

CHAPTER VII

PROBLEMS OF PROOF IN THE ARBITRATION
PROCESS:

WORKSHOP ON WEST COAST TRIPARTITE COMMITTEE
REPORT*

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CHAIRMAN JONES: As you know, the members of this panel come from the State of California, the West Coast Region.

I thought at the outset, and before we get to more specific items, that it might be a prudent thing very quickly to go through some of what we regard as the more important highlights of the earlier pages of the report, since our ultimate conviction on this panel was that this subject is so complex that it is utterly unrealistic to walk up to it in other than a very wide-open-eyed manner.

First off, of course, we start with the proposition that we all buy, until we are pushed a little, that the rules of evidence and those of judicial procedure need not be observed in arbitration. The corollary proposition to that is that rules of evidence had their origin in the felt necessity of courts to prevent undisciplined lay jurors from being gulled in their deliberations by either prejudicial or unreliable testimony or exhibits.

* This chapter is an edited version of the transcript of a workshop or informal discussion on Problems of Proof in the Arbitration Process. The basis for the discussion was the Report of the West Coast Tripartite Committee (Chapter VI). Members of the West Coast Tripartite Committee, with Edgar A. Jones, Jr. as chairman, served as panel members to lead the discussion and to act as resource personnel. This workshop was one of four that were held simultaneously. The audience consisted of Academy members and their guests.

And, as most of you realize, the rules of evidence have themselves been going through in the last three decades, with noticeable acceleration in the last decade, a considerable amount of dilution in terms of the rigor with which the courts apply them to effectuate the exclusion of evidence.

We think that it cannot be over-emphasized in assessing problems of proof and the possible utility of rules of evidence that we are considering problems of *evaluation*, not problems of *exclusion*. Admittedly, like all asserted barriers in human reasoning, it tends to be porous. Some aspects are to be observed on either side of the line.

The report details a pattern of expectations among various groups of what arbitration should be today. In the interest of underscoring the problem of complexity as we discuss or think about problems of proof, we must realize that we enter on our consideration at a certain point in the evolution of the institution of labor arbitration. We seek to describe in these several statements the kinds of expectations which exist currently, some of which obviously are inconsistent with others.

Furthermore, one has to take account of the realities of the conduct of arbitration hearings as they go forward in the various areas of the country today. On the West Coast—and from what I understand from my colleagues, it is not atypical—the great majority of arbitrations are on an *ad hoc* basis, not between goliath companies and goliath unions, but between relatively small companies and small local unions. It also involves a fairly large number of industrial relations managers and business representatives who are not lawyers. Again, among either of these groups, a fairly large number of them have periodic but not extensive experience in the presentation of cases in arbitration. One has to keep that reality in focus in thinking of the utility and the applicability of resort to rules of evidence.

Similarly, Academy statistics show that roughly half of the arbitrators who are members of the Academy are not the possessors of a legal education. Obviously, in presenting a case to an arbitrator who is not a lawyer, a careful advocate will make his assessment of the particular individual before whom he is appearing in determining how he should invoke rules of evidence or how he might

formulate them if he wants to resort to them. I understand from fairly widespread conversations with various lawyers, not just on the West Coast, that there is some trepidation among lawyers who act as advocates representing either managements or unions in the presentation of cases to arbitrators who are not lawyers. And the trepidation runs along the lines of, "We do not want to offend the trier of fact by what may seem to be contentious and 'legalistic' disputation."

I don't know how valid that fear is. I am inclined to think, from the conversations that I have had with my colleagues, both before and after substantial intakes of sodium pentathol and bourbon, that perhaps this is not a valid apprehension. But I suppose it is a prudent caution nonetheless. It is, in short, a factor which has to be taken into account.

Furthermore, this distribution of arbitrators isn't going to change. There may, I suppose, be launched some kind of an evolution which might bring more lawyers into contact with arbitration, to the degree that the courts begin to give some kind of legal atmosphere to it. I know of no Academy study which has compared the number of lawyers to non-lawyers who have become Academy members in the last five years which might indicate that more law-educated people are coming into the Academy, but I doubt that such a study would show any significant difference from the past pattern. Therefore, this is a long range reality that one has to take into account.

This is a distribution which I think is a very healthy one. I don't share—and now I speak as a law professor—I don't share the stridencies of the former law professor who sits on the Second Circuit today, who apparently has jaundiced recollections of his own former arbitral activities and colleagues. I think it is a healthy balance, not an unhealthy balance, that something on the order of 50 percent of widely acceptable arbitrators are not lawyers. I think that this infuses the arbitrable process with something which would not be there were we all sitting here as a group of lawyers discussing a strictly legal function.

I recognize that this is something which may be mooted. But in any event, it exists, and it is going to continue to exist, so therefore when we talk about problems of proof, we have to recognize that

we have advocates who are not lawyers, in fact, advocates who frequently are unsophisticated. We have arbitrators who are not lawyers, and God forbid I should say unsophisticated! So that when we assess the problems of proof in terms of thinking of which rules of evidence, or the degree and the rigor we might wish to invoke in respect to them, I think we must always, and probably on a case by case basis, be thinking in terms of such factors as the experience or background of the arbitrator; whether one or both of the parties are represented by lawyers; what the experience of the parties has been in past arbitrations in relation to the presentation, the reception, and the apparent evaluation of evidence; whether these particular parties are accustomed to having an arbitrator play a passive or an active role in the conduct of the hearing; whether—I suppose it might be added—a particular party registering evidentiary objections to evidence proffered by another party is actually registering those objections in good faith in an effort to aid the arbitrator to reach as realistic a view of the facts—“truth”—as possible, or instead is seeking to hamper or harass either an adversary or perhaps, more subtly, a timid arbitrator.

I think the message is obvious. It is one of complexity; it is one which defies generalization. I think—and I now begin to deviate a little from the opinion of some members of the panel—that we will be able to develop, although we are not going to do it today or in the course of a few months, guidelines which might help one to make prudent judgments with some expectation of conformity, but certainly not with any pressure to conformity, in the complex situation in which we operate.

Having invoked complexity, I think we should turn to something more specific.

What we have undertaken to do is to take what we believe are some interesting problems and attempt to get some understanding of them. I don't use the word *consensus*—I don't like the word *consensus* when it comes to the study of these problems of proof—because I think consensus, if we got it, would be a very delusive thing. What I would be very happy to settle for would be some kind of mutual understanding of what the problems are.

