CHAPTER IV

# THE ARBITRATOR AND THE NLRB: WORKSHOP SESSIONS:*

## WORKSHOP A**

MILTON FRIEDMAN, CHAIRMAN
ARNOLD ORDMAN, CO-CHAIRMAN
HERBERT BURSTEIN
EVERETT E. LEWIS

CHAIRMAN FRIEDMAN: The purpose of this workshop is to give those in attendance an opportunity to make any comments or raise any questions they wish. But it is not possible to have a panel without permitting them to comment first. We will be brief.

Let me first introduce the panelists. I will then make some observations, after which each panel member will have an opportunity to speak. We should have plenty of time at that point to turn the meeting over to anyone who wants to be heard.

On my right is Herbert Burstein, a New York attorney, of the firm of Zelby and Burstein. He has done the Academy a signal honor by jumping on a plane early this morning in order to attend this session, and will jump on one as soon as this is over in order to get home again tonight.

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* This chapter is an edited version of the transcripts of four workshops on the subject of The Arbitrator and the NLRB. These workshops were held simultaneously following the papers presented by Mr. Arnold Ordman and Mr. Robert G. Howlett on the same subject (Chapter III); these papers, as well as that of Professor Meltzer (Chapter I), provided the basis for the discussions in the workshops. The audience consisted of Academy members and their guests who were divided among the workshops.

** Milton Friedman, Member, National Academy of Arbitrators, New York City, served as Chairman of Workshop A. Other panel members were: Arnold Ordman, General Counsel, National Labor Relations Board, Washington, D. C., Co-Chairman Herbert Burstein, Attorney, Zelby and Burstein, New York, representing management; and Everett E. Lewis, Attorney, Vladeck, Elias, Frankle, Vladeck and Lewis, New York, representing labor.

On his right is Everett E. Lewis, who is taking the place of the scheduled panelist, Stephen C. Vladeck, who was unable to attend. Mr. Lewis is a partner of the law firm of Vladeck, Elias, Frankle, Vladeck and Lewis of New York.

Finally, on the extreme left—but not always—is the eloquent gentleman we heard from earlier today, Arnold Ordman, General Counsel, National Labor Relations Board, who will probably have some cracks to make about the other three of us after we finish.

Generally, chairmen should be seen and not heard. However, because of the conflict that arose among the arbitrators at our regional meeting, and because Bob Howlett's point of view is the only expression from the arbitrators that was made at the full session today, and is so different from my views, some remarks are in order.

There are probably larger disagreements between one arbitrator and another on today's topic than between arbitrators and the Board. Mr. Ordman points out quite simply that when arbitrators' views are not consistent with the Act (or the Board's interpretation of it), the Board cannot support them. It's hardly possible to disagree with that approach.

It's hardly possible, however, to agree with Mr. Howlett's approach on the proper role of the arbitrator. He says, "There is a responsibility of arbitrators, corollary to that of the General Counsel and the NLRB, to decide, where relevant, a statutory issue, in order that the NLRB, consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issues through arbitration may be fulfilled."

That one sentence raises a host of perplexing problems. Who gave arbitrators the "responsibility" to decide statutory matters? Why *should* the NLRB avoid decisions on the merits? After all, the Board is never going to rubber stamp arbitrators' decisions—whether or not they are allegedly based on the statute—even if the arbitrator ignored the contract and based his award solely on the Act. If the Board will, nevertheless, review to determine whether the award is or is not repugnant to the Act, it can hardly avoid a review of the merits. Moreover, the Board will give weight to an award flatly based on the contract, if it is not repugnant to the Act,

but it will surely ignore an award allegedly based on the Act but incorrectly so.

"The statutory policy of determining issues through arbitration" envisages private arbitration in which an arbitrator applies a private agreement. What authority has in fact invested the arbitration process with mightier public responsibility? Neither the Act, nor the Board, nor the courts contemplated that the arbitrator would be a quasi-NLRB.

Arbitrators have handled issues that fall within the Board's domain in various ways. Some consider their role to be limited essentially to the contract.[1] Others are far more catholic, and two awards are cited as representative of that approach.

In one, *Buckstaff Comany*,[2] the union sought the discharge of several employees who had tendered resignations during a strike. When work resumed, they refused to pay dues. The new contract was made effective on a date during the strike, which coincided with the date of the employees' resignation from the union.

The contract contained a provision requiring present members of the union, in accordance with its constitution and bylaws, to remain members. The union asserted that the resignations were ineffective under its constitution and bylaws.

