CHAPTER IX

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

WORKSHOP ON PITTSBURGH TRIPARTITE COMMITTEE REPORT*

CLAIR V. DUFF, *Chairman*
NICHOLAS UNKOVIC
MARK C. CURRAN
WILLIAM J. HART
HERMAN L. FOREMAN

CHAIRMAN DUFF: I want to welcome every one to this Workshop Session. We have a completely different format this morning which I want to explain briefly.

First of all, our proceeding will be recorded. Next, most of the discussion should come from the floor. This is not to be a monologue by the panel. We have met on several occasions, ironed out many of our positions, and defined our differences; the results are to be found in our Report. What we want is audience participation. We want the advocates of management and of labor and the other arbitrators in the room to state their positions, to agree or disagree with what we have in the Report, to agree or disagree with any position we take here on the platform. This is not a session in which we expect agreement. We won't encourage it. We want the freest expression of what you actually believe.

Before we start I will introduce the panel.

* 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 Pittsburgh Tripartite Committee (Chapter VIII). Members of the Pittsburgh Tripartite Committee, with Clair V. Duff 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.

Immediately beside me to my left is William J. Hart, Director of District 19, United Steelworkers of America. He also is a member of the Pennsylvania State Labor Relations Board. That is enough for you to realize that he has long years of experience as an advocate for labor.

Immediately beside him, and also to my left, is Herman L. Foreman, an attorney, a member of the partnership of Rothman, Gordon and Foreman, of Pittsburgh. Mr. Foreman primarily represents unions. He has had wide experience.

Beside him is Nicholas Unkovic, a partner of the law firm of Reed, Smith, Shaw and McClay, of Pittsburgh. Mr. Unkovic is one of the best known management advocates in the State of Pennsylvania, and, I suspect, one of the best in the entire country.

On my extreme left is Mark C. Curran, Assistant Counsel for the Pittsburgh Plate Glass Company, a firm known to you all. Mark has a wide labor relations background, including some experience as an attorney for the National Labor Relations Board. His orientation in the past few years, however, has been as a management counsel.

I think you will find that this panel is composed of a group of well-experienced men of diverse views who will try to answer your questions. I will call upon each of them for a brief statement of position. Then, if you want to participate, come up to the floor microphone and state your position—agreement or disagreement. We have kept the group small so that everyone can participate. This is your session. This is not a session where we will impose our view on you at all. We are here to learn.

To kick off our program, I will ask Nick Unkovic to outline his position with regard to relevance, what it is, and how far the concept of relevance should be carried out in an arbitration hearing.

MR. UNKOVIC: First, I want to take a half minute to say that the definition of relevance, as all of you know, is something that reasonably tends to prove or disprove the fact at issue or facts closely related to the point at issue. Our Chairman has justly used in our Report a phrase of Chief Justice Holmes that relevancy is a concession to the shortness of life.

We all know what the Code says about what is relevant and what is not relevant; that the arbitrator should allow a fair hearing with a full opportunity to offer evidence; and that he should exclude anything that is immaterial. The voluntary rules of the AAA talk about relevancy and materiality. So much for that.

It has been my experience over some years of arbitrating that there are some arbitrators—amateur sociologists or psychiatrists—who think by exercising no control of the arbitration hearing, the parties will blow off steam. This is sometimes called the therapeutic approach; others have called it a substitute for a strike—Dr. Taylor, for instance. All of you know the names it has been called. There may have been some reason for this approach 15, 20 or 25 years ago, but today that is no longer true. The people who represent labor—whether they are union people, lawyers, ex-college professors, or even local presidents—come to arbitration hearings seriously. They want to prove a point; they want to get it over with, and the days of yelling are over. If you allow too much steam, you not only lose sight of the issue, but you get involved in other issues. I would like very much to know what Bill Hart and the others think about this.

I think it is about time that those who write about labor arbitration stop using this therapeutic approach and start to realize that we are heading in future decades to labor courts. It is about time the arbitrators helped guide arbitration towards that ultimate end, not in the formal sense of courts of law, but in the sense of a half-dozen common sense rules of evidence.

CHAIRMAN DUFF: Before we throw the subject to the floor, perhaps we can get Bill Hart to state labor's position, as he personally sees it, with regard to using the arbitration hearing as a gripe session.

MR. HART: I should like to preface my remarks by stating that I have the honor and distinction of being the only non-lawyer on this panel and perhaps the only non-lawyer in the room.

As my good friend Bert Selby will tell you when this session is over, having never read a lawbook, I take liberties with the law and on occasion state my interpretation of the law and then try to choke it down some lawyer's throat.

In any event, I learned something here this morning. Nick Unkovic and I have been engaged in many activities over a long period of years, and I feel very upset that he found it necessary to steal my speech from me. At breakfast this morning we were discussing this point. I happened to mention that in my judgment labor has now come of age, we have reached maturity, and I believe that in an arbitration case this business of letting off steam has no other effect except to bring into focus personal animosities that may come out of arguments in the mill. This business of permitting the representatives of the company or the union to publicly castigate someone because of an alleged wrong or alleged grievance is, in my judgment, in bad taste.

We have had our experiences with this therapy deal. Many years ago we instituted semi-annual meetings. The original purpose of the semi-annual meeting was to give this therapeutic treatment to some of our people to permit them to blow off steam. We soon found that permitting them to blow off steam resulted in added grievances at the plant level and more animosity among the people. This in turn impeded production, which is so essential to receiving higher wages. Because of this experience we have changed the entire format of our semi-annual meetings. They are now educational sessions. The union attempts to explain to management the problems in the plant, and the company takes the occasion to explain to the union representatives their problems of production, their problems of sales, and their problems of purchasing materials. As a consequence, I feel quite certain that we have made tremendous progress in attaining a higher degree of maturity than you will find in most relationships.

CHAIRMAN DUFF: I think it is enlightening for us to know that some labor leaders believe that an arbitration hearing should be held on the track by the arbitrator. Bill is an outspoken fellow, and if he believed otherwise, he would have no hesitancy in telling you so.

Whether other sessions should be held particularly for the purpose of blowing off steam or not is for the parties to determine. For our purpose, I believe the theory of the therapeutic approach has been over-played, and what was true several years ago is not necessarily true today.

Let us hear from some workshop participants. Is there anyone who would like to support or criticize the position taken that an arbitrator should hold a hearing reasonably to the point at issue?

LEWIS M. GILL: Clair has goaded me into this. He asked me to help start the ball rolling, and I will, perhaps at the cost of my career in arbitration.

