CHAPTER VII

SHOULD THE SCOPE OF ARBITRATION BE RESTRICTED?

A PANEL DISCUSSION*

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CHAIRMAN BERNSTEIN: I call this session to order for the purpose of discussing the very provocative and interesting papers that were given this morning.

This particular program of the National Academy, known to aficionados as Gill's Folly, presents certain problems of organization—some of which we anticipated and one of which, namely, the high quality of this noon's program and particularly its duration, we did not anticipate. I want you to be mentally prepared for what you are about to face. I suggest that you look at it as one might consider the state of matrimony—that is, it will be in a condition of considerable disorganization accompanied by a great deal of talk. Our plan is to start with brief opening remarks by each of the panelists, then degenerate into a kind of round-table talk among ourselves, and finally descend into discussion with you.

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* Editor's Note: This chapter is a panel discussion of the papers presented by Francis A. O'Connell and Ben Fischer in Chapter V.

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My colleagues on the panel have asked me to offer, more or less as a footnote, this disclaimer: In this age of the Great Society based on consensus, differences among us are narrowed. While two members of this panel are mainly associated with management and two with unions, each wants to make it clear that he speaks only for himself.

A notable phrase-maker among West Coast labor statesmen, a friend of mine who is a supporter of Mr. McDonald in the current unpleasantness in the Steelworkers Union, recently described the opposition in the union as "those who would paddle their canoes in the swirl of any troubled waters." Or, as an equally gifted management spokesman from the same part of the country recently observed in a bargaining impasse, "If we are going to win this ballgame, we are going to have to build a better mousetrap." Well, we are fortunate this afternoon in having four panel members, all of whom paddle their canoes in troubled waters with better mousetraps.

The first such paddler is Isaac Groner, who received his education at Cornell, New York University, and Yale Law School, who is a partner in the firm of Cole & Groner in this city, and who works primarily in the labor-management field, representing labor unions, and who was at one time chief counsel to the National Wage Stabilization Board.

MR. GRONER: At the outset, I have to confess to a feeling of ambivalence. On the one hand, I was wondering, as I am sure everybody else was, at the wonderful program during lunch and the stimulating papers this morning. On the other hand, it seems to me most unfair that members of the Academy should put on such a tremendous program, knowing that they have the express commitment of representatives of both sides to follow them, and knowing very well that they can't possibly do it. So, to descend from poetry to prose, from wit to serious talk, I do want to turn my attention to this morning's two excellent papers.

Since I assume that the members of this Academy find some enjoyment and stimulation from disagreement, and since in general I agree with Mr. Fischer's paper, I will commence firing directly at Mr. O'Connell's paper. While paying some lip service to the attitude that any restriction on the scope of arbitration

should come from the parties themselves, Mr. O'Connell clearly believes that arbitrators have gone too far and are themselves impairing arbitration primarily because they consider and even rely on factors other than literal contract language. I have no quarrel with his position other than that it is impossible in practice, is inherently inconsistent, departs too much from the record in the particular case, and is unrealistic and unfair.

It is impossible in practice because there are many cases where the contract simply says nothing about the issues involved in the particular arbitration. To restrict the arbitrator to the language of the contract in such a case is obviously to make decision impossible.

The position is inconsistent because exceptions are inevitable; and when even one exception has been admitted, this entire argument built on "always or never," "black or white," "yes or no," collapses. The truth emerges that there must inevitably be a range of judgment and discretion assigned to the arbitrator. Mr. O'Connell felt he had to include exceptions even in discussing the right which he evidently regards as most sacrosanct, the right of the employer to go out of business. The theory of implied limitations, he said, should not affect that right "absent bad faith or unfair labor practices."

Where did these exceptions come from? Within the four corners of the collective bargaining agreement, or from some other source? And the concept of bad faith—can that be given meaning except by some degree of individual discretion and judgment in the particular arbitrator? The answers to these questions are clearer than the paper this morning indicated.

Furthermore, Mr. O'Connell is determined that arbitrators must assume and award that every collective bargaining agreement restricts management only to the extent provided therein—whether or not the contract literally so reads. Again this is inconsistent with a flat prohibition against implied limitations. Manifestly, if only the unchanging literal language of the contract is decisive, and the contract is silent, the arbitrator has no basis in express contract language for any presumption about management rights, one way or the other, as opposed to employee and union rights.