In denying the grievance, the arbitrator wrote:

> The arbitrator is of the opinion that if this grievance were sustained, and the Company required to discharge these employees, both the Union and the Company would be guilty of violating the National Labor Relations Act. This conclusion, in the arbitrator's judgment, disposes of the case, because he cannot bring himself to render an opinion and award which, if carried out, would result in both parties to the arbitration being guilty of unlawful conduct. If the arbitrator did not know of these provisions [Section 8 (a) (3) and Section 8 (b) (2)] in the National Labor Relations Act and the constructions which have been placed upon them, it might be possible for him to ignore them as the Union suggests. But this is not the situation. The National Labor Relations Board in the American Newspaper Guild case (1957), 40 LRRM 1405, dealt with a situation which, *for all practical purposes,* is the same as that confronting this arbitrator. [Emphasis supplied]

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[1] For examples, I refer you to *Bethlehem Steel,* 31 LA 423 (1958), and *Rowland Tompkins,* 35 LA 154 (1960).
[2] 40 LA 833 (1963).

Perhaps there were no easily distinguishable distinctions between the *Buckstaff* and the *Guild* case, although there was a specific contract provision for an escape clause in the *Guild* case and none was mentioned in the *Buckstaff* case. The issue in *Buckstaff* was whether or not, under the contract, there were effective resignations from the union on or before the contract date. If there had been, the arbitrator could readily have decided the case under the contract. If there had not been, then surely the parties were entitled to have the arbitrator perform his assigned function, which was to apply the contract.

In a case of this kind it is at least remotely possible that the Board will also find a distinction in the contracts and in the facts. Almost all arbitrators err on occasion. When they do, how much healthier it is to err in construing a contract than in fleeing the contract and construing an extraneous policy, or regulation, or statute.

As a practical matter, if the contract violated the Act, or the arbitrator's construction did, the Board is not without power. If in *Buckstaff* the arbitrator erred in finding that under the contract the employees had not effectively resigned, the Board would quickly enforce the Act. But consider the practical effect of an erroneous application of the Act by the arbitrator. The case is over. The union is foreclosed forever more. The arbitrator's decision that these employees cannot be discharged is irreversible. Since that kind of decision precludes an unfair labor practice charge of any kind, the Board never sees the case at all.

The same is true, for example, where an arbitrator rules that a company may not subcontract. Such an award ensures no Board review, and the likelihood of judicial review is remote. It is a final award even if the arbitrator's reasoning was rooted in an erroneous appraisal of the Board's application of the Act, rather than in the contract.

Thus, the arbitrator who looks everywhere but to the contract is making the arbitration process a pale imitation of the Board. Contract rights are derogated, yet the arbitrator has not bound the Board, by any means.

Moreover, when the Board errs, there stands a circuit court of appeals ready to right a wrong. The Board is often a penultimate step no matter what it does in a difficult case.

How different is the arbitrator's status! Once he has acted, even if he misunderstands the Act, misapplies it, misreads a decision, he may irrevocably have bound both parties. There is no sound reason why an arbitrator should apply the Act when his error may leave parties without recourse, while the Board's errors are subject to judicial review.

Some arbitrators are inhibited from acting at all, despite the presence of a contract issue, when the matter clearly involves the statute. This is exemplified in another award, *Printers League (Sorg Printing Company)*.[3] The union claimed that its members should perform certain work, in accordance with the contract, which was being done by members of another union in a subsidiary plant. The arbitrator held that he lacked jurisdiction to make *any* award:

> . . . a decision here would invade the outstanding certification and rather than settle this dispute merely aggravate it. Arbitration awards should be issued only where they are meaningful and capable of enforcement. While the Union may have a meritorious claim under its agreement (as to which no decision is made) a decision in its favor would be unenforceable as an attack upon and interference with the outstanding certification of the New York Printing Pressmen's Union Local No. 51. Had there been no outstanding certification the result might be otherwise since the case would merely be one under contract . . .
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> While the Company has requested that the grievance be dismissed the arbitrator is reluctant to do so lest it be interpreted as a decision on the merits and foreclose the Union from proceeding, if it desires, before the National Labor Relations Board. For the reasons above stated it is determined, however, that the arbitrator has no jurisdiction to issue an award in this matter.

Since the issue arose under a contract, the parties should have the benefit of an answer to the question submitted. Is the Union entitled to the claimed work, under the contract, or not? Perhaps the arbitrator's interpretation of the contract would subsequently prove helpful to the Board, which in any event is not bound to

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[3] 38 LA 1162 (1962).

accept the award if it finds it repugnant to the Act. Perhaps none of the parties, including the other union, would want to go to the Board when they see the sparkling wisdom of an award on the merits.

As far as I know, the Board has not asserted that arbitrators should refrain from pronouncing contract rights, whatever they are. To do so can hardly affect the Board's processes adversely. Not to do so may fail to give the Board helpful information on the actual meaning of the contract.