With the emphasis that we are talking about—“Evaluation Si, Exclusion No”—I will ask the panelists to give us their brief

reactions to the various topics. I will call upon some people in the audience although I have not consulted any of the people in the audience about this prospect. I do have, however, a reasonably full profile here of the kinds of people, their backgrounds, and their names, and I intend to get a little mileage out of you.

The first thing I thought we would take a look at is discovery. Speaking of discovery, I don't think that I have divulged—although the program has—the names, ranks, and serial numbers of the gentlemen on this panel.

From my right to the left, Bob Tiernan, Kaiser Industries, of Oakland, California; Al Klein, attorney in Los Angeles, representing various unions, notably the Machinists; Berry Jones, who is with Douglas Aircraft Company in charge of their grievance procedures; and Charlie Hackler, attorney in Los Angeles, representing unions, including the Teamsters.

Charlie—succinctly put—“Does discovery have a place in arbitration?”

MR. HACKLER: Mr. Chairman and members of the Academy, you will find in our written report some observations on the use of prehearing and discovery procedures. I am the one member of the panel, I suppose, who feels more strongly than our report reflects that, whether you call it prehearing discovery or pretrial procedures, or whatever, arbitrators ought to address themselves more than they sometimes do to the necessary disclosure between the parties prior to the hearing, not only as to their respective positions, but as to their evidence.

Ted mentioned that at least half the arbitrators are not lawyers, and I suppose even more than that are not practicing lawyers. I find that it comes as a surprise to even knowledgeable laymen or non-lawyers to learn that developments in the legal profession and in the court procedures in the last 25 years have for all practical purposes eliminated the element of surprise in civil trial work, at least in any substantial litigation.

In my profession perhaps we protect ourselves by not letting our clients know the extent to which there has been a preliminary run of the trial long before it takes place through depositions, demands for admissions, the forced disclosure of documents, and

forcing the other side to disclose the names of prospective witnesses. The discovery system, both in the Federal Courts and in all states except the most backward, is such that in the preparation for a trial, at least in a matter of importance, most of the work is done before the trial and the Perry Mason aspect of it is, for practical purposes, minimal.

This came about through a dim view of the gamesmanship or sporting theory of justice, the contest theory, the paid-contestant proposition. In a modern complex society we cannot afford that, and there is a growing conscious public awareness that you cannot just play games, that the person who has hired the best available advocate, in the sense of a forensic display artist, ought not to prevail for that reason alone. It isn't the way justice ought to be meted out in our country.

But strangely enough, at least to me—and it may come as a surprise to some of you—in labor arbitration the opposite is true. Although there are very much stronger reasons why gamesmanship should not be a deciding factor in the labor-management area, perhaps even stronger than in general commercial affairs, nevertheless, arbitration proceedings are such that there is relatively little formalized pretrial procedures or discovery, at least between the participants, whether they be lawyers or union representatives or industrial relations people.

As our report points out, there is no statutory basis for pretrial discovery in arbitrations. An arbitrator prior to submission can't order, as can a judge, people to answer interrogatories or to produce documents in advance of trial, even though as our report shows, in some jurisdictions the power of subpoena to bring in witnesses or documents at the trial is present.

And so our report reflects the idea rather sadly that, "Well, it just doesn't seem very practical to have any pretrial discovery in arbitration proceedings."

I want to set forth three very strong reasons which I think indicate there is a need for pretrial discovery, using those words in the broadest non-technical sense in arbitrations, and then finally to suggest a way that the arbitrator, by indirection, can encourage a wider use of discovery between the parties.

I mentioned the gamesmanship idea in civil litigation. It seems obvious, and I am sure it is to all of us, that because of the continuing relationship of a union and a management, long after any particular arbitration is over, that the winning of at least an important arbitration by pure gamesmanship can fester the relationship for many, many months and years afterward. If the union has to go to its members and say, "Yes, the arbitration was lost because we were outfoxed at the hearing because of clever cross examination; you people are saddled with a certain rate of pay or certain working conditions because of it," that is not conducive to good labor relations.

If the arbitrator's decision, publicized to the working force, is based on some highly technical ground that anyone reading it can say, "Well, if all of the information had been made available early enough, there might have been a different result," there is a consequence beyond a particular judgment in the case.

Now, this is different from most civil litigation. My lawyer friends will all agree with me that in most civil litigation, the plaintiff and the defendants have no further continuing business, and in many instances, not even a personal relationship. Regardless of how the lawsuit comes out, they are not compelled to live with each other, and mostly they part as enemies, regardless of who wins and who loses.

This means that a decision based upon other than the fullest disclosure of facts in the arbitration ought to be avoided. There is a positive interest in advancing collective bargaining interests to avoid it, to the extent that disclosure will do so. Secondly, and this comes as a surprise to some also, there is a statutory basis for full disclosure by both union and management to the other, not only of positions to be taken in an arbitration, but of the evidence upon which their positions are based before the arbitration proceedings begins. Many of you are familiar with the fact that the NLRB, under section 8 (a) (5) of the National Labor Relations Act, as a part of the mutual duty of labor and management to bargain in good faith with each other, has held that each is under the duty to make a full disclosure of facts necessary to the other to discharge its duty of bargaining in good faith the terms of a labor agreement. That's well known.

It is not equally well known or appreciated that the same obligation applies, according to Labor Board decisions, in making disclosures necessary to permit a union to discharge its statutory duty of fair representation of the employees. In appropriate cases a remedy can be obtained from the Board. Of course it is very slow, admittedly, to make the employer disclose, or conversely the union, if there is withholding of information necessary in connection with the administration of a labor agreement. I have had occasion to resort to the NLRB a few times; I have used it by way of threats several times on the eve of arbitration to say, "Well, look, rather than box this thing out in a vacuum, where neither side knows what this is all about, and frustrating the possibility of settlement, we will go to the NLRB and secure an order to examine these documents or these records or this information."

The point I want to make here is not to suggest that this is a particularly appropriate way to get the information. It is slow; it isn't very good for the relationship between labor and management that I spoke of a moment ago, but it expresses a federal statutory policy. That is not true, however, in private litigation. There isn't any federal or state statutory policy that plaintiffs and defendants ought to exchange information before they are locked in fond embrace in the courthouse.