The only justification tendered to support the stated presumption in favor of management rights is not derived from contract language, or even from any facts or considerations applicable to a particular case, but solely from universal and absolute assumptions. To state precisely how the argument runs, it must be presumed that it is always true that management continues to have all rights which it had prior to the institution of the collective bargaining relationship; that management never intends to, and never does, surrender any rights except those which it surrenders expressly; and that all collective bargaining contracts are drafted in every word with complete professional competence so that there is only one possible correct decision for all the questions which will arise in the future. Even if this could ever be true, which seems to me most doubtful, it would be a fact to be found far outside the language of the contract. It has to do with the general nature—the Platonic essence—of collective bargaining negotiations and contracts. Any person's general views on such questions are manifestly derived from study, reflection, experience, and similar sources, all having nothing whatever to do with the bare language of any particular contract.

Indeed, this entire approach may fairly be viewed as a device for departing from consideration of the particular case. The actual history of the particular bargaining, the practice of the parties, and similar particular facts cannot be considered in this view.

Much injustice will inevitably result if this view is adhered to. Let us assume that a bargaining relationship is 25 years and 25 contracts old, in which the company, at least six times each year, in addition to every contract negotiation, has expressly stated to the union that it has no right to subcontract under this particular relationship and this particular contract, unless the union agrees, and that there is no need or point to having any contract language on subcontracting in view of this agreement and understanding. Within a few days after the execution of the most recent contract, the company subcontracts some work. As a result, a grievance is duly filed and processed to arbitration. If Mr. O'Connell were the arbitrator, I take it that at the hearing he would exclude all the facts I have mentioned as being outside the contract and being offered to derogate the unexpressed but always effectively

implied and presumptive reservation of management rights. He would award that the company may subcontract because the literal language of the contract does not inhibit its right to do so. I submit this is clearly in error. All the express conduct involved in this case, every one of the many objective expressions of understanding and intention and agreement to be bound, point to the opposite result. To urge that these expressions be disregarded to vindicate an absolute presumption is to destroy the actuality as well as even the appearance of impartiality, intelligence, and fairness.

Further, Mr. O'Connell urges that the recognition clause should count for nothing because, he says, it is the only clause required by law. He does not tell us how this is consistent with his admonition that the meaning of the language of the contract can never change in response to different external circumstances such as the history and background of how each different clause came to be in the contract. Nor does he explain why the obligation to recognize and bargain in good faith is not the fountainhead obligation from which the entire contract flows.

To an employer who would never have recognized the union or bargained with it in the absence of the legal obligation, the entire agreement is no more volitional than the recognition clause. To those employers who recognized and bargained with unions prior to the Wagner Act, and to those employers, who I believe would be the vast majority, who would continue to recognize and bargain if the law were repealed today, the recognition clause is no less volitional than the other provisions of the contract.

In any event, the recognition clause can be relied on because it reflects the real world of industrial relationships rather than solely or primarily the law book of obligation. The consequences of recognition transform the relationship just as do the marriage vows, because of the inherent nature of the change in status and relationship, not the visible meters and bounds of the few words recognizing and symbolizing the transformation in fact. The economic enterprise which before recognition could be administered unilaterally by the employer without his paying any attention whatsoever to any of the employees or any of their representatives, must today, after recognition, and indeed after a

labor organization has begun to organize the plant, be administered to some extent on a bilateral basis, taking into account the collective bargaining representative.

In addition, if any generalization is safe about collective bargaining contracts, it is that they involve parties who are in a closer and more permanent relationship which affects more people with apparently conflicting interests, and which must be applied by laymen in a wider variety of situations, than the ordinary run of commercial contracts. Accordingly, as the Supreme Court has clearly held, it is unsound to assert that collective bargaining contracts should be interpreted more literally and legalistically than commercial contracts. To declare that implied contract provisions are acceptable in the general commercial field, but are alien to the basic nature of collective bargaining, thus stands the world on its head, including *Williston on Contracts,* the courts, and administrative agencies.

Finally, from the fact that I do not have time to express them, please do not draw the conclusion by implication that I have no other disagreements with what was said this morning.

CHAIRMAN BERNSTEIN: Our second discussant is J. Warren Shaver, Vice President of Labor Relations of the United States Steel Corporation. Mr. Shaver is a graduate of the University of Pittsburgh and the University of Pittsburgh Law School. He is Chairman of the U.S. Steel Negotiating Committee in its negotiations with the Steelworkers Union, and perhaps with other unions, and is Co-Chairman of the Steel Industry Contract Review Committee.