The suggestion that awards should not be issued unless, in the arbitrator's judgment, they are "meaningful and capable of enforcement" is also debatable. It adds a new dimension to the arbitrator's role in the collective bargaining process. I am not at all sure that the concept of "capable of enforcement" is within the arbitrator's purview unless the parties ask for an opinion on it. If there is a contract right at issue, that is what the arbitrator should decide, permitting the appropriate party to see about implementing an award. Unsolicited concern about what a party will do with an award in its favor appears to me to be further indication of the arbitrator's tendency to roam from confined pastures to the greener worlds beyond.

Mr. Howlett raised as an analogy (and answered negatively) the question: "Should an arbitrator enforce a contract which provides payment of wages below those established in the Fair Labor Standards Act, or, if possible, a state minimum wage law?"

I do not believe the arbitrator enforces contracts. His function is simply to determine contract rights. It is quite unlikely that a refusal to pay legal wages would go to arbitration, although there might well be arbitration of such related, practical questions as apprenticeships at less than regular minimum wages, wage-payment systems with seemingly less-than-minimum wages but allowable under the Fair Labor Standards Act, or wages below the cents-per-hour minimum where food and lodging are legally credited.

How often are arbitrators presented with cases which involve *unquestioned* violations of law? Such rare and unusual situations are cited to support the right of arbitrators to base their decisions on something other than the contract. However, the real issue we

face today is not whether we should award an illegal minimum wage, for example, but whether we should interpret an ambiguous statutory provision rather than apply a clear contract provision. Obviously, an ambiguous contract provision that can be illuminated by reference to a statute poses no problem at all for any arbitrator, I hope.

The frequency with which the courts overturn the Board—and batting-average percentages are not meaningful in this context—further highlights the danger of arbitrators' applying the Act in preference to the contract. If the Board's application of the Act is held at times to be improper, it is safe to assume that arbitrators would fare even worse. Contract rights therefore should not be subject to mutable interpretations and rulings of the Board, and to the vagaries of some courts.

Perhaps it is now an old-fashioned notion to believe that the arbitrator's function is to decide the limited question put before him in the light of the contract and no more. If he comports himself in this manner, the arbitrator may fail to solve many problems and alleviate many irritations which beset the parties. He will merely have done his job.

Granted that contracts can only be applied in the light of the law, and that arbitrators should not make awards which would require criminal acts, there still is no reason to base an award upon the putative meaning of an act or regulation subject to diverse interpretations. It also should be recognized that a regulation may be in the process of change at the very moment that an award based on it is issued. Therefore, parties should not be saddled for their contract term with awards which flatly ignore the contract.

Where the Act is involved, the Board cannot be ousted from its jurisdiction by the arbitrator or anyone else. It will often await the outcome of an award, however, when arbitration has been initiated. Mr. Ordman notes that "the Board will normally refrain from determining the unfair labor practice issue pending rendition of the award," and also states that the regional offices "will defer action on the charge pending the completion of the grievance-arbitration procedure if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest."

When the Board chooses to defer to arbitration, does it do so in the expectation that the arbitrator will apply the contract, or that he will ignore it and apply the Act as he construes it? I think perhaps the Board itself expects the arbitrator to look to the contract. Gallant as is the Board, it can hardly see the arbitrator as the appropriate agency to apply the Act. Why should it defer acting under its exclusive statutory powers if the only reason for delay is to give someone else time to apply the statute?

I doubt that the Board would generally impute competence to apply the Act to arbitrators. The Board good-humoredly watches arbitrators paddling about in the sometimes muddy waters of the Act but, in the end, it is the Board which does the meaningful applying of the Act. Whatever the arbitrators do, the Board will be the arbiter of the Act. Arbitrators ought to be the arbiters of the contract, confining as that role may sometimes be.

I think that *Spielberg* and the Board's overall respect for the arbitrator's role assume that the arbitrator will decide the contract issue under the contract. If the award then meets *Spielberg* standards, it will not be disturbed by the Board. This is quite different from expecting the arbitrator to abandon explicit contract obligations to become the interpreter of the Act.

Mr. Ordman's definition of the arbitrator emphasizes this fact. In distinguishing arbitration from the Board's function in the arena of "public rights," he states:

> An arbitrator, on the other hand, is the creature and servant of the parties selected to determine disputes arising under the system of private law found in the collective bargaining contract and in the practices and customs which illuminate the nature and extent of the promises and arrangements evidenced by that contract. He has a limited charter "in a system of self-government created by and confined to the parties." The arbitrator, therefore, determines private rights and private duties stemming from a private contract.

Sound labor relations will receive its best contribution from the arbitration profession if the arbitrator adjudicates the contract and allows those who have the statutory responsibility to administer the Act. The arbitrator's responsibility is to define the parties' rights under their contract. If he performs creditably that assignment alone, he may not solve all problems, but he will have done what those who selected him entrusted to his keeping.

Now I would like to turn the microphone over to Herbert Burstein of the law firm of Zelby & Burstein, of New York.

