not an execution squad firing away at him.

Mr. Stein: I should think that even if they agreed you should not permit it.

Mr. Haughton: It is nice to have a spokesman. Sometimes notes are sent to him by his people. In any event, I normally would let the questions come up as long as they are presented in an orderly fashion.

Mr. Platt: I wouldn't be so positive as Manny Stein is by saying I just would not permit it. It is not always that simple, especially if you are arbitrating for the same people a number of times and there is some tradition there. For example, in our Ford operation this is standard practice in some locations; some committees do this regularly. When the spokesman is through he will turn to the rest of the committee and say, "Do you have any questions?" And sometimes they will ask them and I will permit them to do so, while in other units they have learned otherwise. You cannot just shut the thing off, simply because you believe it would be a nice, fine, orderly rule to have it this way, if the parties have been doing it that way for a long time. The best thing you
can do is to confine it, of course, and point out the advantages of having one spokesman or of having an orderly proceeding.

Mr. Wallen: I am inclined to agree that it may be an educational process, but what it reflects very often is a political division in the local committee; that the president, the local agent, and the division chairman don't see eye to eye, and you get this reflection. I think if you try to choke that off you are simply creating resentments and difficulties in the local union which are better aired.

Mr. Stein: I suggest that it is not the concern of the arbitrator.

Mr. Wallen: Even at the expense of subjecting company witnesses to a barrage of questions rather than having one questioner.

Question: How would the panel handle this: On the fourth day of hearing, one side, feeling that it is losing, and in an effort to prepare for a court review, comes in for the first time with a court stenographer and demands a record. The arbitrator rules that it is not the official record. The party that brought the stenographer along says, "She is my assistant, taking notes for me." The other side says, "This is an unfair advantage. You are going to have a microscopic copy of the testimony and our testimony in court will not have that advantage."

Chairman Gill: I might comment that I had always presumed if either party wanted to keep their own transcript and not have it the official transcript, it was perfectly free to take notes with either a stenotype machine or a pencil. The only question would be, is it the official transcript?

Mr. Haughton: I would allow the stenographer to come in and take notes as the assistant, as defined.

Question: I just want to go back for a moment to Jones's comment about the use of the interpleader, to say that I don't quite agree with the use of that kind of device or any kind of device to blackjack a union into a proceeding with an employer, so that the arbitrator makes an ultimate decision assigning the work to one union or the other. It seems to me that as an arbitrator under a single contract, he has the single duty to make a determination under that contract. My experience has been particularly in the broadcast and communications field where you have a lot of craft unions and employers who very glibly give the same
jurisdiction away to two different unions. There is a real danger that the arbitrator merely gives a hand to opening up a very dangerous area of collective bargaining into which he ought not wander.

Rather than looking for devices, the arbitrator should make his determination under the single contract. If that union is entitled to the work, it should get it. It may be that the other union is also entitled to the work, but it is not our job to rescue the employer who has signed a contract giving a jurisdiction away twice from his own generosity and thus make a decision giving it to one union or the other. I think the interpleader and other gimmicks we try to use that way will only do a disservice to the parties and, with due respect, to the arbitration process.

Chairman Gill: I did that once, as you suggested. I awarded part of the work to the union in question, and disregarded the other contract. It worked out fine. They paid my fee, and the lawyers for all three sides have been feasting in the courts since then. They still are there.

Mr. Haughton: I went along the way you did. I excluded the Machinists when they wanted to come in as a visitor in a case in which they thought they had an interest. In another case, they came in—all this happened to be with the same company—and wanted to be a party to a tri-lateral hearing. I excluded them on that. Then, finally, we did have one where they came in with the other union with the company's permission. The Machinists paid a quarter of my fee, the other union paid a quarter, and the company paid half.

Chairman Gill: We will now adjourn.