MR. SHAVER: The subject matter *as stated on the program* of the Morning Session is "Should The Scope of Arbitration Be Restricted?" with Mr. O'Connell taking the "pro" side of the question and Mr. Fischer taking the "con" side. The morning remarks of Mr. O'Connell were entitled "The Labor Arbitrator: Judge or Legislator," and he then proceeded to talk about what's really wrong with labor arbitration. The material that I received for review covering Mr. Fischer's remarks was entitled "What and When to Arbitrate." Mr. O'Connell clearly indicated that he was not willing to embrace the "pro" side of the question posed in the title of the morning session, and both Messrs. Fischer and

O'Connell believe that the scope of arbitration can and should be just as broad as the parties want it. I believe that I have been "conned" in agreeing to be a member of this panel for the purpose of commenting on the pros and cons of restricting arbitration; and I believe that we are guilty of the very thing that sometimes we charge the arbitrators being guilty of—namely, missing the stipulated issue. I, therefore, consider myself released somewhat from the format drafted by the National Academy. After all, the printed program may have represented nothing more than "the over-zealous" efforts of an "inexperienced draftsman" who "just happened to use those words."

More seriously, however, the question, "Should the Scope of Arbitration Be Restricted," is extremely broad, embracing procedural and substantive issues in management-union relationships and the arbitration process. Except as the question is narrowed, it seems to me that it would of necessity have to be answered: "Yes, the scope of arbitration must be restricted." I don't believe that any private enterprise could last very long if an arbitrator had the power to grant a remedy on every question or complaint raised by employees or their union. My answer must be that the scope of arbitration must be limited to those items on which the parties have successfully bargained and come to terms. On the other hand, I see no feasibility at this time in carving out areas of an agreement where the parties have come to terms and saying "these are verboten." Arbitration is a contractual arrangement that can be as broad or as narrow as the parties negotiate. The basic issue then is what kind of a scheme the parties can and will negotiate. They can arbitrate some things and leave others as matters of strike. The parties may negotiate agreements with which they are prepared to live and foreclose all other matters for the life of the agreement and bar all strikes during the life of the agreement. In other words we are dealing with a contractual matter that can be varied infinitely. Clearly, no single individual can speak for all management or all the unions, not only because of the varying experience of different managements and unions in arbitration, but also because of wide divergencies in their operations and philosophies. My comments on Messrs. O'Connell's and Fischer's remarks will, therefore, be based essentially on my arbitration experience with United States Steel over the past 25 years.

The list of problems in arbitration for both management and the union is long and such problems vary in weight and import. I do wish to state at this time, however, that United States Steel management is not desirous of abandoning arbitration as a labor relations tool. It remains the most workable technique developed to date for the resolution of grievances. Utilized properly and in a mature bargaining relationship, it is useful for resolving those honest differences of opinion which arise in even the soundest of relationships without working major hardship on the parties.

Our chief problem is not to find a substitute for arbitration, but to develop ways and means to make it operate more effectively. However, I must hasten to add that this view would change if arbitrators continue the trend toward the dispensation of social justice, and fail to observe the bounds of the agreement. I was happy to hear Ben Fischer clearly state that the only limitation placed upon the jurisdiction of the arbitrator is that he cannot go beyond applying the terms of the contract.

I do not think that the problem of an overreaching arbitrator or an arbitrator who conceives his role as omniscient mediator can be completely or effectively cured by language which restricts the scope of arbitration. The Supreme Court's decision in *Warrior and Gulf Navigation Company* is now five years old.

The holding in *Warrior* was narrow enough:

> The grievance alleged that contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of this agreement' which the parties had agreed would be determined by arbitration.

Thus, even if an employer succeeds in negotiating an elaborate superstructure into its arbitration scope section, the law of *Warrior* still stands; in a dispute over an issue of arbitrability the arbitrator has jurisdiction.