I find myself, by and large, in disagreement with what has been said so far, with all due respect to these gentlemen. But we may be thinking about different problems.

I agree, first of all, with what I think is a rather obvious point, that you need an orderly procedure in a hearing. If that is what is meant by keeping a hearing in order, no one will disagree. The days of shouting are over. But it seems to me that it is a mistake to assume that we are already in labor courts, to try to act that way, and generally to try to run the arbitration hearing much as we think a court of law would run it.

A good many of us have never been in a court of law, nor do we know how it is run, except as we see it over television. I am a lawyer myself although I have never practiced law privately; still, I feel strongly that the therapeutic approach should be maintained, at least, to the extent of letting the witness tell the story in his own way. I think it must be frustrating for a foreman or worker to try and tell what happened concerning the incident in question, and every time he opens his mouth, to be told, "That is hearsay. You can't tell that." If he wants to tell what the foreman told him, he can't do that either. So he winds up feeling he hasn't had a fair shake, he couldn't tell his story.

My point is that the therapeutic treatment should be maintained. Let them get their story out without a lot of technical interruption.

CHAIRMAN DUFF: Does anyone have a comment on Mr. Gill's suggestion? Do I understand you all agree with the panel and with Mr. Gill, as well?

MYRON JOSEPH: I think I agree with Mr. Gill, primarily, but I would like to make one point. True, we try to keep the hearing on the path and we don't want irrelevancies, but to a very large

extent I think the parties are entitled to get the kind of hearing they want or need.

I was brought up on a set of procedures in arbitration, a set of procedures developed by the parties, that serves the parties' interests. The arbitrator is there, to a very large extent, to help the parties further their own interests as they see them. I think that means a lot of things.

In part, arbitration provides a communication device that is not available in any other way. It is not just on labor's side; it is on management's side as well. It is not just that the grievant and the people who represent him communicate with one another at the arbitration through testimony, and the member of the union feels so much better about his representation because he is able to see that indeed he is being represented in a manner that seems appropriate. But I am sure that all of us have seen management representatives who are learning for the first time what is happening on the plant's fourth floor, and that some of the problems are really the basic issue out of which the particular hearing may have developed.

I suggest that if you let the arbitrator put too tight a rein on the hearing, these valuable adjuncts to the entire arbitration process may be lost.

MR. UNKOVIC: No one would disagree with what Lew Gill said. You took the other extreme. That's all right. You are entitled to do that; but you are not entitled to come into a half-day arbitration and tell the company or the union how to run their labor relations. Nor should you try to cure them in one day, or, in a month or two, assume you have all the answers when you issue your award.

Our point is that we don't want the rigid rules of law, but we want to develop some reasonable rules. I have seen many arbitrators just tighten the seat belt and let the parties go. More arbitrators do than don't, and I think it is wrong.

HERMAN L. FOREMAN: I think arbitrators forget sometimes that before they hear a case, that case has gone through certain steps of the grievance procedure, that there has been more or less of a dialogue between labor and management going on before the case

reaches the arbitrator. It is only when they are stalemated, or they would prefer, for the betterment of labor relations, not to make a decision but to have a third person make it for them—even though they may personally be of the same opinion as to what the decision should be—that they take the case to arbitration.

If arbitration is going to be a forum for letting off steam, then what they are trying to do in creating a better labor climate between the parties is completely destroyed because the dissidents who have been giving both sides a heck of a time now come in and stir up the whole storm again.

In addition, there is another side to it; in trying to present a case on behalf of labor you have certain problems with your employees and with your employers and you present the facts as they see them. An arbitrator, after all, is only a human being. He is subject to all the prejudices. If he has a soft heart, he is subject to that too. I have seen situations where after the arbitrator has heard a case, and I have felt he has more or less made up his mind about what should be done, he then decides to question the grievant some more to see if he can find an escape. As a result, the fellow gives him a sob story. After the sob story, the arbitrator feels soft about it and thinks, "Well, I have to change my mind," and he gives the fellow another chance, or he rules as he shouldn't have ruled, had he based his decision solely on the evidence. As a result, I have had at least four cases where the same party came before the arbitrator several months later over the same problem merely because the arbitrator didn't rule in accordance with the evidence.

There is also another point. About three years ago I was invited to participate in a labor-management program held by Duquesne University. We had a panel discussion on arbitration. A group of steelworkers from Johnstown were present, and they started to rip into the arbitration process. They said: "This is no good. This is a management set-up. Management wins 90 or 95 percent of the cases in arbitration. Labor never wins."

There was a reason for that. If you looked at the way cases were presented in that particular area, you would have found in many instances that the kind of evidence that was being presented was not evidence at all. Although there may have been an attempt

by a union official to screen the evidence, everyone was allowed to speak as he pleased. Or some union officials were using arbitration as a political forum to keep their offices or to promote their candidacy for another. If these people had been informed that only certain standards of proof were acceptable, the number of cases would have been reduced and the relationship between labor and management would have been different.

So, as one representing labor, and even with members saying they don't want lawyer-talk, nevertheless, I still feel if measures of standard proof could be accepted by all arbitrators and the parties made aware of it, it would be better for both labor and management.

CHAIRMAN DUFF: We might remind ourselves that evidence which is not relevant doesn't prove the point in controversy. No matter how interesting the irrelevant story may be, it has nothing to do with the case. By definition, if the evidence has a direct bearing on the case, it is relevant.

I believe the arbitrator has to conform his rulings, however, to what the parties have created as their arbitration instrument. If they want a strict hearing, he must be prepared to give them a relatively strict hearing; if they want one less formal, he must accommodate himself to their desires. I believe there may be some difference between *ad hoc* arbitrations, which constitute 82 percent or so of all cases according to our 1962 survey, and the permanent setups, where they have agreed upon rules and where arbitration may serve a somewhat different purpose.

JULES JUSTIN: Not that I want to mediate the differences, but let me say that in Greece, among the Delphic oracles, there were two sayings: (1) know thy thesis—and I would suggest that it would be well for management and union representatives to know their case; and (2) nothing in excess—all extremes should be avoided.

I suggest from my experience that in order to aid the arbitrator to keep within the lines of appropriate proof, the parties do two things:

First, each side should present a written pre-hearing brief. The arbitrator will then know exactly what is relevant and what is not

relevant, and the representatives of both sides will know what proof the other side will present. In that way the arbitrator, who knows nothing of what went on for three or four weeks in the grievance machinery, will be apprised immediately, at the beginning, of the points to be made by each party. Then the relevance or materiality of the evidence can be determined at the beginning of the hearing.