Thirdly, and I think even more important and much overlooked, is the fact that in the average labor agreement in America, pretrial discovery, pre-arbitration trial discovery is called for and has a consensual basis. That's exactly what is called for in the preliminary steps of the grievance procedure. It says the parties will meet and not only attempt to resolve the grievance, but by implication—and I don't think any lawyer or judge would say that there isn't an implied obligation if you are in good faith going through the steps of the grievance procedure—to make disclosures of what you know about the dispute.

Take, for example, the typical discharge case. The employer says, "Well, here's why we fired the guy, and here's the basis for it." And the union fellow says, "Well, here's what the employee says. How do you answer that, John?"

"Well, we answer with this." Now, we know that most of those cases get adjusted before they go to arbitration. Clearly, the whole

basis of arbitration—if you regard arbitration as I do, and as I think it ought to be regarded—is that it is the last stage of the grievance procedure rather than a self-contained forum to bring about an adjudication. It seems to me, therefore, that this is even a stronger reason for pretrial disclosure and discovery.

To summarize, my three reasons for pre-arbitration disclosure and discovery are: *First*, there is a stronger reason to avoid gamesmanship in arbitration than in litigation; *second*, there is statutory basis for pretrial disclosures of basic and fundamental information that go to the making of the arbitration; and, *third*, the parties, if they are administering their own contract in the spirit in which it is written, ought to do so.

You say, “Well, what can the arbitrator do about it?” Obviously, he can’t say prior to the submission, “I order you to produce something.” Even at the hearing, and even when the subpoena power is available, the average arbitrator, for excellent reasons, prefers to cajole and nudge and hope that there will be disclosure and stipulations between counsel, or disclosures outside the hearing room and opportunities to examine documents rather than resort to its use. I believe that is unfortunate although most arbitrators are very generous in giving short recesses or continuances to consider matters that ought to have been reviewed days before.

I suggest, and I know most members of the panel would disagree with me, that the arbitrator, without benefit of the power of a judge to compel discovery, can by indirection but with propriety encourage it simply by evaluating the weight he is going to give to withheld evidence that ought in good conscience to have been disclosed earlier.

That sounds very horrible, of course, to the purist who wants you to put a nickel in the slot and get out the true facts. But let’s face it; this is done frequently in discharge cases under a different rubric.

The employer tells the union he fired the guy for two reasons, but has held back, for a surprise at the arbitration, the third one. The average arbitrator is likely to say, “Well, this seems like an afterthought.” Why? Because it wasn’t disclosed until the hear-

ing. Now, indeed, it may not in fact have been an afterthought. It might have been a piece of gamesmanship. But nevertheless, it doesn't offend the conscience of most arbitrators to say, "I look with some suspicion upon the reason that comes to light for the first time at the hearing."

I suggest an extension of that doctrine is for an arbitrator to say forthrightly, "The fact that there was ample opportunity for this particular factual or conceptual matter to have been laid on the table and discussed but wasn't will substantially affect the weight that I am going to give to it." He takes this position because the party did not produce the evidence at an earlier stage in the proceedings, although there was opportunity to do so.

Of course, if there are no earlier stages, if they have been waived as they sometimes are, or if they are of a type in which it wouldn't be fair to say that there is an implied obligation of fair dealing to put things on the table at the grievance stage, you cannot expect an arbitrator to take such action. But I do think that in view of the substantial policy considerations I mentioned, which go far beyond private litigation, and the realization that in private litigation the area of surprise has been diminished to the vanishing point, arbitrators might be a little more forceful, shall we say, in allowing parties to inquire into the extent to which information has been withheld by one side or the other.

CHAIRMAN JONES: Thanks, Charlie. It might not be inappropriate to assume that, at the outset of a hearing, Charlie came into an arbitration and said, "We have been trying to get this information; we think we are entitled to it; we have been unable to prepare our case for the lack of it; we would move for a continuance; indeed, we would ask an order, in the nature of discovery, if you will." I suppose the arbitrator might very well say, "All right, I will issue an order," either relying upon existing state subpoena statutes or relying upon an inherent federal power as an arbitrator in states which do not have subpoena statutes. "Even if we don't call it an 'order,' I request that you produce identified, discoverable, discovery-appropriate data."

Now, would that be an alternative which might have practical utility?

MR. HACKLER: I think it might. But what do you do? This is the embarrassment. Suppose the guy says, "I won't do it." This is always in the background. What sanction can the arbitrator apply?

I now have an arbitration where upward of 50 men were fired in a single week, allegedly for pilfering company property in one manner or another. And the forthright statement is made by the other side, "We won't give you any details. You will find out the details when we put on our witnesses before an arbitrator."

Presumably, when they put on their witness, I can call for a continuance to talk to the individual, whichever one is involved, and say to him, "John, is that so what he said? And if it is, we had better withdraw your grievance; we are in difficulty."

We are satisfied that a number of these grievances are not meritorious, but we can't evaluate which ones are good or bad, because the man says, "I am not dishonest, I haven't done anything wrong." Some of these men have 15 years seniority. We have to believe them until we are proved wrong.

Where would an arbitrator be if he ordered the other side on the first day of this hearing to come up with the information we seek? The company could care less. These men are fired; we are the people who want the arbitration to take place.

In this particular instance, we forced the disclosure of some information by a threat to go to the NLRB. We did this purely for the purpose of evaluating the grievances. We have been able to evaluate some of them on the basis of that forced disclosure.

I don't have any objection to the nudging, but I think you have to face up to the fact that if you are pushed to the wall, it is a little embarrassing to say, "Well now, what do we do next?" The continuance is of no value to the side that doesn't have the information unless it can be obtained.

CHAIRMAN JONES: There may be some thought on this among our colleagues and guests here. Perhaps an attorney, one representing management, may have a thought on it. I will ask Mr. Schoonhoven of the Seyfarth firm in Chicago if he cares to make some observation.

MR. SCHOONHOVEN: I don't particularly quarrel with most of

what you say, Mr. Hackler. I do quarrel with how far you would go with it, I guess.

First of all, on the same premise you used, that we have a continuing relationship between employers and employees; secondly, on the premise that we are dealing with people who are not always skilled in the legal profession, or are sophisticated.