I understand and agree with those critics who have criticized Mr. Justice Douglas's romanticized views of life in the shop and of his ludicrous attribution to arbitrators of peculiar skills and esoteric insights, but the potential harm of *Warrior* has thus far, in my judgment, proved to be more academic than real. I know of no employer, including General Electric, who has identified one single arbitration case, of which it could say "But for *Warrior,*

this case would not be in arbitration." I know of not a single case before our own Board of Arbitration in the years since *Warrior* which we could characterize as a frivolous consequence of the rationale of the court in the trilogy. This should not be interpreted as a bow to Mr. Fischer and the Steelworkers. We have always had more than our share of frivolous and inane grievances —those grievances were filed without the help of Mr. Justice Douglas, and they continue to be filed by wage earners who presumably never heard of *Warrior and Gulf.* As a matter of ascertainable fact, those encroachments by our arbitrators, which we have resisted most bitterly over the years as exceeding the scope of the board's authority (subcontracting, local working conditions, retiree's vacations, vacations for the deceased, etc.), all predated the *Warrior* case and represented the reasoning of the board as to the reach of specific contractual provisions which *are* subsumed by the retained rights theory of management.

I have never understood what I consider to be the over-reaction to the *Warrior* rationale in some management quarters. It seems to me that there are some inherent anomalies for a too adamant management in protesting the reach of *Warrior.* To wit: the employer bemoans the absurdity of the courts in holding that the issue of arbitrability itself is for the arbitrator, saying that if the employer decides unilaterally that an issue is not arbitrable, then that matter should be heard before the courts—presumably, in spite of their absurdity in these matters.

The extreme concern which some employers have with *Warrior* is even further perplexing in view of the award of Fred Holly in *The Matter of Arbitration between United Steelworkers of America, AFL-CIO and Warrior and Gulf Navigation Company.* In most of my discussions with company and union lawyers of the "Trilogy," I have encountered very few practitioners who have ever read the arbitration case which followed the decision by the Supreme Court in *Warrior.* May I cite several pertinent sentences from the thrust of Holly's award?

> The arbitrator's jurisdiction does not extend to evidence subsequent to the filing of the grievance except as previously noted. Accordingly, he is not empowered to grant relief on subsequent evidence. Secondly, the arbitrator does not possess the authority to order the parties to accept his criteria for contracting out and to require them to examine all past instances of contracting out in

> the light of these statements [I commend this rationale to our board]. To do this the arbitrator would be assuming a negotiation function and would be guilty of legislating where the parties have not legislated. . . . Finally, the arbitrator is well aware of the fact that this holding does not settle the problem of contracting out. He is convinced, however, that in view of the nature of the grievance and the evidence, he is powerless to do more. Now that this conclusion has been reached that implied limitations exist on the right of the company to contract out work, the parties can proceed to resolve the problem to their own interests and situation.

The Supreme Court, having determined that the issue of arbitrability was for the arbitrator, and the arbitrator having found the issue involved to be arbitrable, the arbitration case was then decided within acceptable limits of proper arbitral self-discipline, that is, the arbitrator perceived his role accurately and did not attempt to impose his own view of what the parties might have negotiated, or should have negotiated, or, in his wisdom, what they meant to negotiate.

After a review of arbitration history in the United States Steel Corporation, I can tell you for our part that we have little problem with defining the limits of arbitrability. To zero in on the abuse of arbitral discretion, I would have to say that they have most often come in the past from arbitrators who attempt to read in restrictions, limitations, and expansions on language which is in the agreement, and which does attempt to regulate, somewhat, problems relating to wages, hours, and other conditions of employment, but which may not do so fully and completely in all instances. It is in this more narrow area that we find arbitrators unable to resist filling in the blanks or unable to summon the courage to tell a grievant that the company has not bargained away its discretion to make a varied response to certain situations.

So, I submit, the future of the arbitration of labor problems lies with you.

CHAIRMAN BERNSTEIN: Our third discussant is John J. Adams. Mr. Adams is a graduate of the University of Michigan Law School; he is a partner in the law firm of Squires, Saunders and Dempsey, of Cleveland, Ohio. For about twenty years he has worked almost exclusively in the labor and industrial relations field, representing firms of all sizes, from the very large to the very small.

MR. ADAMS: I am not so sure that what I am going to do is comment on this morning's papers. I don't know how the union people maneuvered Warren Shaver and me into the position where they get to open and close, unless they got to Irving Bernstein before we did.

In an effort to confuse the union, and perhaps you too, I want to offer you first a new trilogy, with the hope that at least I can divert the closing union speaker.