Second, which is just as important to me, the time has come when arbitration should be of a tri-partite nature and not with a single arbitrator who knows nothing about the case except notice from the AAA or Federal Mediation Service that a dispute has arisen. In a tri-partite set up, the arbitrator can have the benefit of a representative of each of the parties to whom he can turn for briefing. I find this of great help to the chairman. There are times to ask questions, but we hold back because one or the other may say we have already decided the case, or that we have a bias. But if you are going to use tri-partite arbitration, you must train the members who will sit with the chairman. They must not be just fellows who sit by and let the chairman carry the ball. Train them so they will know the case and can truly act as a board member.

These two things can help the chairman and the arbitration process.

CHAIRMAN DUFF: One last comment on this subject and we will pass to the next topic.

LOUIS A. CRANE: With respect to this matter of letting off steam, I suggest that this is a function the parties should perform themselves and not leave it to the arbitrator to do for them. By bringing cases to arbitration, they are letting off steam. Let the arbitrator conduct the hearing, as these gentlemen have suggested, within the boundaries prescribed, and from my point of view, as close to the courts of law as you can make it.

On the tri-partite method for handling arbitrations, my experience, which I am sure is more limited than Mr. Justin's, is that although representatives of the parties on boards of adjustment or tri-partite panels are not supposed to be advocates, in fact, they become advocates.

CHAIRMAN DUFF: We turn to a word that is used a lot, under-

stood but little—hearsay. It has been said that the admission of hearsay evidence has to do with the erosion of the right to face the witness. Primarily you should be able to face a witness. Now the question is, how far should someone who is not a witness be permitted to influence the outcome of a case? I will ask Mr. Foreman to state just briefly what our Committee has come up with. Then we will open the question for discussion.

MR. FOREMAN: Actually, most of the rules of evidence are necessary, are common sense rules of every day justice. One important aspect of this is, are you hearing the facts from somebody who knows them from his own knowledge? If a witness attempts, as you all know, to tell what the facts of a case are from what someone has told him, that is hearsay.

Now, as I see this hearsay rule, it goes beyond a witness saying, "John told me this is what happened," and you are trying to get what happened from what John told him. You can see the problems we have in such a situation. It is quite similar to the old parlor game we all played at one time or another; whisper a phrase in someone's ear, it goes around the room, then you see what comes out—and sometimes you are very much surprised. And it is this parlor game we all played at one time or another; whisper a phrase labor arbitration case, such as a man's job, his livelihood. This is one of the things we are trying to avoid, and it is one of the reasons why the observance of the hearsay rule is so important.

In addition to getting a witness who will come in to state what happened, we have a situation that often occurs and that specially gripes the union lawyer or the union representative in conducting an arbitration case. The company will get up and say, "I fired this driver-salesman because we had reports from our customers that he was not doing a good job." "Who are the customers?" "We can't tell you." "What did they say?" "Specifically we are not allowed to tell you, but we can say generally the driver didn't deliver his milk on time, he was generally late."

We ask, "How many times was he late?" "What were the weather conditions?" "What other circumstances may be important?" The Company replies: "We don't know." But, based on these types of reports that the company allegedly received, it goes

ahead and disciplines the employee, sometimes to the extent of discharging him.

I think this is poor justice. If the company doesn't like an individual, it can come in and make up the story. Labor, of course, feels that management doesn't always tell the truth, just as management feels that labor doesn't always tell the truth. Nonetheless, if we are to get justice, we have a right to have the facts on the table, to cross examine all the witnesses to determine if the story they relate is true or not and to probe the circumstances surrounding the incident. Because, even if the story, as related, is true, nonetheless, upon cross examination there may be a set of circumstances that an arbitrator may not believe sufficient to discharge an individual.

CHAIRMAN DUFF: The hearsay rule has been invoked for centuries, has been followed for centuries. Nobody believes it should be used in arbitration in its full rigor. The question is, do you give it any attention at all?

The classic reason, as Mr. Foreman pointed out, why hearsay is objectionable is the lack of opportunity to cross examine the individual making the statement, and a person is not permitted to face his accusers.

The idea of confronting your accuser is a basic principle in law. Too often arbitrators are confronted with statements, both notarized and unnotarized, sometimes perhaps to protect the man so he will not be cross-examined.

Is there anyone else who would like to comment upon the hearsay rule?

JAMES HILL: In a customer complaint situation, as in the service industry, is Mr. Foreman suggesting that that kind of evidence should be ruled out as inadmissible, or do you temper the weight of the evidence?

MR. FOREMAN: As far as I am concerned, the company must give us something more than a letter that is claimed to have come from a customer. As to whether or not the customer's complaint is valid or not, at least we know the company received a complaint

and that may be admissible as such. I would not object to that, although it is technically hearsay.

The arbitrator, however, in weighing that evidence should recognize it as hearsay. But as I said, too often the case is that the company says, "We have a list of customers," and they don't give us names, notes, or anything, except to say, "We have reports," or something along that particular line. This is the same as saying, "My foreman issued a complaint against so-and-so," and they don't bring the foreman in so that we can cross examine him.

CHAIRMAN DUFF: I have found it a practical thing, instead of ruling that it is hearsay, to turn to the witness and say, "I would find it more effective if that man who told you this could come in and testify before me so that I could hear him and see him personally."

RUSSELL GREENMAN: I would like to raise a question and perhaps make a point or two to illustrate the reason for the question. What is the end result going to be of this session? Is this an intellectual exercise to justify our four-day junket to Puerto Rico, or do you intend to do something about all of this? Do you intend to put out a manual to advise your members?

Many years ago I appeared before an eminent member of the Academy in a hearing when the union introduced some hearsay evidence, and we promptly raised the question of whether we had the right to postpone the hearing to bring in the gentlemen to testify. The arbitrator assured us that he was taking everything for what it was worth and would not base his decision on the hearsay evidence. He refused the request for adjournment, and then decided the case on the basis of the hearsay evidence.

So, is it your intention ultimately to put out a Code of Ethics or a guide for the use of members of your Academy or for us poor practitioners who have to guess each time what type of procedure the arbitrator will follow?

CHAIRMAN DUFF: Do you think such an outline would be useful, if in fact, it could be drawn?

MR. GREENMEN: I think it would be very useful for the guidance of the practitioners, and we would like, hopefully, to have arbitrators guided by it too.