HERBERT BURSTEIN: After reading the *Acme Industrial Co.* and *C & C Plywood* cases and hearing Mr. Ordman's presentation, I began to wonder whether this visit was necessary. Indeed, the solution to the conflict of views about jurisdiction might well be to avoid both arbitration and Board proceedings. I must confess I am not enchanted with arbitrators, nor am I enamored of the Board. My 25 years' experience with the benevolence of the Board and the charity of arbitrators has made me a nervous labor lawyer.

It seems to me there can be no automatic deference to, nor insulation for, an arbitrator's award. An arbitrator who insists that he is a prisoner of a contract leaves lawyers who try arbitration cases exposed to multiple proceedings and to awards which are subject to judicial challenge for violation of specific statutory provisions or which offend public policy.

I am somewhat disturbed by the implication of Milton's statements. I am very fond of him and firmly believe in his right to be wrong, and I think he is exercising it.

I think his statements reflect somewhat on the competence of arbitrators. Why can't they read an agreement and at the same time incorporate in their award the accumulated knowledge of labor law?

It seems to me that an arbitrator can do both; he can look at the contract and apply to it the kind of sophisticated wisdom he acquired after years of experience and try to work within the framework of existing law.

A friend of mine was recently advised of the death of his mother-in-law. The undertaker asked him, "Shall we embalm or cremate?" He said, "Do both. Take no chances."

From the lawyer's point of view, what is needed is clarity, certainty, and stability in contract administration. I believe this can best be provided by arbitrators. But I submit that there is hardly a case—discharge, representation, or work assignment—that cannot be translated into an unfair labor practice proceeding. I suggest to you that there are few union members who do not know

all the tricks. They know the Act as well as the arbitrators. Within the last year or two I have come across no dispute involving a discharge where there wasn't an overtone of an 8 (a) (1), 8 (a) (3), or 8 (a) (5) violation.

I said before that I wasn't certain, from a labor lawyer's point of view, whether it was wise to pursue a case to arbitration. I prefer to exhaust the grievance procedure without reaching arbitration, because my own experience shows that—and I borrow a phrase from Will Rogers' definition of politics and paraphrase it—"arbitration is sometimes the art of looking for trouble, diagnosing it incorrectly, and applying the wrong remedy."

The guideline for arbitration, as suggested by Learned Hand's definition of law, is that it must be a formal expression of a tolerable accommodation of the common law of the plant, the Common Law, statutes, and decisional precedents construing those statutes. Arbitration is, in my judgment, more salutary than a Board proceeding, and arbitrators do not need the superintendence of the Board.

To begin with, the Board isn't the sole guardian of the public conscience. Corrupt awards, awards that are plainly in violation of the statute and public policy, can be corrected by the courts. Clearly, where a statutory provision, such as a closed-shop or hot-cargo clause, is incorporated into an agreement, the statute is violated by the agreement, and a court will act if the arbitrator does not. Indeed, the court must vacate the arbitrator's award because such a contract is, on its face, a nullity. The Board knows, where there is an agreement to arbitrate, that it is the job of the courts and not of the Board to correct such errors. The Board's assumption of this power is a giant step forward in the area of contract construction; it is an invader and not a resident.

The Board ought not to decide whether a dispute is arbitrable, because that is the function of an arbitrator. It ought not decide the merits of an arbitrable dispute or presume to interpret contracts or superintend their administration. The fact is that the Board does so, and it reaches beyond the outermost perimeter of its jurisdiction in some cases.

On the other hand, arbitrators must be sensitive to the Board's role and the statute. Contrary to Marx's pronouncement on the

state, administrative agencies just don't wither away. They grow larger and larger.

I suggest, therefore, a kind of judicial restraint, if not self-abnegation, where possible, in pre-award cases. In post-award cases, where jurisdiction is retained, then it ought to be primarily in the tradition, not of primary or concurrent jurisdiction, but of judicial review without importing the substantial evidence rule. Arbitrators have the right to be wrong, both for the wrong and right reasons. It is only when an award palpably offends against the statute that the Board should act, and, like conventional judicial review of administrative action, there is no need for a hearing *de novo*. If, upon review, the Board finds a violation of the statute, the proceedings should be remanded to the arbitrator. On the other hand, where the legality of the contract itself, rather than a dispute under the contract, is at issue, the proceedings belong exclusively before the Board. This ought to satisfy the injunction that one renders unto Caesar that which is Caesar's.

If I have to pursue one of the two remedies, I prefer arbitration and I support it.

CHAIRMAN FRIEDMAN: Our next speaker is an attorney who is very active in the practice of law in New York City on behalf of unions. He is Everett Lewis, of the law firm of Vladeck, Elias, Frankle, Vladeck & Lewis.