This is a trilogy of stories about arbitrators that I can share with you. They were passed on to me within the past couple of weeks by a very lively and astute friend of mine, with whom I sometimes sit in arbitration cases. As you might guess, he is also a paying client.

The scene is the typical hearing room. The parties were lined up waiting for the arbitrator to appear, and appear he did, briskly, and walked straight up to the front of the room, standing there, surveying us for a moment, before he sat down. At that point my friend turned to me and said, "You know, he reminds me of the Sultan who has just come in after three months in the desert, has bathed, perfumed and oiled himself, and then enters his harem. He stands there, surveying the sight, and says to himself, 'I know exactly what I want to do. I just don't know where to begin.' "

As the hearing progressed, my lively and observant friend watched the chaotic scene that developed and at one point, when it was particularly chaotic, he turned to me and said, "You know, I heard an argument not long ago about what is the oldest profession in the world. The argument was going on among an engineer, a doctor, and an arbitrator and, aside from the fact that there might be a fourth profession, still older, these men wrangled at some length. Finally the doctor said to the other two, 'You know, you are very difficult to convince, but I think you should look in The Bible because there you will read in the Book of Genesis that God fashioned Eve from Adam's rib. This is clearly a medical operation, and establishes the medical profession as the oldest in the world.'

" 'If you look even earlier than that in the Book of Genesis,' said the engineer, 'you will see that God divided the world into land and water, created the heavens and the earth, and created order out of chaos. That is quite clearly an engineering function. I think, therefore, you must admit that the engineering profession antedates the medical profession.'

"With that the arbitrator said, 'Who do you think created all that chaos?' "

In due course the hearing ended and in still more due course we received the arbitrator's award, and so now we reach the third in my trilogy of stories about arbitrators.

As he and I sat ruefully studying the award, my friend observed to me, "You know, this arbitrator reminds me of the Irishman named Pat who, after many years of roistering about, was finally taken very ill. Mike, who had been his companion in many of his adventures, hearing of this, rushed to his bedside. He looked at his old friend and said, 'Pat, you are going soon. Have you made your peace with God and renounced the Devil?' Pat looked up at his old friend Mike and smiling weakly said, 'Mike, in my condition, I can't afford to offend anybody.' "

So much for the new trilogy about arbitrators.

Like Francis O'Connell, I decline the invitation to probe the abstract question whether the scope of arbitration should be restricted. I am a working stiff, an advocate, concerned almost exclusively with *ad hoc* arbitration rather than the kind known as "permanent"—or "thank God, his contract runs out this year"—arbitration. Mine is therefore a worm's eye view of arbitration. My one special qualification to appear before you is that I am that rare management or labor representative—I am completely without prejudice or partisan thoughts.

It is on this footing that I say it is high time the scope of arbitration be restricted—*by you—to the contract—and to its true function and purpose.* This is, I think, the basic thrust of Francis O'Connell's analysis. I can do little more than footnote his theme and a few of his points.

My one criticism of his talk is that he allows you to leave Washington less worried than I would let you depart, because I think

you must recognize that many thoughtful management people are deeply concerned about the points Mr. O'Connell has raised, and are seriously reappraising the value of arbitration to management. It is, in the classic phrase, an "agonizing" reappraisal, because none of us likes the alternative of strikes and the threat of strikes.

But we don't like what we see too many of you doing, over the broken back of the recognition clause and some other clauses as well, to management's ability to manage its business.

We cannot accept the notion some of you seem to have that the contract does, or does not, forbid us to let outside contracts, or transfer work elsewhere, for example, depending upon how you trudge your way through our economics, our motives, the availability of equipment, the effect upon employment levels, and so on.

In our minds, either the contract forbids it, or it doesn't. We don't understand how you infer an implied restriction, and then infer that this implied restriction does or does not restrict, depending upon how you add up a long list of considerations, *which you also infer* because the contract is equally silent about *them.*

Not all of you do this, of course. But those of you who do seem to me to forget or give only lip service to the basic principle that a labor contract is *not*—I repeat, *not*—a statement of only those things an employer can do. From start to finish it is a statement of *only those restrictions* on management's freedom to manage which the bargaining has succeeded in imposing. In spite of Mr. Justice Douglas, I assure you—I guarantee you—that *no management* ever believes or intends that it has parted with *any* aspect of managerial freedom that is *not* spelled out in the contract.