CHAIRMAN DUFF: In the next session the program will be devoted to an analysis of the experiment which went on in Chicago, Pittsburgh, New York, and Los Angeles, and I believe that there is going to be some idea given you at that point as to what others want accomplished.

What our Committee suggests is that the subject of proof be studied in greater depth by a more permanent group, probably a university group, properly financed, with the idea of seeing if it is possible to put out a handbook to provide guidance. I think it would be particularly useful in the training of new arbitrators, although you may share the view that old arbitrators can be taught new tricks.

THOMAS KENNEDY: I want to ask the panel how they would like the arbitrator to handle this sort of thing. Would you like the arbitrator to say: "This strikes me as being hearsay evidence; therefore, we will hear no more of it?" Or would you like the arbitrator to say: "This strikes me as being hearsay evidence; I will weigh it accordingly?"

CHAIRMAN DUFF: We will ask Mark Curran the question of how he wants the arbitrators to rule when, in fact, the evidence is hearsay. How do you want him to handle this, as a practical matter?

MR. CURRAN: The first thing that would be helpful, even if there were no objection from either side, would be for the arbitrator to say: "This is hearsay. This fellow wasn't there. You actually did not hear it said or see it done. It would be more helpful to me if the fellow who did see it testified, so that I can really get an appreciation of precisely what he saw. Also, I think it would afford counsel for the other side the opportunity to cross-examine this man, to develop his story more fully."

Now, if they do not want to bring the fellow in at this point, my own feeling is that very little weight should be placed upon the hearsay evidence.

MR. KENNEDY: But do you want us to hear it?

MR. CURRAN: Yes.

CHAIRMAN DUFF: Does anyone disagree with that? If there is

a point that becomes not only relevant, but crucial, I think the panel may agree that we should give a continuance of the hearing if it is asked for.

MR. FOREMAN: I disagree. I believe, if it is hearsay, they should be told it is hearsay. I have heard it said by arbitrators, "This is hearsay and I don't think we should continue along this line." And he hears no more of it.

The reason I don't like hearsay evidence is because the arbitrators, I think, can be made to feel sorry by listening to it. I think the arbitrator is there to hear the facts. He should base his decision on the facts, and I don't think he is doing an injustice by shutting somebody up when the testimony is blatant hearsay.

CHAIRMAN DUFF: Suppose it is a medical case and there is a certificate from a doctor, which the union doesn't know is hearsay. The company objects. The union then says, "Can I bring the doctor in? Will you recess for a few hours?"

MR. FOREMAN: An affidavit may be hearsay, or a doctor's testimony may be hearsay. I do believe there has to be an exception made for the latter, however, because if those of us who practice law, whether we try accident cases or labor cases, have to schedule or re-schedule cases just to get a doctor in to testify, we would be in a constant mess of recessing cases.

I don't know if any of you people have ever tried workmen's compensation cases. You start a case, you have a hearing for two hours and recess it because the doctor says he can't be there. A doctor's written statement, although hearsay, I think has to be accepted for what it is worth. I think an affidavit may be severely criticized, but it is all right if the parties put it in, although I don't think much weight should be given to it.

MR. KENNEDY: I would like to hear the people who represent management tell us if they want us to receive doctors' written statements in evidence.

MR. UNKOVIC: I think it is the function of an arbitrator, if there is too much hearsay, to try to stop it because it is not right, it is not relevant. By the same token, it is the function of a company representative or a union representative, if there is hearsay, to

object, and I am not talking about the old fashioned objections, where you get everybody's back up. Do it politely. There are certain exceptions to the hearsay rule—the confessional, the lawyer-client relationship, and the newspaper reporter and where he received the information.

Now we come to a doctor. I would say, ordinarily, if I were an arbitrator, I would not keep out doctors' statements. Yet I realize the danger—it only costs $5 or $10 to get a doctor's statement. Still, you have to keep moving, and I think if you adjourned the hearing to bring a doctor in, too much time would be consumed. My reaction is unless the medical evidence is the very heart of the case—to prove whether or not a fellow was permanently disabled, for example—I don't think you need the doctor.

MR. HART: You can get a doctor's certificate for $1.00.

MR. UNKOVIC: If you are arbitrating the question of whether or not a fellow did not show up because he was sick and he relies upon a doctor's statement as proof of his illness, I would take the statement.

MR. GREENMAN: Evidence is a two-edged sword, and it works on both sides of the street. Either we eliminate hearsay evidence totally, or we permit all of it to come in. If we are going to admit a certain amount of hearsay evidence, the preponderance of weight may be applied to that, just as the gentleman explained. So far as I am concerned, I see no jusification for hearsay evidence at all. If you bring in a witness, let him testify only to the facts.

MYRON JOSEPH: I am wondering about the position of the majority of the Committee because you say in your Report if evidence is offered, the arbitrator should indicate to the parties that he recognizes it is hearsay and that direct evidence would be given more weight. You also say that even though it is customary to admit hearsay evidence, seldom should a decision be based exclusively upon it, and so on.

Now I hear you saying that the majority of the Committee thinks hearsay evidence, with certain specific exceptions, should be excluded from the hearing.

MR. UNKOVIC: I don't think you listened. I wouldn't want to be in your class, Professor Joseph.

Myron, even in a court of law you will receive some hearsay. Let's not kid ourselves. It depends on how alert the lawyers on each side are and how alert the judge is. In an arbitration case you are bound to get more hearsay than you would in a formal court case. You can't help it. It is the nature of the beast. But that is not to say we should not try to have some reasonable control over hearsay through the arbitrator and representatives of both sides.

CHAIRMAN DUFF: The consensus of our Committee was that we should realize we are dealing with a dangerous type of evidence and, hopefully, indicate to the parties that we recognize it as such. After all, admissibility of evidence means only whether we will give it any consideration. It does not guarantee that because it is admitted, it will be given very much weight. If we indicate that we recognize the beast for what it is, we are prepared to admit it for special review, that hearsay is admitted to be weighed on a scale, that it is not to influence the entire outcome of the case, and that we are handling the situation in the best way possible.

It is hard to state a rule that is acceptable to every one. I believe counsel for the parties indicated that if, at least, you do admit it, instead of just saying, "I admit it for what it is worth, I know it is hearsay," but say instead, "If you have any more forceful testimony that could prove the same point, it would be helpful to me in the case," it would indicate that you know you are dealing with light stuff. With some few exceptions, hearsay should not be the determinative point in the outcome of the case.