Due to the fact that there is a continuing relationship, there are all kinds of grievance committees. You have those that are out looking for grievances, who are continuously trying to drum them up. If you give them a right of discovery, which they would like to have, and you let unsophisticated people use this right of discovery, and maybe give an unsophisticated arbitrator the right to award it, you are going to have them asking for information which, by stretching, could be termed "relevant," but really is not. I have been on some Labor Board cases where they asked for every record you owned, and the Trial Examiner gave it to them because it had some little relevance.

So you have a committee or a local union president who says, "I want this, this, this, and this," and it is relevant, but he wants it for more than one reason. Or if he doesn't at the time want it for more than one reason, he sees a lot of good reasons for having it once he has got it and it could certainly be of use.

I would fight that to the death, I will tell you right now.

Secondly, it could be abused for another reason; we have a continuing relationship and we have to bargain with those people. I am one attorney who does a lot of bargaining as well as arbitrating. There is a lot of information they could obtain by this procedure, advertently or inadvertently, which later could prejudice my client at the bargaining table, when we are talking about contract terms.

I am in complete sympathy, however, with the approach that you ought not to surprise a person with a reason why he was fired that he never heard before. I am in accord with what you say to be the law the Labor Board has enunciated, although I think they sometimes go too far. But I certainly don't go for this discovery proposition with the background which we have now in labor arbitration.

CHAIRMAN JONES: Let me ask you whether you think it would be an adequate response to any kind of normal discovery problem in arbitration for the arbitrator to listen to a proffer of the evidence, and then to indicate whether a continuance would be useful?

MR. SCHOONHOVEN: I don't quarrel with that.

CHAIRMAN JONES: Even without any kind of order?

MR. SCHOONHOVEN: Without an order. But I just don't want to get an idea started here, or anywhere else, that there is such a thing as pretrial discovery or discovery at the time, where they can just go in and name what they want—you don't know how this can get out of hand if you haven't tried some Labor Board cases. It just gets to be ridiculous, and if it gets started in arbitration, the foot in the door, it will go beyond that.

I can think, however, of an alternative solution to this problem. Suppose we have a discharge case where the burden is really upon the employer, and the employer comes through for the first time with something which shows that employee X did such and such. The arbitrator could then say, "You haven't given the union an opportunity to consider this charge; they have not had a fair hearing. I am going to hold, therefore, that the grievant is exonerated, he is not discharged for cause." If the arbitrator says in advance, "If you don't give them this, this is what I am going to do," then the information should come out.

CHAIRMAN JONES: An effective discovery order?

MR. SCHOONHOVEN: Right.

CHAIRMAN JONES: All right. Did I see a hand? Ben Wolf?

MR. WOLF: I have struggled with this problem in a number of cases, and frankly, I think that perhaps there is a line to be drawn which is more toward discovery than we generally afford, and certainly there is a need to prevent the abuse of the device.

In the particular case that I had, an NLRB order to disclose the complaint, I was faced with the problem of adjourning the arbitration until the matter was litigated up to, the threat was, the United States Supreme Court.

So as an arbitrator, faced with the probability of years and years

of delay in a discharge case, with back pay running, I felt duty bound to deny the right to discover, at least through the Board, and relied on the old device of arbitrators that, "if you are surprised, I will give you as many continuances as you need to meet the issue."

It is a troublesome problem, but I do think that we must not lose sight of the fact that arbitration was meant to be a quick remedy, because a quick answer to a grievance, even if wrong, is to be preferred to a delayed answer. In some instances, as is true of railroad arbitration, the delay may be considerable.

That is equally intolerable. I think that if ways and means of permitting discovery were to be found which did not unduly delay the arbitration hearings, it would be to the advantage of everyone.

CHAIRMAN JONES: Thanks. We have to recognize that in our discussion this morning we do not have time to probe any of these subjects as much as we might wish. For that reason, we have to take up another topic at this point.

We are going to turn now, with your indulgence, to some consideration of the subject of privileges. A new California Evidence Code has been recently enacted, to go into effect on January 1, 1967—a very unusual procedure, designed to enable the California bar and the judiciary to become acquainted with the changes.

In the Code, for the first time in the State of California, there is an express exception of the statutory rule in California that rules of evidence need not be observed in arbitration. To put it more affirmatively, the Evidence Code expressly includes the arbitral forum within the strictures of the Evidence Code relative to the claim of privilege. Of course, these privileges are fairly extensive in nature, not the least one of which is the privilege against self-incrimination.

As is indicated in our report, the *Malloy* case in 1964 applied the privilege against self-incrimination as a federal rule to the states for the first time. There is no longer an inconsistent rule, and the rationale which the Court used was that with respect to this constitutional privilege, there ought not to be a divergence among tribunals with respect to its observance.

Given *Lincoln Mills* and the federalizing process, I think there

are some very real questions which are raised in the federal sphere as to the obligation of arbitrators with respect to the administration of the privilege against self-incrimination. It is relevant here to observe that the Court in the past has not affirmatively required judges to interpose between a question of counsel and an answer of the witness to advise the witness of the existence of a self-incrimination problem, where the witness is not represented in court by a lawyer. I don't think it is too far down the road to foresee that the court may very well impose that kind of obligation on a judge at the expense of vitiating the trial or creating some kind of immunity. If so, maybe a step further down the road walks our arbitrator.

We are not at that juncture yet. Suppose that a grievant, outside of California, refuses to testify at the outset of an arbitration in which the company counsel calls the grievant as the first witness for the company. How about that, Al?

MR. KLEIN: My point of view is that of the individual representing the underpaid, oppressed, and downtrodden worker, who was referred to by the Great Emancipator as "The Common Man." In this regard, I believe that the company, having the burden of proof in a discharge case, must prove its case without resort to calling the grievant, and that the grievant has the right to stand upon his constitutional rights, or any other rights he may think of, in refusing to testify as a part of the company's case.

I liken very much the proceedings of a discharge arbitration to a criminal proceeding. I can't think of a more severe penalty in the criminal courts than the taking away of a man's livelihood under our economic system, where his seniority and other rights are taken away and he must seek a job, often when he is too old to find employment in many plants. Therefore, because of the criminal nature of a discharge case, where the penalty as I say exceeds that under most criminal cases, I would liken to it the question of proof, the burden of proof, and the necessity for proving the case before the grievant is forced to testify.

I might parenthetically add that I would also tie the facts which can be brought out at the arbitration to those upon which the company relied in basing its discharge, and I would prevent the

company from bringing in after-discovered facts or after-occurring facts.