I grant you that the written expression in the contract may be imperfect on occasion. When it is imperfect, you have a classic case for the exercise of your talents. "Then if ever come perfect days," to be poetic, when you can diminish—or heighten—tensions in the plant, and consider the consequence to morale in the shop. (Parenthetically, I might add that under the trilogy cases, I guess you are forbidden to consider the effect of your award on morale in the office, or on outside counsel who also have to eat.)

But when the contract is silent, so far as we are concerned you have nothing to interpret or apply. It is not enough, for us, that you can speculate—or can establish—that the union had a different intention or expectation. The most you can make out of that is disagreement, *not* agreement. And your function is not to interpret or apply our disagreements.

But this is not all. Some of you seem to forget that arbitration is an informal *judicial* process, *not* legislative and not mediatory. Certainly in the case of ad hoc arbitration, it has just one object: to establish that this particular grievance is sustained or denied. *None* of the management people I know want your views on what is good industrial relations practice, or what the parties should have done, or what our labor contract ought to say. The grievance is before you because we think it should be denied and the union wouldn't take "no" for an answer.

Arbitration is *not* an extension of the collective bargaining process, any more than a suit for divorce is an extension of the "negotiations" which led to the marriage. You encourage irresponsibility in management unless you deal incisively with the case in which the employer obviously is wrong and only "backed its foreman." You encourage irresponsibility in unions unless you deal summarily with the flimsy grievance which the union processed for "political reasons." If you do not forthrightly label these cases for what they are and stop there, you will, in the end, weaken the very procedure which your Academy seeks to strengthen. Again, I say, *you* must restrict the scope of arbitration.

There are other ways, too, in which you must restrict the scope of arbitration if you want it, as I do, to flourish, not flounder. One in particular I will mention.

You must resist the temptation to speak on subjects you need not decide. Again, not all of you do this, but enough of you are guilty enough of the time that for this reason too, many management people are re-examining the true value of arbitration.

Some time ago, I tried a case in which two union officials had been discharged for causing a wildcat strike. The arbitrator—and unlike Mr. O'Connell I prefer to let him squirm in anonymity—used up nearly 20 pages sustaining the discharges, and then said, in effect:

> The Arbitrator therefore has no alternative but to uphold the discharges. He notes, however, that one of the employees had 14 years of seniority, the other 11 years, and that neither has a record of prior discipline. The Arbitrator's decision therefore is not intended to preclude the Company from *hiring* the two employees, as new employees without seniority.

In another case, decided just last week, the issue involved, on one view, the company's right to let an outside contract. The arbitrator upheld us and denied the grievance. So far, so good.

But he began his opinion by announcing that "of course the company had a duty to bargain with the union about its decision to let outside contracts." At two or three other points in his opinion, he reiterated this proposition.

To me, there is no justification for this kind of thing. In the discharge case, we have been badgered ever since to take back the two employees in question, and are criticized for not following the arbitrator's "recommendation." In the outside contracting case, I strongly suspect the arbitrator is wrong in this case about our duty to bargain for reasons too complicated to explain here, quite apart from the fact that this is none of his business.

The point is that *his* failure to restrict the scope of arbitration cannot be tossed aside as two aberrations of two arbitrators. The managements involved do not easily distinguish between *arbitration* and the *arbitrator.* Neither do I and neither can you, if you want, as I do, to make arbitration succeed.

CHAIRMAN BERNSTEIN: Our final panel discussant—Vernon Jirikowic, Research Director of the I.A.M., having been with that organization for the past 15 years—is a gentleman to whom we owe a special debt of gratitude since it was only within the last 24 hours that he was asked to replace one of the original panelists.

MR. JIRIKOWIC: Thank you, Irv. When Lew Gill called me last night and asked me if I would substitute for Mr. Fisher, I asked him what the topic of the paper was and he told me. For approximately an hour or so thereafter, I sat down, and in my own mind tried to review the contribution which arbitration, as such, has made to the institution of collective bargaining. I agree with Ben's statement: I do believe that arbitration is an important tool of the collective bargaining process. It fills certain gaps which

are created in the collective relationship between labor and management. It has given a certain degree of stability to the entire institution.

In examining the past, the present, and the future, I like to think of the institution of collective bargaining in today's terms of something like 17 to 18 million organized workers and something like 120,000 collective bargaining agreements. There are organized workers in two to three hundred different industries, and they are members of approximately 180 different international unions, all of which have different problems and utilize different approaches to the entire question of representing people.