MR. GRADY: I don't think you are touching on the important aspect of the subject. I think arbitrators are happy to rule on hearsay, because ordinarily it is easy to rule on whether or not it is admissible, even in an arbitration hearing. But the thing that bothers us who present cases to arbitrators is that, if you object to a certain type of evidence or a question which has no relevancy, most arbitrators hear it and say, "I will give it the weight it should have." Then you get the decision, which may be favorable or unfavorable. But my question is, why waste so much time on hearsay, on matters that have no relevancy?

I think it is sloppy practice. I would like to know what your panel's recommendations are to the arbitrator on that.

CHAIRMAN DUFF: If you don't mind, give us a recommendation right now as to what we should do about it. We are primarily here to learn, not to teach. I mean that sincerely. What kind of a rule can we set for the arbitrators which will be meaningful and which will have sufficient flexibility to be workable? After all, we aren't going back to the old court system. It is impossible.

Do you have any suggestions for a way we can handle it?

MR. GRADY: I don't know if I have a suggestion, but I would like to make an observation. If an arbitrator is willing to rule on the admissibility or inadmissibility of hearsay, let him pay the same attention to objections.

CHAIRMAN DUFF: Suppose he doesn't know at the time?

MR. GRADY: Then let him adjourn the hearing. Let him say, "This seems important to me, and I would like to give it some thought."

CHAIRMAN DUFF: Fifty percent of our arbitrators are not lawyers. The fifty percent who are lawyers seldom get into the law courts, so I think good evidentiary rulings could only be expected from ten percent of the arbitrators. Is that a fair statement?

MR. GRADY: I don't know. I didn't make it.

MR. UNKOVIC: We'll rule you out of the Academy for that statement.

CHAIRMAN DUFF: Should we know the rules of evidence and practice?

MR. GRADY: I didn't say anything about technical rules of evidence. I deliberately avoided that. I said, if an arbitrator is going to rule at the beginning on any one piece of evidence, he ought to be prepared to rule on all the pieces, particularly where he is going to pay some attention to it. That is all I said.

MR. MCGILLIVRAY: If the parties would sit down and agree upon a fairly definite set of rules and principles—which I think can be done because there doesn't seem to be very much disagree-

ment, for a change, between management and labor and the arbitrators—and the arbitrators would be willing to follow those rules because they still have a propensity to let everything in, but if we had some sort of submission agreement that would bind their hands as to what they could base their decision on, could we overcome this problem?

CHAIRMAN DUFF: That is a dream situation. I hope to experience it sometime. Certainly, in the context of the situation that I believe you are suggesting, where there is a regularity to the arbitration proceedings and where there is a maturity in the union-management relationship, it is a possibility. Certainly, the arbitrators would be delighted to find such guidance. They must look too often for only Divine inspiration without human aid.

MR. CURRAN: I had a question to throw out to see what the reaction is from arbitrators. Do you think it is proper for an arbitrator to issue an opinion when the only evidence on a pivotal issue has been hearsay evidence which has been objected to but has been allowed in for what it is worth?

CHAIRMAN DUFF: Mr. Kennedy, do you have any suggestion on this problem?

MR. KENNEDY: Not on this point.

MR. UNKOVIC: Are the arbitrators sitting out front surprised that the union and management representatives are in agreement on this question of relevancy of hearsay? Are you surprised that our blowing-off steam days are over?

VOICES: No.

MR. UNKOVIC: Then, why, in so many decisions and articles, is there still talk about this therapeutic reason for arbitration?

IDA KLAUS: I have had years of experience in evaluating transcripts and records, attempting to come to some conclusion as to what was proven and what was not. I am a little amazed at the way the discussion has been going this morning. No one has commented upon the fact that the obligation to convince is an obligation on both sides when they come before an arbitrator. One has done something to someone else. The question is: who is going to prove it, who has to prove that it was done? It is claimed

that it was done. Who has to prove it was done to the satisfaction of the arbitrator?

CHAIRMAN DUFF: The next point will be burden of proof.

MISS KLAUS: You can't merely say "burden of proof" in a vacuum. I don't think you can talk about the last question in a vacuum. Suppose all the evidence submitted is hearsay evidence? God help you if you get into that and accept the principles guiding the courts on evidence and presentation, because you know there are as many exceptions to the rules as there are aspects to the rules. But I think you have to have a frame of reference for discussing this question.

The purpose of submission of evidence to any tribunal is an attempt to persuade the presiding judge or his equivalent that the particular occurrence actually took place for a particular reason. Somebody has that burden, and I don't see how you can avoid talking about what you would do if you were an arbitrator and the record was nothing but hearsay. Would you call the parties back for another hearing? I don't think that is the function of the arbitrator. I think he has to get the issues before him as soon as possible after the hearing begins. Once he knows the issues, he decides who has the burden of convincing him. The party which has the burden must sustain that burden by evidence which the arbitrator believes is acceptable or, to use the word lawyers use, is probative.

If he is convinced, the decision goes one way; if he is not convinced, it goes the other way. So I don't see how you can discuss this entire question as you are doing, not only on the manner of the proof but the quality of the proof, without reference to the question of how an arbitrator views the process before him. What is it he requires of the parties? And I don't believe that has been discussed.

CHAIRMAN DUFF: I want to assure you this matter has been considered by the Committee. There are many questions we will no doubt leave unanswered at the moment.

However, suppose on all crucial points there is nothing but what could be described technically as hearsay. In that situation my guess is that the majority of arbitrators will decide, as they

decide every other question, to give some weight to it, the weight depending on the credibility of the statements, the context in which the hearsay occurred, the availability of witnesses who could have been called and were not called, the burden of proof, and many other considerations that do not immediately occur to me. But he certainly would not automatically say, "Oops, that witness has given nothing but hearsay."

I would like to say that Mr. Unkovic is not as technical a lawyer on cases I have had with him as he would lead you to believe. He has a practical approach to the problem, believe me.

On burden of proof, I don't think we have too much to discuss. Perhaps, for better or for worse, we should start with the proposition that he who asserts any proposition has the duty to prove it. I guess that is the way of most arguments. And ordinarily the person who brings the grievance, be it the company or the union, has the duty to convince the arbitrator, and, failing that duty, he loses the case. You must start somewhere, but that rule is often modified. We state in our Report that in disciplinary cases the burden is on management. In disciplinary cases sometimes there is a distinction made as to the degree of the burden of proof, depending on what is alleged.