There are more specific details relating to discharges in our report. I might also say that my point of view is not necessarily shared by some of my panel colleagues, who would first take the grievant before the arbitrator to have him testify against himself and incriminate, and then perhaps justify the discharge.

CHAIRMAN JONES: How about it, Berry?

MR. BERRY JONES: My point of view is entirely opposite. I realize that my opinions are colored by my experience at Douglas Aircraft over many years. We have some labor agreements that require the company, in disciplinary cases, to put on its case first. We have others where that is not true.

Where that is not true, of course, the situation doesn't arise in the way that Al has put it, because the union is putting on its case, and presumably it will call the grievant as the first witness.

But with the other type of contract, where the employer is bound to put on his case first, I do think it is quite proper to call the grievant as the first witness, in fact we do it quite routinely. We regularly call the grievant in a disciplinary case as the first witness. Why? Usually a discharge case is based on an individual's misconduct. He is the man who knows how he has acted at a certain place at a certain time. He is the man best qualified to tell you that. By so doing, it may be unnecessary for you to call additional witnesses, and thus reduce the hearing time.

Here is the grievant, who sets the stage, and if he tells the truth, you don't have to call other witnesses. I don't consider it an invasion of his rights or privilege at all, because he has originally filed the grievance, he has claimed that the company has violated the labor agreement, that the company has violated his rights under the agreement, and that the company did not have just cause for discharging him.

Procedurally there are other reasons for taking this course. I think the most credible evidence is produced where the person being questioned is questioned by someone who has not done so before, although typically with the first and second steps preceding

arbitration you talk to this man again and again. In fact, you typically give him a chance to tell his story before you even discharge him.

A grievant has the right to be present during the arbitration of his case. To me, it is just improper to give him the opportunity to sit there and listen to all the other witnesses, and to have him, if he is that kind of a person—and a lot of them are—to tailor his answers to the various things that have been said by other witnesses.

CHAIRMAN JONES: Berry, suppose that this is the typical grievance, let us say, in your company, where he has sat in on the first and second steps and in the final intermediate step, and where presumably he had heard all the witnesses testify as they can be expected to testify at the hearing. Do you still feel the same?

MR. BERRY JONES: I still feel the same. Perhaps as a practical matter it wouldn't matter much at that point, but I thought the question was with the employer's right to do it. The problem is, is there any impropriety in the employer calling the grievant as the first witness? I don't believe there is.

CHAIRMAN JONES: All right. Are there any strong feelings among our participants? Professor Russell Smith?

MR. SMITH: It occurs to me that in part this matter is one aspect of the fundamental question of whether to regard an arbitration proceeding as strictly a judicial proceeding, or on the other hand, as a kind of extension of the collective bargaining process.

If you take the latter point of view, and I think there is something to be said in its favor, there are perhaps fewer reasons for invoking some of the strict rules which would apply in a criminal proceeding.

In addition to that, it occurs to me, as Mr. Jones said, the grievant very likely will have been interviewed at several points during the pre-arbitration processing of the case, and presumably the company, during one or more of these stages, will have inquired of the grievant whether or not he actually did the act, performed the act complained of. And the grievant will have denied, I suppose, that he did. The grievant also, I take it, will

have been confronted with some of the kinds of evidence upon which the company is going to rely, or has relied, in discharging the grievant.

I suppose this leads to the inference that the reason why the company wants to call the grievant as the first witness in the case is to treat him as an adversary witness and to test his credibility by some process of cross examination. There is no point in putting him on simply to deny the fact again, is there?

CHAIRMAN JONES: Any response to that up here?

MR. BERRY JONES: Yes. Of course, we might have the employee's denial, but we are almost always confronted by the other problem, the other issue that the arbitrator must answer, whether or not the employer's disciplinary action is too strong. And there is a possibility of getting much that touches on that issue.

In addition, as I mentioned in my remarks, you can shorten the hearing, because while the employee will deny the wrong-doing, perhaps he won't deny that he was at a certain place at a certain time with other people, and that certain things were going on. Perhaps he denies his part in them. To me, this is an economic, natural, and direct way of going about this particular business. In California, we do have a statute in civil cases, which gives a party the right to call the adverse party and to treat him as a hostile witness.

In my opinion, although there are many similarities in disciplinary cases to criminal cases, it is really a civil type of action, and I think that if we are going to talk about law and not practicalities, that the arbitrator would be interfering with the employer's right if he did say, "I will not permit you to call the grievant; I will not permit you to question him."

CHAIRMAN JONES: It may be of interest to know that the new California Evidence Code, which as I say expressly incorporates arbitration, is very rigorous in its handling of privilege. It requires that neither the arbitrator nor counsel—in quotes—may comment on the fact that the privilege was exercised, whether by a grievant or by witnesses, and furthermore that no presumption shall arise because of the exercise of the privilege, and the arbitrator—in the

statute's language—may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceedings.

The rationale for that, as expressed, is if comment could be made on the exercise of a privilege, and adverse inferences drawn therefrom—this is the California Revision Commission—a litigant would be under great pressure to forego his claim of privilege, and the protection sought to be afforded by the privilege would be largely negated. And you can certainly hear a few federal overtones in that language, if you read it, and then take a look at *Malloy* against *Hogan*, the 1964 self-incrimination case in the Supreme Court.

Let us now turn to the relatively peaceful topic of the use of the parol evidence rule in the reformation of contracts.

But first another comment by Russ Smith.

MR. SMITH: It is relevant to the point Ted just made. I don't know what the California statute means when it says the arbitrator may not draw any inference from the fact that somebody doesn't testify, when there is no basis for reviewing what the arbitrator does anyway.

I tend to feel—I guess I am expressing now a personal reaction—that I would like to see the grievant on the stand at some point during the proceeding, and I feel a little uncomfortable, frankly, when he is not. I don't know how many other people share that feeling.

CHAIRMAN JONES: How many other people share that feeling?

There was, I would say, 20 percent silence, one vote "no," and the rest "yes." A very large majority do share that feeling. I am now going to call on Mr. Seward, then Mr. Wolff, then parol evidence and Bob Tiernan.

Ralph Seward.

MR. SEWARD: This is not a comment, it is a question to the panel. I am wondering whether you dealt with the closely related problems of proof that grow out of, I wouldn't call it privilege, but the often self-imposed limitation on management, for policy reasons, not to call witnesses from the bargaining unit.