EVERETT LEWIS: I don't feel that I am appearing here today as a union spokesman because I think that both unions and management have a common interest in the institution of arbitration. I agree with much of what both Milton and Mr. Burstein have said to you, and I disagree with much of what Mr. Ordman and Mr. Howlett previously said to you. But I think, at the outset, that it might be worthwhile to try to put this problem we are dealing with today in perspective.

What we are concerned with is the arbitration of disputes where there is an NLRB remedy as well as a contractual remedy.

How many grievances, ordinary day-to-day grievances, fit that description? I woud say perhaps most of them do. Virtually every discharge case, particularly those involving union shop stewards and union officials, is potentially an 8 (a) (3) violation. Virtually

every grievance challenging something the company has done unilaterally is an 8 (a) (5) violation. Virtually every job-assignment grievance, every grievance where the union claims that nonunion bargaining-unit people are doing bargaining-unit work, is potentially a representation matter or a jurisdictional dispute coming within the cognizance of the NLRB. So I honestly believe that if you analyze grievances to determine whether there is a potential Board remedy involved, you will find that a majority of grievances as framed by the union would involve a potential Board remedy.

How many of these grievances, when they are decided against the grievant or against the union, find their way to the NLRB? The answer is that it is an insignificant number. Yet Mr. Ordman and Mr. Howlett would have arbitrators scrutinize each grievance to determine whether there is a potential NLRB question presented, and, upon finding there is potential NLRB jurisdiction, mechanically apply Board criteria to the facts before them. That is an outrage. That is a tail-wagging-the-dog proposition.

I may say in this regard that the marriage analogy—the suggestion that there is a marriage between arbitrators and the NLRB—is not apt at all. If anything, the marriage is between the parties to the collective agreement and the arbitrators. That is the marriage. That is the legitimate situation. The NLRB's true role is more closely analogous to that of a paramour, insistently making increasingly unreasonable demands upon the tragically susceptible arbitrator.

The position that I really argue for very vigorously is that in arbitrating disputes, where there is a Board remedy as well as the contractual remedy available, the arbitrator should act like an arbitrator. He should apply and interpret the contract. He should decline to become a servile adjunct to the Board. He should flatly refuse mechanically to apply Board criteria to matters presented to him.

How do I arrive at this? If I had even the slightest talent for flattery, or wished to express my appreciation to the Academy for its gracious invitation to come out here, I would use as a springboard for this position the *Steelworkers* trilogy because Justice Douglas did say all those very, very flattering things about arbitrators. But that is emphatically *not* the basis for my position. I

don't share Justice Douglas' mystical reverence for the arbitration profession. I don't think all arbitrators are philosophers, kings, or labor relations doctors. Far from it. Moreover, it is not my position that arbitrators have an expertise in this area of overlap that is superior to that of the Board. I think a very persuasive case to the contrary can be made.

Why, then, do I take the position that arbitrators should insist on retaining their paramount role to resolve contractual questions on the basis of the contract?

Simply because arbitrators are creatures of the parties. Arbitrators are assigned a unique contractual role under the collective bargaining agreement, which is to interpret and apply the contract to the disputes submitted to them. An arbitrator is obligated to act like an arbitrator and not like a glorified trial examiner.

Does that mean that in interpreting the contract an arbitrator should not pay any attention to statutes which may be pertinent to the matter before him? Obviously not. Certainly, the contract is not written outside the law, and the statutory law which impinges on the administration of the contract should be considered by the arbitrator. I think that anyone who takes the contrary position is living in an ivory tower and really doing a disservice to arbitration.

In that regard, in reviewing some of the arbitrations in which I have been involved, I found that arbitrators had been concerned with and had dealt with an incredible number of statutes and federal executive orders—for instance, the Federal Security Regulations which were issued pursuant to Executive Order. I recall the plethora of "Kennedy-Day-of-Mourning" grievances. I don't know if any of you were involved in such grievances, but when President Johnson declared the day of President Kennedy's funeral to be a day of mourning, a whole raft of grievances resulted, and the designated arbitrators generally took into account the fact that the day had been declared an official day of mourning.

I recall one case where separate and distinct statutes were cited. This case involved a big, healthy girl who bid on what had always been a male job. Obviously, there was a potential Title VII violation. There was also a state labor law limiting women in

handling certain heavy work. Finally, there was a Section 8 (b)1 question concerning the union's reluctance to process the grievance on her behalf.

Arbitrators have traditionally considered the statutory background of the matter before them and they should continue to do so, and where the National Labor Relations Act has application, when the Board's decisional authority is pertinent, they should consider that also. But in doing so, they should not attempt to place themselves in the position of the Board. They should remember what they are there to do; that they are arbitrating under a contract and their prime duty is to interpret the contract. Consideration of all these statutes, regulations, Executive Orders, and what-not is incidental to their obligation to interpret and administer and apply the contract.