I would be glad to hear anyone who believes that in all cases the burden should be on the grievant. Partly, the problem is who has the evidence available and can produce it? In the airlines cases the burden of proof and the burden of going forward is different than in other cases because if the plane is destroyed and the instrumentality is exclusively within the control of one party, the burden is somewhat different. I won't try to explain it to you. We have professors sitting here who know much more about it than I do. But I do say in law courts the burden does shift around a bit also.

On the quality of the evidence there is not much we have to say. It must be sufficient to convince the arbitrator. We are trying to sharpen our perceptiveness on that.

In disciplinary cases management is in agreement that it is a subtle bit of arbitrable law that the burden of proof is upon them.

MR. JUSTIN: Let me tell you how I handle this question. Rather than using the words "burden of proof," which I don't believe

belong in arbitration, I say he who initiates the action has the burden of justifying that action. I follow the precept that in every case except one management has the burden of justifying the action. The grievant does not discipline himself, the grievant does not deny himself promotion or four hours call-in pay or overtime. Management initiated the action. The only exception is where there is a violation of the no-strike clause, a quickie or slowdown. Then the union has the burden of justifying why they slowed down or took concerted action.

Again, I must say, the arbitrator is not a judge. He is an agent selected by the parties and his job is to be convinced in the light of all the evidence that is placed before him.

I agree with the panel that on hearsay, particularly doctors' certificates, I for one always insist that a doctor be produced, unless there is a good reason not to do so, and I will then grant an adjournment. I just had a case where the doctor said the employee was appreciably recovered. I don't know what that means. The union brought a two-page letter explaining it and because I couldn't understand it, I didn't give it any weight at all. I recognize the difficulty in having doctors present, but in my experience most doctor's certificates are accommodation notes, and I think, as Mr. Hart or somebody said, for $5.00 you can get a lot of doctors' certificates.

CHAIRMAN DUFF: Mr. Hart said that it only costs a dollar.

Does anyone care to agree or disagree with Mr. Justin? You should certainly support one position or the other.

MR. KABAKER: I have practiced law for some 30-odd years, and, in a practice extending 30 years, you are bound to bump into the question of burden of proof. As a matter of fact, I don't think we can ever escape it. I think the only confusing thing for practitioners and the parties in arbitration is not what constitutes burden of proof, but instead is the misunderstanding which arises of proceeding first. To some people this infers that they also have the burden. I think the arbitrator must explain when this arises that the two things are separate. The parties do lump them together, but it takes a little patience to explain to the parties who

are confused by the difference between burden of proceeding and burden of proof.

MR. UNKOVIC: May I answer that? In answer to Mr. Kabaker, I have found many times, to my benefit, that if the union wants to go first, I let them go first, because the more the union talks, the more cases we win. This idea of orderly procedure can be a detriment to management, but we have to have orderly procedure.

MR. KENNEDY: Let us take a case where the company is asked to go forward, say, in a discharge case or another type of discipline case. The company will put in its case without calling the grievant as a witness. The union will then say, "Is this all of the company's case?" and the company will say, "Yes," and then the union says, "We rest."

How do the parties feel the arbitrator should handle a situation like that?

MR. FOREMAN: I have always accepted the principle that in discharge or disciplinary cases, the burden of proof, not only the matter of going forward, but the burden of proof is with the company. If the company on its own cannot show a good cause why this man should be discharged, then I have a right to say, "Well, I am going to rest since you did not give any good reason why you discharged this man." I have done this. Usually, when I have done it—not too often—there is not the slightest doubt in my mind that the company failed to present its case; if there is, then I will put my man on. I don't want him to say, "If I could have told my story, I could have won." So the man who tries the case has to make the decision.

Again I say, in discipline cases the company has the burden of proving that it had good reason for disciplining the individual. If I am trying the case and the company doesn't prove its case, I don't call the grievant; then I take my chances on the arbitrator agreeing or not agreeing with me.

MR. UNKOVIC: I think if there is any doubt, the arbitrator should have the right to call the grievant. Very frankly, many times I have called the grievant as a witness for management even though some arbitrators don't like for you to do it. In fact, there are a lot of them that don't like for you to do it, but I think in an

arbitration case a lawyer for either side is foolish to rest without calling all his witnesses.

MR. HERSCHEL: I primarily represent labor organizations. The problem, I think, is the one of going forward rather than the one of burden of proof. The arbitration process is actually an extension of the fact-finding process. I think the duty of the arbitrator is to reach the proof. I don't think it is a game of witnesses, whereby one side or the other should play lawyer, or engage in the claptrap we in the legal profession may properly use. Many of the rules of evidence came about principally because we want to protect a jury from hearing certain things.

We are buying the expertise of these people, and they don't have to be protected from themselves as does a jury. I think the arbitrator has the expertise. He can decide who is right. If he doesn't have the expertise, then I think we are wasting our time in arbitration.

I do want to comment on the reference Jules Justin made, that he would never accept a doctor's report, and some cavalier reference that you can get a doctor's certificate for $5.00—Bill Hart can get them for $1.00. Maybe they work cheaper in Pennsylvania, I don't know. But there is a problem about getting a doctor into court. I have seen them fighting against a subpoena or a sheriff. They won't come in. Why, I don't know. All I know is a doctor likes to stay in his office or in the hospital. He dislikes legal proceedings. If he can get it down on paper, and we can get a statement for $5.00 or $10.00 or $1.00, I think it has probative value and should be used.

Now along with that, of course, the arbitrator should consider the standing of the doctor in the community. Is he a specialist in his field? Does the statement reflect the fact that he has given the matter careful consideration? As a union lawyer, I do know one disparity that we must contend with: the company generally has a doctor. The company has this doctor on the payroll, and I rarely find such a doctor's statement that is full and complete as that presented by a doctor in the flesh. I think the arbitrator should take cognizance of that.

I have had the pleasure of cross examining doctors, and I find

you get no more out of them from cross examination than you do from their statements. They are not good witnesses because in many cases the doctor is just as much an advocate of the side for which he is testifying as is the lawyer. I think we must take this into account.

CHAIRMAN DUFF: I want to change the subject matter again. We have so many fields that we are delving into, we can't cover them all.

The next problem we will struggle with is the propriety of admitting evidence introduced in the grievance procedure—how much of what took place during the grievance procedure should be admitted into evidence? If admissions or offers of compromise were made, should these be admitted? If something was not discussed in the grievance procedure, should it be admitted at the hearing?

I am going to ask Bill Hart to state his viewpoint with regard to offers of compromise and things of that sort.