As an arbitrator, I have far more difficulties arising out of that than out of these more formal problems that we have been discussing in this area of privilege. What do you do? What is the effect on the arbitration process of management's feeling that in a discharge case, when all of its information about the actions leading up to the discharge came from employees, that it should, nevertheless, not call those employees as witnesses? Do you then get into hearsay problems? And what in those circumstances should the reaction of the arbitrator be to a supervisor testifying that employees told him such and such, often without identifying the employees?

I suspect that many managements have found themselves in a far more prejudicial situation, or far more difficult situation, owing to the fact that all their information comes from members of the bargaining unit than from questions of privilege. Was this a subject of inquiry on the part of the panel?

CHAIRMAN JONES: I remember we did refer to this at one point in time. I think our feeling was that this was a self-imposed stricture on the part of management. It is certainly a stricture of which management can relieve itself.

So that in terms of a problem of proof for the arbitrator, it doesn't really pose a problem, except in the sense that you are underscoring, and that is he is sitting there wishing that he were listening to more direct evidence, more reliable testimony.

How about the panel? Do I accurately reflect the opinions of the panel members, and the people that we have had contact with on the West Coast? [Panel affirms.] There may be some variance among regions. I am not familiar with a practice on the West Coast of management not calling those people.

I guess this is the wrong panel to ask that question of, Ralph.

Sidney Wolff, then we will turn to Bob Tiernan.

MR. WOLFF: I would like to say, as Ralph did, that it is not an unusual situation in our area for companies not to call bargaining unit members as witnesses. As a matter of fact, I know one company that lost a case because it refused to put such witnesses on the stand, and the union attorney and the union business agent refused to accept statements in lieu of actual testimony.

But I would like to go one step further with Ralph and ask, what would you do, as an arbitrator, when word has come to you that the union has, shall we say, an unwritten but well-known policy that any member of the union who testifies against a brother member may have trouble with the union? What do you do then? Of course, you may issue a subpoena and force the person to be there, but that action has inherent problems.

CHAIRMAN JONES: Last week I had occasion to include a paragraph at the end of an opinion calling attention to the fact that there had been references made in the course of the hearing to this prospect for certain witnesses and to indicate that I did not have to do anything, although the employer asked me to protect them, because they had ample remedies—I may have overblown the adjective “ample,” but I did say that they had ample remedies. I was talking to union officials, not to lawyers, and I cautioned that employee witnesses had ample remedies before the Board and in court under notions of fair representation; indeed, under some very recent Board decisions and court decisions.

That's an exhortation type of approach. I declined to put anything in the award which would condition the reinstatement of a discharged employee upon the withholding of any discrimination against employee witnesses by the union.

People will respond to this, I am sure, variously. People also respond variously to the parol evidence rule. Bob?

Let me give you a quote to launch you. The Uniform Commercial Code deals with matters of parol evidence. It uses the following language: “The meaning which arises out of the commercial context in which it was used,” and applies that language to the interpretation of written instruments by resort to extrinsic evidence; it rejects the idea that ambiguity must first be found before the evidence may be received to interpret the language.

Some people say that's the modern trend, Bob. Should it be a trend in arbitration?

MR. TIERNAN: May I first comment on something else? I had better explain that the practice of not calling union members as company witnesses has at least come to San Francisco and Oakland.

It may not have gone south of the Tehachapi, Charlie, but it is in San Francisco, believe me.

The principal reason—and this is something which has not varied in Kaiser—is because of the difficulty it might cause the individual within the union, as Mr. Wolff pointed out. That's the basic understanding for not calling these people as company witnesses.

And if I were to comment, Ralph, on what would I do if we did, it would be pure conjecture. All I can say is, when we talked about it within the Committee, we did say it is an individually imposed stricture which can be individually removed.

MR. SEWARD: Do you ever ask the arbitrator to call those witnesses?

MR. TIERNAN: I see Saul Wallen in the room. Early this month we had a situation where I think Saul was all but saying, "For crying out loud, won't one of you call this guy?" And I sat there, and the union attorney sat there, and Saul said, "Fine, I'll call him; bring him in."

CHAIRMAN JONES: Parol evidence?

I don't want you to lose sight of that quote I gave you of the Uniform Commercial Code because of this deviation.

MR. HACKLER: Ted, before we go on to parol evidence, I would like to make one more observation on this matter, in case this practice of Kaiser does develop in Southern California.

This policy of not calling employees because you don't want to put them in a bad position strikes me as a very, very unusual policy, particularly if you are going to rely in an arbitration on what bargaining unit employees told you. You are certainly going to encourage employees, if they know they don't have to get up in an arbitration and testify, to curry all the favor they can with the company by giving all kinds of hearsay information. You then have the foremen testify that, "Some unnamed employee told me thus and so, and I acted on that."

I am not suggesting that this is so in the case of Kaiser, but I know the motivation of many companies in Southern California,

if they adopted such a policy, it would be to have a group of reliable stool pigeons who, knowing they would never have to testify and be subject to cross examination, would supply all kinds of information.

And I certainly would oppose any effort of a company to rely, by hearsay, either on written statements obtained from these people, or generalized statements of foremen that, "I had 17 reports from reliable employees that thus and so happened." I would certainly expect that to be rejected as long as the company had such a self-denying rule.

I might suggest that if it is not appropriate for the company to decide matters of this kind, that they should not be advantaged if they don't want employees to testify. I think a different thing might apply if you were faced with a union who was saying, "Don't call people in the bargaining unit." And I for one wouldn't have any hesitancy in expecting an arbitrator to take a very dim view of my union client if it had such a rule, and to draw inferences adverse to us by the absence of witnesses, if we procured their absence from some rule of that kind.

CHAIRMAN JONES: May we turn to the parol evidence rule, then?

MR. TIERNAN: Initially, I want to make it clear from my standpoint that while I am the person who was quoted in the report, I am not the intractable, arbitrary advocate that this may portend in other areas. But in this area, I confess that I am.

I take this position on the basis that I have a great respect for arbitration. I think it is a very necessary procedure, but I think that intrusion into this area threatens the process.

In my opinion, arbitration to survive, must remain acceptable to all parties. I believe the parties on both sides of the table can accept a lot less than perfection from arbitrators in decisions, because, I am sure, everyone in the business of labor relations realizes it is a lot better than the alternatives.