Reference was made to the respective responsibilities of arbitrators and the NLRB in accretion and representation cases. Let us consider a hypothetical case—actually it is a real case, an arbitration case, in which I am presently involved. It presents very interesting problems as to the application of Board criteria, and what is or should be repugnant to the Board in an arbitration award. Here is the case:

There is an association contract. The association contract has been applied to this employer for 30 years. The association contract provides that all new plants in the metropolitan area established by any of the employers covered by the contract shall come under the contract. The contract also provides a legal hiring-hall arrangement, to which both members and nonmembers are to be given access, requiring the employer to apply first to the union when he has to hire new people. Then, if the union cannot furnish satisfactory people within 48 hours, the employer can go to the open market. This employer, who had been under contract with the union for 30 years, surreptitiously opened a new plant. The union found out about it some six months later, went to the employer and said, "Well, our contract applies." He said, "Oh, no. Do you have cards representing a majority of these people?" The union said, "No, we do not, but, of course, we would have if you had notified us at the outset and placed these people through the union hiring hall."

In that situation I am quite confident that an arbitrator is going to rule in the union's favor, and I think he should. The employer in that instance established a new plant, as I said, surreptitiously, and in disregard of his obligations under the contract. He also disregarded the hiring-hall provisions of the contract, and this made it more difficult for the union to represent a majority of those workers hired at the new plant. However, if the arbitrator were bound to apply the Board's accretion criteria, I am equally confident he would have to rule that the interest of the people employed at the new plant, in selecting their own representative, would be paramount to the union's interest under that contract.

Of course, if the arbitrator rules in favor of the union, it is very possible this matter will go to the Board. What should the Board do in such a case? I am convinced that, while it is rapidly crystalizing, the Board's approach is not yet fully formed. The NLRB is still subject to persuasion, and here is the legitimate role of labor practitioners and arbitrators.

What arbitrators should not do is permit themselves to look over their shoulders self-consciously while deciding a case of this sort because they are fearful that the Board might ultimately refuse to honor their awards and give them "hospitable acceptance." What I think arbitrators and labor practitioners alike should do is to attempt to convince the Board that it is not repugnant to the Board's policy to honor the contract obligations, despite the fact that in a particular case the Board's accretion criteria or other standards could not be met because of the employer's wrongful conduct in violation of the collective bargaining agreement.

But even this accretion case that I have cited to you could be complicated by changing the facts a little: Suppose the union had known all along that the employer was going to open this plant in the metropolitan area, but the employer had come to the union at the time he opened the plant and said, "Look, how about giving me a year to get this going before we cover it by the contract?" Given a relationship of 30 years, it is possible that the union might have been sympathetic to such a request. Then, after the union had let the new industrial plant linger on the vine for a year without union representation, it went out, demanded recognition, and maybe the employer was really prepared to give the union recogni-

tion at that point. Now they have no real difference to arbitrate. What I am referring to here is the consent award which in this instance might operate to deprive the workers in the new plant of their legitimate rights. So I am not saying that even my hypothetical case is so clear cut and simple a matter that reasonable men could not differ concerning its proper disposition.

And I can readily understand why Mr. Ordman would like arbitrators to apply Board criteria. It is one way of reducing the Board's caseload. I can understand that because part of Mr. Ordman's administrative responsibility is to control the regional offices and he is doing the job when he tries to reduce the Board's caseload without incurring any additional expense for the hiring of new trial examiners and so forth.

I can also understand why Mr. Howlett and other arbitrators might find the prospect of applying Board criteria rather seductive. You would have *stare decisis* entering into arbitration; you would have a body of criteria you could rely upon, and, of course, many arbitrators would like that. Being able to rely on the Board's standards, the arbitrator could shrug his shoulders and tell the losing party that he couldn't do anything for him, that he sympathized with him but was stuck; that the party had a good case under the contract, but Board criteria were controlling and he was therefore compelled to do what he did.

I think arbitrators have to stand up to their obligation to interpret the contract. I don't believe they should regard lightly the Board's attempt to encroach on this obligation, or to insinuate itself and its criteria into the arbitration process. I suggest, rather that arbitrators have the obligation to educate the Board to give more and greater hospitable acceptance to arbitration awards.

CHAIRMAN FRIEDMAN: Thank you, Everett. I wouldn't be a bit surprised if the General Counsel of the NLRB, Mr. Arnold Ordman, had something to say. Am I right?

ARNOLD ORDMAN: Not really. I am going to yield my time since I have already stated my views to the Academy earlier today.

Frankly, the only thing I might take exception to is the statement that the Board isn't always right.

I find the gentleman on my left is right, and the gentleman on my right is right, and the only gentleman I may disagree with is the Chairman.

CHAIRMAN FRIEDMAN: The floor is now yours. There is only one condition. When you take the floor, please give your name for the record.