MR. HART: I don't find too much unanimity among arbitrators on procedure, and certainly there isn't unanimity among employers or among union representatives as to the way this kind of evidence should be handled.

We have discussed the blowing-off-steam process. We have discussed evidence, its reliability, hearsay, and so forth. Certainly along this line would be the grievance procedure itself.

Now, contracts differ. Some have five steps in the grievance procedure, some have four, three, or two steps. I know contracts that have one step. So you will find all kinds of situations with respect to this. But it is my humble judgment that in the first or second step of the procedure, both management and the union have had all the opportunity required to blow off steam, if blowing off steam is necessary. I believe, after the first step, all the relevant material ought to be recorded and accurate minutes should be kept. Certainly, this ought to be admissible as evidence in any arbitration proceeding, because, unless it is admitted, there is no value in having these hearings. It is at the lower level hearings that all the pertinent evidence can be brought out and where witnesses are available without extreme financial obligation. As a

consequence, I am of the opinion that minutes of these hearings should be admitted into evidence, and, where possible, both the company and the union should agree on the accuracy of these minutes.

CHAIRMAN DUFF: How about an offer of settlement made by the union or the company? What about that, specifically? That is the sore point.

MR. HART: The purpose of the various steps in the grievance procedure is to try to effect an agreement. If you are trying to effect an agreement, you are actually engaging in the collective bargaining process. If the union makes an offer in compromise, certainly the company ought to be permitted to present that to the arbitrator. If the company makes an offer in compromise—this is an indication, of course, that the company believes the grievant has some justification or some basis for the complaint that he alleged—the union ought to be able to present it to the arbitrator. I believe that offers of compromise or of settlement, during the course of the grievance procedure, should be submitted to the arbitrator.

CHAIRMAN DUFF: Our panel is not unanimous on this question.

MR. FOREMAN: I object to any offers of compromise or settlement being introduced into evidence. I think this is a mistake because it would make the grievance procedure meaningless; the company would be afraid to make an offer of settlement, and so would the union.

The parties must have protection concerning what they say in the grievance procedure. Certain things might not be said because of fear that if the matter goes before the arbitrator, these statements would be prejudicial. When you have certain evidence that was presented during the steps of a grievance procedure, by one side trying to prove its case to the other, I think it is permissible for this to be presented at the hearing. Both parties can expect that evidence presented during the grievance procedure will be presented at the arbitration hearing; and if it is not presented, I think you have a right to bring this to the arbitrator's attention. But when it comes to the matter of presenting an offer of compromise or settlement, that is taboo, because once you do

that, you are going to have everything submitted to arbitration, and the first party to object will be labor because of the cost.

MR. HART: I would like to make one observation. In one major steel company we have a contract that provides for double arbitration in respect to certain of our wage rates.

The company meets with our people and makes it offer with respect to the wage structure. We meet with the company and make our recommendations. The contract provides for arbitrating the middle point between what we have jointly proposed. So when I made my statement, that there was not unanimity in labor on this question, I want to make it clear, that while that is so, in some phases we have gone far beyond what other unions have done.

CHAIRMAN DUFF: Mr. Curran, is there any type of case which, in your opinion, it would be helpful if offers of compromise were available?

MR. CURRAN: I agree fundamentally and almost entirely with Herman Foreman's position. To permit offers of settlement to be introduced can stifle the grievance procedure. But it can sometimes be useful if the matter involves a new or a changed job and the grievance procedure is regarded as an extension of collective bargaining.

Management tries to compare the new job to the one it doesn't compare with, and the union does the same thing. When the matter goes through the grievance procedure, however, the union goes down to $2.20 and the company comes up to $2.14. These offers present a range that the arbitrator can use in reaching his decision.

CHAIRMAN DUFF: Perhaps it should be handled by agreement, having a general rule prohibiting offers of compromise being mentioned, but specific agreement in a limited number of cases, if the parties so desire.

MR. GILL: I think this matter of offers of compromise is one that should not be addressed to the arbitrator at all. It seems to me it is a matter for the parties to settle, because either party has it in his power to bring it out at the hearing. If he wants to, he can say, "You offered to do so-and-so in the grievance procedure."

Once it is said, it doesn't matter whether you admit it or not, you have heard it. Whatever evil effect it has, it has already been implanted in your mind. It is not a question of our listening to it—it is a question of the parties telling us.

MR. UNKOVIC: If you hear it, you shouldn't be bound by it. If you took Jules Justin's suggestion, it wouldn't be so bad.

MR. CURRAN: Our company probably has more contract provisions requiring a non-voting tripartite board than any other company. The union appoints a panel member, the company appoints one, and it is required that they meet with the arbitrator for consideration of the decision. The board normally meets after the arbitrator has received the transcript and prepared the draft of his decision. This is an idea that goes back to a man in our company a number of years ago, Leland Hazard, who developed it with the idea that it would help arbitrators.

The unions don't like it because it results in another day of cost. There has to be a panel meeting after the arbitration is held, so that is another day of time. They also feel it is a difficult enough job to get adequate representation to try their case, and then they have to double it and get representation on the panel.

I also find increasing reluctance to accept this procedure by the arbitrators. I have heard them say, "I have never learned anything from a panel man. He doesn't have the right to vote." Not that that means anything. But there seems to be a great reluctance to accept the panel system by a number of arbitrators although I think it is very useful. In job evaluation cases, I think it is terrific.

CHAIRMAN DUFF: Now we come to the so-called parol evidence rule, the question of oral contradictions of the written instrument. The arbitrator is often cautioned that he cannot change the written agreement. He couldn't anyway, unless you gave him specific authority.

Mr. Curran, will you outline management's position?

MR. CURRAN: There was not a consensus among the Committee on this question. Fundamentally, management members of the Committee felt the parol evidence rule should be applied. In other words, let the contract speak for itself, and exclude state-

ments which went before or which were made contemporaneously with the execution of the contract unless there is a claim of mistake or fraud.

I think there is a prayer included in practically every labor contract where it talks about the arbitrator's authority. I don't know if it has been often read, but the gist of it is, that the arbitrator should not add to, modify, or subtract from the contract. I think this is the prayer to the arbitrators: "Will you stick to what has been said here?" Everybody pays lip service to the parol evidence rule and then they proceed not to apply or mis-apply it. I think there has been a genuine dissatisfaction on the part of many management people because arbitrators have not been following this admonition—please read the contract; if it is not in the contract, it is not there.