But arbitration must substantially realize for the parties the resolution of their differences in accordance with what their bargain really was at the table. The way I have put this, I realize, places me in jeopardy with our leader, and with Charlie Hackler

to my left, but, nonetheless, it is the bargain that must be substantially realized by the parties.

If arbitration can't produce that, it loses a substantial amount in the process. Companies and unions will lose arbitration cases they think should never have been lost. They may think the arbitrator was completely wrong, but they are not likely to criticize the process and subject the process to possible damnation because of that. However, a collective bargaining agreement represents in many cases millions and millions and millions of dollars, and when you intrude into the clear and unambiguous words of the contract, you are jeopardizing that same amount of money to one extent or another.

We in the profession of industrial relations can proffer to our principals, our superiors, who are not in this profession, some of the platitudes that I have just mentioned to you about "you win some, you lose some; it was a bad decision, but these were our problems," and so forth. And you can also say, "Don't forget, Mr. President, it is a lot better than having the employees in that plant walking out, which could have been one method to resolve this dispute."

However, when he tells you "I thought that you told me last year when this contract was signed that we were only paying time and a half for overtime, not double time. That's what it says, time and a half in the contract. But yet you just came out of an arbitration case where we lost that, and now we are paying double time."

At that point in life the defense becomes pretty grim. And here you are, an advocate of the process without a viable, vital, substantial argument.

Now, getting back to the business of being the advocate in arbitration, I say, as an advocate and as a fan of the process, the arbitrator absolutely must not intrude into the clear and unambiguous words of a contract. He intrudes into that at the risk of imperiling arbitration, at least in that company, and if it became a pattern, I think it would imperil the entire process.

This is the one sacrosanct area which I think companies have to have. This is the one area that they are not prepared to listen

to their industrial relations vice president tell them about, "You win some, you lose some."

The basis of the expectation that companies have is a two-fold one. *First*, the parties include in 99.9 percent of the contracts—I don't exclude unions because they have the same expectation and should be as jealously guarding that expectation—the language that the "Arbitrator shall not alter, amend, vary this contract," etc., in giving the arbitrator authority to resolve disputes under the contract. The consideration pressed by our chairman, is that, "Well, wait a minute now, if it says in the contract that you are not to vary the 'agreement,' agreement with a small 'a,' that's the written word, that's only evidence of the agreement. The real agreement was when the minds met. And in Charlie Hackler's case, where 1965 became 1966, or vice versa, we have to do something about that, we have to give the arbitrator the opportunity to change 1966 back to 1965."

Such a case is admittedly rough for my position, but I am willing to stand on it with the platitude that you can only be pregnant, you can't be a little bit pregnant. You either open the door or you close the door; you open it up a little bit, and the door becomes wide open.

This contract language that I am talking about, that extends the jurisdiction to the arbitrator, as far as the arbitrator is concerned, means what it says—the arbitrator is not to vary the *words* of the contract. That's what it means, notwithstanding any deviation there might be in the precision of the words. That's the one bar that should stop everybody in the arbitral field from intruding into the clear and unambiguous provision.

There is also the parol evidence rule. I don't contest what Mr. Corbin said. I don't think that's a great innovation, nor is the Uniform Commercial Code. I graduated from law school a long time ago, and as Russ Smith, I think, can attest, I got the same teaching as put forth in this document by Corbin, from my law professor, Mr. Grismore, at Michigan in 1949. So it is not new.

But the parol evidence rule has a lot more meaning and purpose. It is part of the parties' expectation when they make the contract. It may well be that the definitive observation is, "The parol evi-

dence rule means that you can't vary the agreement, but that doesn't mean I can't find out what the real agreement is, and the contract, the written contract, is just evidence of that."

Well, I can't quarrel with that. However, I can quarrel with the fact that when people expect the parol evidence rule to interact, they expect it to interact with the written word of the contract.

Second, I think it is entirely arguable that the parties intended at the time their minds met at the bargaining table, and in the subsequent review of the written collective bargaining agreement, that they transferred that intent and they made a subsequent agreement and said, "That contract is our understanding, that now is our contract." They replaced the oral contract with the written contract.

These are arguable things, of course, and we are into an area which I really abhor. I don't think we should be nit-picking in this area because I think when we start intruding into parol evidence, we are so far beyond the people who wrote the contract. It is a complete academic exercise. That brings me to reformation.

CHAIRMAN JONES: Let me say, since Bob has paused and is shifting gears to discuss the reformation of collective agreements, that he made a point in our discussion yesterday which I thought was significant. It had reference to the position of an industrial relations advocate, whether lawyer or not, who can at least, if he goes to court, say, "Well, it is the judicial system." And his personal commitment to the judicial system is no more closely held than that of any other of the citizens of the community, including the industrial relations manager, or the vice president, or whomever's ears are being filled with this tale of woe. On the other hand, if he has to say, "Well the *arbitrator* did that, the arbitrator unstuck it," then the arbitral process and he himself become somewhat exposed. He is a committed participant in the process.

I also throw in a footnote apropos of Russ Smith's comments yesterday about Judge Hay's opinion. After I came out of Russ' very excellent talk yesterday on this particular subject, I learned of a major company in this country, identity withheld, where a high echelon executive, above the industrial relations echelon, reproduced excerpts from Judge Hays' Storrs Lecture, printed in the *Yale Law Journal*, and circulated it among top management.

This was nothing less than an onslaught on collective bargaining. It was not just on arbitration; it was an onslaught on collective bargaining. So if anyone has the notion that when a Federal Court of Appeals judge, sitting in the Second Circuit, engages in an intemperate speech, it has no impact on the community, he lives in a world of illusion.

Go ahead, Bob.

MR. TIERNAN: Reformation, as far as I am concerned, occurs once the arbitrator has intruded into the clear, unambiguous language of the written contract. As of that moment, the contract has been reformed. Quote and unquote.

It certainly has been changed, and that's what I think we are talking about in reformation.

I think I should comment a little more on what Ted said about the choice of the courts. There is no question about it, by placing restrictions on the arbitrator's authority in a contract, the parties, both company and union, have elected to have the courts handle reformation problems. Equity courts, lower courts sitting in equity, handle reformation problems, an area of long jurisdiction of that court, and not arbitrators.