LLOYD BAILER: I was intrigued by the remarks of the Chairman. It seems to me he contradicted his thesis because, although he is listed on the program as the Chairman, he became one of the principal speakers even though the theme of his speech was that arbitrators should confine themselves to a narrow jurisdiction, namely, that of the contract.

I agree wholeheartedly with Herbert Burstein's comment that an arbitrator should not live in an ivory tower. Today, the arbitrator has to concern himself with many statutes—not just the Labor Management Relations Act. He may have argued before him a case, for example, in which the union declares that an employer in the railroad industry violated the seniority rights of an employee because the employee after working the first shift was not held over for the second shift. But it so happens that the Interstate Commerce Commission has what is called an Hours of Service Act for a number of railway employees. It was enacted by Congress for safety reasons. The union argues only that the agreement was violated. And looking solely at the contract, the seniority provision was violated. But if an arbitrator ignores the Hours of Service Act, he is living in an ivory tower.

Or take the case of a bus driver in an over-the-road, long-distance transportation situation who must meet ICC regulations with respect to eyesight. I don't remember exactly what these regulations are although I used to know them. Nevertheless, in an examination the bus driver cannot pass the eyesight test. He is either dismissed or demoted, and the union files a grievance. The employer's defense is—and there is no dispute—that the employee no longer meets the ICC regulations with regard to eyesight. An arbitrator who ignores such a statute is, I believe, living in an ivory tower.

What Milton has said is that there are some posted cases, such as NLRB cases in which the Board itself is uncertain, and if the

arbitrator isn't certain what the decision of the agency is, then he should not apply an uncertain government regulation.

HERBERT BURSTEIN: I think Lloyd has, in a sense, capsulized what I was trying to say. Nor do I think I am in disagreement with my good friend Everett. I have some difficulty with the approach which says, "Let's look at the four corners of the contract alone." Maybe that is the way it should be; maybe that is the kind of legislation we should get. But that is not the way it is. I would be very much disturbed to have an award made in an arbitration case which might violate either the Fair Labor Standards Act, the Hours of Service Act, or the maritime laws applicable to seamen.

I suggest not primary or concurrent jurisdiction, using the concept of the *Western Railroad* case, but a limited judicial review. It doesn't have to be the exhaustive review which is a kind of *de novo* examination. If there is a rational basis for the conclusion reached, then the award should be sustained.

I think you would agree that no one is suggesting that an arbitrator should reverse *Peerless* or *Adams Dairy*. But, in any event, let me give you an example.

I represent employers who like unions. I have one who likes unions so much that he signs two contracts covering the same workers with two unions. This is the case, and, as a matter of fact, Steve Vladeck's firm is involved. The reason I asked him to come down here is so that he wouldn't start a strike.

We had a contract covering mechanics with Union A at a plant located in New York City. We acquired an operation in Brooklyn from a company which had a contract with Union B. In any event, Union A said, "Our contract covers all locations," and it did. Consequently, all the men who were working in Brooklyn had to join Union A, and most of them did so. However, while he was busily extending the unit, my employer, in an excess of good will, went down and signed a contract with Union B in Brooklyn. Then Union A said, "Fire these fellows; otherwise we'll strike you." We then threatened the dissident employees with discharge because they refused to join Union A. What is the remedy?

Well, the employer's house counsel decided to go to arbitration with Union A. Union A prevailed, and the employer was ordered

to discharge the dissidents. Unfortunately, Union B wasn't a party and threatened to strike. Here's a case where we have a perfectly fine arbitration award enforcible against the employer, but entirely impracticable because compliance will produce a strike. Moreover, we may be violating the NLRA.

Had this matter been called to the attention of the arbitrator, he could have dealt with the problem. Although there is no interpleader remedy, he couldn't close his eyes to what was a clear and explicit statutory problem. I merely suggest that competent arbitrators—and you are certainly one—are familiar with the body of labor law. I don't think you have to shut your eyes to the statute or Board precedents.

MR. EDELSTEIN: I would like to address myself to Mr. Ordman. You were the Trial Examiner in the *Adams Dairy Case,* were you not, sir?

ARNOLD ORDMAN: Yes.

MR. EDELSTEIN: In that case you proceeded on the theory of an 8 (b) violation. I would like to touch on the issue of an unilateral change under Section 8 (a) (5).

Isn't is true that under *C & C Plywood,* in conjunction with *Acme Industrial,* any unilateral change in the conditions of employment by the employer which could be the basis for a grievance under the contract might also be an 8 (a) (5) violation? And, based on your footnote in the *Adams Dairy* decision, isn't this really an 8 (a) (6) violation; that is, a violation of a provision that is not in the law and was rejected by the Congress when it was proposed? In other words, are you not proceeding on the theory that a violation of the contract is an unfair labor practice?