The institution of collective bargaining will be strained, not only today, but also for what we will face tomorrow. I have been told that by the year 1970, we can expect that our body of knowledge will double every four years. This fact reflects the tremendous changes which will occur in our society. The question of change and adjusting to change is going to place a severe strain on collective bargaining because collective bargaining is the mechanism of accommodating the interests of management and the interests of labor, and since these interests will be changing, the task will become more difficult. I think, to date, the institution of collective bargaining has done a very good job, and I think that arbitrators and the institution of arbitration have made a very worthwhile, a very significant contribution to the success of collective bargaining in our country.

If we polled the representatives of organized labor today, there would be no question in my mind that they would substantially agree with me that arbitrators have contributed realistically to strengthening the whole institution of collective bargaining, notwithstanding the fact that we don't agree with all decisions, and I am sure management doesn't either. But, in the long run, I think it has provided a certain degree of stability which we could not have achieved through the constant resort to strikes.

I like to think of the International Association of Machinists, *not,* if you please, as the young man who saved all his life to buy his mother a house, only to find out the police wouldn't let her operate it.

Conversely, we *do* try to keep abreast of the changing developments within industry, and, perhaps, as Research Director of the Machinists, I am in a good position to see the changes that are occurring. In representing some three-quarters of the organized workers in the aerospace industry, I can state to you that this is an industry which has undergone tremendous changes within the past 10 to 15 years. In 1950, approximately 25 percent of the total employment in this industry was salaried personnel. Today that figure is in excess of 50 percent, and the complex question of defining and clarifying the unit has come up repeatedly.

In commenting upon Mr. O'Connell's paper, I do recognize that a recognition clause is not in fact a scope of work clause; it would almost be impossible to write a scope of work clause for an industry which is constantly changing its product and its manufacturing processes. It is for this reason I believe a recognition clause, which enumerates certain classifications, *can* and *must* be treated as if in fact it is a scope of work clause.

Accordingly, in view of this obvious fact, I cannot be critical of arbitrators who have used this line of reasoning when issuing subcontracting decisions. Be assured, when these decisions are made, the parties certainly attempt to get their understanding straight at the next round of negotiations. In the interim, however, it is not unreasonable in implying that the recognition clause should be treated as a scope of work clause.

There is one other point I want to make before closing. The issue which is occupying much of our thinking on subcontracting —namely, that arbitrators have gone beyond the language of the contract and therefore management is alleging discrimination— may have another side to the coin. It is not unlikely and not impossible that the shoe may be on the other foot tomorrow insofar as organized labor is concerned. If it is, we would perhaps be just as vociferous as management is today. Notwithstanding this possibility, I cannot generalize in recommending or advocating that arbitrators should at all times limit themselves strictly to the actual language of the contract.

I do think, in perfecting a relationship between an employer and a union, there is reasonable ground in specific instances to go beyond the contract language, and I, for one, certainly would not criticize arbitrators for doing so.

CHAIRMAN BERNSTEIN: We have now come to the end of the more or less formal presentations by members of the panel. We, in fact, have only about 10 or 12 minutes left to us. This has raised in my mind the serious conflicts which must exist in your bodies between the tired seats of your pants and your unexercised vocal cords.

As any good arbitrator should, I have mediated a settlement with the panelists. We have decided to forego any further direct discussion by members of the panel in order to allow you to participate in the discussion.

MARK KAHN: I would like to have the chairman of the panel designate the member of the panel who will answer this:

What appears to have emerged from this morning's program, which has not been directly touched upon, is that in many cases the parties who select the arbitrator appear themselves not to agree on the nature and function of arbitration. It is unclear to the arbitrator whether they have engaged him because each side seeks a victory or because both hope to get a fair and just examination that may guide them in interpreting the contract.

Yesterday I heard discussants talk about formal procedures, other folk talk about informal procedures. Today we hear about restricted arbitration and unrestricted arbitration. I have participated in a few arbitrations. One day I hear the union lawyer argue that the arbitrator cannot vary a single word in the contract. I hear the company lawyer argue that there is an implication to be drawn from that language. The following day the same union lawyer will take the position expressed the day before by another company attorney, and vice versa. Therefore, I think an arbitrator is sometimes confused as to which way he is to view the contract: Should he give it a liberal interpretation, or should he give it a strict interpretation?