I disagree with the union's position with respect to parol evidence, where the report states they believe if the evidence is forceful enough, even an express contract provision may be altered or amended by a verbal side agreement or a well established practice.

First of all, you have to understand the parol evidence rule. It has nothing to do with agreements made after the contract was executed. You can put in a provision for the distribution of overtime, then, next week, put in another side agreement that it is out. You then have a new agreement on overtime distribution.

Committee members representing labor believe that past practice can overrule the express provisions of a contract. This is a point where we are in disagreement. We are not in disagreement that there can be an existing agreement between the company and the union which ante-dated the contract and is not covered by the contract; that continues on. But with respect to those matters which were expressly bargained for and put down in black and white in the contract—that is what you look to.

MR. FOREMAN: I have found that both in trying arbitration cases and also in negotiating contracts, there is often a reluctance on the part of management when asked to change the verbiage of a contract to do so. They say, "No, no, no, we do not want to change the language because we have lived with this 15 or 20

years; both sides understand what it means, that which is written, that which is not written. If we start to fool around with it, we will have trouble. Your members will cause a lot of difficulties, and it will not be good for either of us."

So the result is that we have contracts where the language is bad, but we keep it because we believe both parties understand it and will live with it accordingly, both that which is written and that which is not.

Unfortunately, from time to time management gets a new labor relations man. He comes in and decides that he will be a new broom and sweep everything clean. Once he tries, he has trouble. I don't think it is fair to the union or their members. I can understand that when a labor man says, that this or that was done five or six years ago but has not been constant, that they can't use this to get around a specific clause in the contract. But where there has been a continuous practice, then I believe it is wrong to say we must adhere strictly to the letter of the contract. The parties never so intended.

That is the reason why I have to take exception to this parol evidence rule and do say the arbitrator should listen to evidence, that he should not be bound entirely by the contract as it is written.

CHAIRMAN DUFF: Would a high degree of proof be required, if there is seemingly contradictory language?

MR. HART: I share Mr. Foreman's views. I would like to go one step farther. In many of our agreements we have past practice clauses. In addition to the past practice clauses, we have other clauses which cover all oral and written agreements that we may not even know about. In large steel plants, agreements are made every day between the foremen and the grieving men. Consequently, we are not aware of them, so we put a clause in the contract to protect all those agreements.

MR. GREENMAN: I can cite many distinguished members of the Academy who have invoked the doctrine of undisclosed intent. Arbitrators have insisted that there be presentation and discussion on what the parties meant when they used "normal" language.

Arbitrators have insisted that both parties present what was said in the original negotiations to explain the undisclosed intent.

Does the enforcement of the rule of parol evidence nullify the other document?

MR. UNKOVIC: Not at all. The word "normal" can be very ambiguous on its face. What is "normal" in one plant may not be "normal" in another. You might have Confederate Day in the South as a holiday, and Good Friday as a holiday in the North.

CHAIRMAN DUFF: Should patent or latent ambiguity be treated differently?

MR. CURRAN: I think it is really a question of whether you are trying to establish a new and separate agreement, or explain what is already in the agreement.

MR. MCDERMOTT: Like the bird that is becoming extinct in Australia, I am an extinct arbitrator—the non-lawyer type. We are continually getting into arguments with lawyers over the handling of proof in arbitration.

I think you have to look at the collective bargaining relationship itself and what comes out of it—the contract. A contract, as we are well aware, restricts management. For the most part, nearly every provision in it is a restriction on the rights of management. Therefore, it is to be expected that management should insist on a strict interpretation of those limitations it has conceded. At the same time a labor-management contract is not the same as a sales contract. You are dealing with a great many broad generalities, a great many provisions that express a principle rather than any particular rule that is to be followed. So if you are going to interpret this thing, you have to interpret it in terms of the relationship that exists.

Now, there are two areas that require an arbitrator to look at the implied limitations that the contract sets up.

In the first place, it might be something that the contract doesn't even mention, but the very relationship requires that if the contract is to make any sense, it has to be an implied limitation.

For example, most of us have had discharge cases where there

was no discharge clause in the contract, nothing about it, yet they do have a grievance procedure, a no-strike provision, and arbitration as the final step in the grievance procedure. The company will argue, "There is no discharge clause, so we have the right to discharge." So, if you say, "You have to discharge for just cause," you are writing something in the contract that is not there.

But it would seem to me that the no-strike clause and arbitration must be completely ruled out unless the arbitrator implies that any discharge action that is taken must be for just cause. The agreement is meaningless otherwise.

The other area involves the matter of practice. Certainly, the contract can be taken as the beginning and the end of the relationship, but the very fact that the parties have been living together means they evolved certain other agreements that are in the form of practice.

Again in the matter of practice, you can't arbitrarily take the fact that a practice exists because you have to break it down to the kinds of practices and their relationship to the contract.

First of all, you have the vague and ambiguous provision. Certainly, practice is a great guide to the arbitrator in trying to interpret what the vague and ambiguous provision means. So he looks at the practice, which enables him to interpret this provision in the contract.

Then you have the second kind, where the contract is completely silent on the action. For instance, let us assume there is an existing practice which allows the union officers three hours off a week to work on grievances. There is nothing in the contract about this allowance, yet it has been going on for a number of years, and both agree it has been going on.

Now the company decides, "It is not in the contract, we are going to cancel it out." This is during the life of the contract. Certainly, the very fact that this practice has existed is a tacit agreement on the part of both sides that this is an addition to the contract and certainly practice would have to prevail, it seems to me, in an arbitrator's mind.

Then you get the tough one: where you have a provision in the contract that is very specific and very clear. There is no question

about the meaning of the provision. But lo and behold, you look and find they have been completely ignoring this provision and have established a practice that is absolutely contrary to what it says. This is a tough nut.

How you decide this one is a matter of opinion. Most arbitrators would agree with me on the other two areas, but we differ here. To me, if the contract is clear and specific, then the contract should prevail, provided the party who is seeking to regain his rights under the contract has given ample notice prior to the incident that gives rise to his determination to do so. If he comes to the arbitration hearing and gives notice, then that particular incident should be of no avail; by allowing the practice to continue he has tacitly agreed to change what the provision says. He should have the power, however, through the life of the contract to regain his rights.

By approaching the question in this sense, I think you cannot argue that the contract language should be specifically and literally applied in all instances or that the arbitrator has no power to limit it.

CHAIRMAN DUFF: That concludes our session. I want to thank everyone who has participated, and to tell you that at 11:30 there will be another meeting addressed to this general subject, which will attempt to draw together the various reports.