There may be several reasons for that. A major one has to do with the comparison, as Charlie Hackler pointed out, between arbitrators and judges. It is true I know a couple of men that none of you would want to arbitrate anything before, judges before whom you might have to go in a reformation case, even if you would not like to do so, if arbitrators are not to handle them. But there is appellate activity available to the parties in the court situation. You also have to realize that it is probable you won't get a National Academy member as the arbitrator in many cases. You put a lot more on the table, you risk a lot more, when you open up a reformatory opportunity to an arbitrator than you do in not opening it up to him.

And the last observation on both of these areas—and I say this in all deference to all arbitrators—as an advocate in the field, when I think in terms of an arbitrator, I think in terms of three kinds. I think in terms of the one who is unknowing or inexperienced, and that inexperienced individual or person, lacking knowledge,

may not know of or appreciate the parol evidence rule in a reformation problem.

The second one is the arbitrator who is knowing, understanding, and experienced, but who recognizes what his powers are, and acts accordingly—sometimes in magnificent restraint.

And then there is the third kind, who is just like the second kind, but who doesn't exercise restraint.

I know of more cases than not where the arbitrators before whom I have put arbitration matters have been highly overtrained for what I bring before them. It is like a highly tuned car going around a kiddy drive. The best thing that an arbitrator in that circumstance can bring to that case, in my opinion, is not his experience which is not going to be used but the restraint which he has to exercise to realize that this is, unfortunately for his great ability, a pedestrian case, and it should have a pedestrian resolution and should become as inconspicuous as it possibly can.

Arbitration, if it becomes Stage Center, does itself a tremendous disservice. Arbitration, to remain effective, to remain useful, especially to unions though certainly to companies also, must resolve things in a low key, in a matter-of-fact but final manner. If it becomes a big deal and takes over Stage Center, I think the system is going to be in trouble.

In labor relations, I don't think the parties by and large think of arbitration as other than a means, and in some cases a small means, to an end, and that is to resolve the disputes that arise. And they don't expect them to arise all the time. Stage Center is the collective bargaining agreement and the implementation of it. Once we get intrusion into it, the ignoring of jurisdiction, the ignoring of the parol evidence rule and we get our contracts changed, arbitration is no longer a means, it becomes the end. Negotiation really isn't over.

CHAIRMAN JONES: I pass it down to Charlie. There are three minutes of commentary time left, if you wish to use them.

MR. HACKLER: This subject, as has been said, causes more disputes than any other, and three minutes or even 15 isn't enough to cover it.

I disagree very fundamentally with what Bob has just said. You arbitrators are rarely, and some of you never, called upon to interpret clear and unambiguous terms. The clear and unambiguous terms are only clear and unambiguous in the mind of the industrial relations directors of corporations. If the case goes against them, they immediately start whining that "the arbitrator amended and modified our agreement." They say that because the arbitrator didn't agree with their interpretations of the contract.

The fact that the arbitrator received evidence to assist him in reconciling a half dozen obscure provisions of the contract doesn't alter the fact that he has the duty and the responsibility to do just that. I for one believe, and our Report underpins it, the modern trend of the writers in the field of law, the modern trend of the courts, the progressive trend, is to treat the parol evidence rule as a cautionary matter only, not as a highly structured thing to be used as a mystique to exclude evidence that might cast light in determining what the agreement in its entirety means.

Bob knows as well as I do, and his company deals with a lot of my clients, that year in and year out, we renew contracts that are absolutely obscure, but our clients don't want to change them. They don't expect to have disputes, but when one arises, an arbitrator settles it.

Since most of the grievances are filed by unions against companies, the admonition that the arbitrator be worried about the result of an arbitrable award, because of the palpitations it will make in the breast of the company, is not the correct way of looking at this matter. To do so favors the company.

Secondly, the suggestion that the arbitrator limit his function to being a modest minor figure in the matter and be as inconspicuous as possible has the implication behind it that since the grievance is against the company, the company has made a preliminary interpretation of that agreement and anything that disturbs that interpretation is a violation of the parol evidence rule. I think the implication is a very bad one.

Finally, I would call your attention to the very narrow area in which our committee reported on the subject of reformation in

its true legal sense and not to the sort of thing Bob is talking about where an arbitrator is actually using evidence *de hors* the contract to determine what different sections mean. Reformation in our Report is limited to correcting mistakes shown in the actual drafting of the contract. As our Report shows, courts have traditionally corrected such contracts where the written document simply doesn't say, through a scrivener's error for example, what the parties agreed to. But I can see no mortal reason why a judge is better qualified to decide an issue of fact of that kind than an arbitrator.

As I pointed out in our panel discussions, when you have that narrow kind of issue—and I will admit it doesn't come up very often but when it does it is rough—it isn't always on the union's side. I asked my colleagues, for example, what if the contract, through a typing error, gave everybody too much vacation after one year. After everyone signed it, the union looked down their nose and said, "Now you have got to give them two months, the only way you can get out of that is through a lawsuit, and we will keep it in court for three years. We can't let an arbitrator look at this fact." That was the other side of the *Union Fish* case. It can cut both ways.

Finally, I might add, to make it even more confusing, if you have a genuine question as to whether the written document itself reflects what the parties agreed upon, the NLRB gets into that act under Section 8 (d) because that section says the parties are duty bound, both of them, under federal law to reduce their agreement to writing. If the agreement does not reflect what they actually agreed upon, through a scrivener's error, you can get relief in that fashion. And the Board has begun to issue orders in this area.

Again I suggest, if the arbitrator is good enough to settle very important issues on a day-to-day basis, I think it is denigrating to say that this one area, the very limited area of proper reformation where the written document is in error, should be removed from the arbitrator and given to some court or to the Board. Or, more likely, with many of my clients, if you have such a matter and it involved a matter of substance, you are really saying it is not arbitrable, and you will end up settling it on the street with a strike. That's the other alternative.

So there are really four places to go on these reformations, true reformation matters: the arbitrator, the Board, the court, or the street. And of the four, I go for the arbitrator.

CHAIRMAN JONES: We have run out of time, and I don't want to have anyone leave until I acknowledge the very real debt that the Academy owes, and that I personally owe, to Charlie Hackler, to Berry Jones, to Al Klein, and to Bob Tiernan, who have spent many traumatic hours over a number of days in participating in contests which got very warm, but also, I must say, set very warm feelings in my heart for each of them and caused me to come away from this process with a considerable admiration professionally for each one of them. I thank you very much.