CHAIRMAN BERNSTEIN: I will ask Mr. Groner and Mr. Adams to comment on these questions.

MR. GRONER: I would like to restrict myself to the first question, which is, as I understand it: How do the parties approach arbitration; do they approach it to win or do they approach it to assist in reaching a just result? I would like to give, first, a personal answer, and, secondly, a general answer.

My personal answer is one which I assume every advocate would give, and which I give sincerely: Thank God, for me there has never been such a conflict! It is always true that the side I am on I feel is the side that should win and the side that is most consistent with the fairest interpretation of the contract. And I hope it will continue that way in the future. I am not making a personal judgment so much as I am relating to you an historical fact.

Now, secondly, to generalize, I at least would regard arbitration as an adversary proceeding. It is an adversary proceeding like court litigation and presumably this means that, by and large, the advocate performs his function in achieving the just and rational result, by, within limits, acting as the advocate for his side and seeking to vindicate his side. If the two parties could agree on what is the just result, there would be no need for the court and there would be no need for the arbitrator. And I say that the arbitrator cannot help being in the middle any more than the court can. That is one of the comments I want to make, although Ben Fischer made it well.

The thesis that Mr. O'Connell selected, indicating that arbitrators should be judges rather than legislators, I agree with; but I was confused because Mr. O'Connell seemed to be criticizing judges just as much as he was criticizing arbitrators.

Also I don't think the line between adjudication and legislation is all that clear in a particular case. Every arbitration, to the extent that it involves a new problem or an unfolding issue, is, to some extent, an act of legislation, and I believe, if we read Cardozo's "The Nature of the Judicial Process" or any other analysis of jurisprudence, we will find that there is no precise or crystal clear dichotomy between the judicial and the legislative function.

MR. ADAMS: With respect to the first half of what Ike Groner said, I will tell you that the only place where I would disagree with him is in the case I tried against him, because that would be the one place where his advocacy and the rightness of his position would not coincide with mine. What I am attempting to do by this statement is to underscore something which he has made as a basic point—I touched on it in my remarks: You make a fatal

mistake, in my opinion, certainly in the ad hoc cases with which I am familiar, if you do not regard an arbitration from first to last as an adversary proceeding. The only reason we are there is to win.

I urge you to strike us down, on management's or labor's side, if you think we were irresponsible to have brought that case there. But believe me, I am there to win. I am an advocate. I believe my position is right. I wouldn't be there if I didn't think all those three things.

Some years ago I heard a very distinguished professor of evidence, Professor Morgan, begin a very learned speech he was making by saying the purpose of a lawsuit is not to get at the truth. It is to settle a dispute.

Now, the underlying point here is not that he encourages perjury or dishonesty, nor do I advocate that, but the purpose of litigation or arbitration is to settle a dispute. We sincerely hope that the settlement will not injure industrial relations in our plant for the remainder of that contract; all too often we suspect that it will. So I cannot say too strongly, arbitration is an adversary proceeding. I expect to win. I expect your decision to be right, which means that the grievance will be denied.

CHAIRMAN BERNSTEIN: I don't want to inject my own views into this, but, to answer your question, there are means by which the arbitrator can explore what the parties really want.

HARRY RAINS: I am interested in the utilization, proper or improper, of the recognition clause to determine the scope of a contract, particularly in the collateral issue of the right to subcontract.

If the recognition clause carries an additional sentence such as I have seen in the Dow Chemical contract, it is simple. The gist of the recognitional sentence is, that this clause shall not be utilized for any other purpose than the intent required by the National Labor Relations Act. Some of these clauses carry also reference to specific cases, so would that kind of clause, then, prevent the utilization of the recognition clause as a basis for collateral interpretation relating to the right to subcontract?

MR. JIRIKOWIC: I don't believe your question could be answered with a simple yes or no. If that particular qualification were proposed to the union during negotiations, it would no doubt be questioned. I am certain that the union would respond in another way to protect itself. However, I am not a lawyer, and there may be some question as to whether such a qualification could, in fact, change the nature of a recognition clause.

MR. ADAMS: Fifteen years ago I would have said, "yes." Today, I would say, "No," because I have the healthiest respect for the ingenuity of arbitrators.

CHAIRMAN BERNSTEIN: Thank you very much, gentlemen.