And one more point: Aren't you really promulgating this position in giving the union the freedom to go to the Board in any one of these cases by filing an 8 (a) (5) charge, whether there is an arbitration clause or not, as you point out in your paper? This, of course, in contrast to arbitration, costs the union nothing.

ARNOLD ORDMAN: Let me say that I believe there is a large area of agreement here. I think the question is really a matter of more precise definition.

The difference is that the arbitrator, quite properly, should use the law of the contract, the law of the shop, as his point of departure. There should not be any question about that. But I think all the speakers have agreed that where a statute, such as the Civil Rights Act or the National Labor Relations Act, sticks out like a sore thumb and makes it obvious that it is very heavily involved, you also pay some attention to that. The law of the contract is controlling, but the public law becomes relevant.

Our position is exactly the reverse, as illustrated in *Acme* and *C & C*. What we are interested in is the statutory violation, but sometimes the contract, as in *Acme* and *C & C*, enters into the problem. The contract question is ancillary to our basic jurisdiction, and we sometimes have to interpret the contract to find out what our principal function is—to determine whether there is a statutory violation. Although the principal function and important job of the arbitrator is determining whether there has been a contract violation, sometimes the ancillary problem is NLRA or some other statute.

You said something about a unilateral change. A unilateral change, broadly speaking, lends itself to an 8 (a) (5) charge, not because it is a change in the contract, but because the contract has set up terms and conditions of employment. If terms and conditions of employment have been changed, we look to see whether the contract permits this. The contract might permit it; the union may have agreed to permit certain changes in terms and conditions. Generally speaking, a change in terms and conditions of employment, if not agreed to by the parties by contract or otherwise, is an 8 (a) (5) violation. The parties may have agreed to let the employer make those changes, but we have to look at the situation.

MR. EDELSTEIN: But wouldn't this completely circumvent the arbitration procedure, because in most cases a charge would be filed which would be upheld by you as an 8 (a) (5) violation?

ARNOLD ORDMAN: Only if the arbitrator grossly erred within the meaning of the *Spielberg* criteria.

MR. EDELSTEIN: Would the employer have to bargain about this, and how long would he have to bargain about it? Suppose he bargained but did not reach agreement?

ARNOLD ORDMAN: This is a grievance filed by the union that the employer violated the contract by unilaterally changing terms and conditions of employment. Let me change the facts of *C & C Plywood.* In that case the union said the company gave individual increases, and the contract provided for such increases. If that contract had provided for group increases, I think the Board, if the contract were plain, would have said this was a change in the terms and conditions of employment, but the parties agreed to it in their contract. No violation. If the arbitrator had that case in the first instance, and an 8 (a) (5) charge were filed with us, I would wait for the arbitrator's decision. The arbitrator interprets the contract. He might or might not say, in that case, that there was a violation. Let us say that he rules there was no violation, that the contract permitted the change. I get the charge. I read the terms of the contract and say that the contract permits this change in terms and conditions of employment, that it has been agreed upon, and that it is not subject to new bargaining. The case is dismissed.

HERBERT BURSTEIN: Isn't it true that before the United States Supreme Court the Board took the position that there was no clause by which the union had waived what you call the statutory rights under 8 (a) (5)? Wasn't this the real issue?

I want to reframe your question. I don't believe that every time a charge is filed it results in a complaint, but must the Board await an arbitrator's determination of the relevance of the requested information before it can enforce the union's statutory rights under 8 (a) (5)?

What appears to have happened in this pre-award situation—there was no arbitration, the employer refused it—is that the Board made an initial determination that a given clause did not constitute a waiver of the union's right; that is, instead of granting individual premium wage adjustments, there was a wage adjustment for a certain crew. Now, isn't that really the essence of the *Plywood* case? It says, in effect, that the Board does not construe collective bargaining agreements but does take a look at language and decide whether the action of the employer was within or without the scope or ambit of the language. Isn't that what the Congress did not intend the Board to do when Congress refused to adopt a position

on it? Isn't it an accretion to the Board's jurisdiction by which you supplant the arbitrator? And don't you open the door to every dispute case whether it is accretion, representation, or a potential 10 (k) situation?

In an ordinary dispute case the Board may in the course of its investigation undertake to construe a collective bargaining agreement. My objection is not to the arbitrator's obligation to examine the statute. My objection is to the Board's making collective bargaining agreements—simply that—and replacing the collective bargaining process. That is what I think these cases stand for.

ARNOLD ORDMAN: I think, again, if you will let me revert to my point of departure, it is settled law, always has been, that a unilateral change in terms and conditions of employment is an unfair labor practice. That is what was alleged in the *Plywood* case. The defense was that this was not a unilateral change in the terms and conditions of employment, because it was pursuant to an agreement of the parties, and they cited a contract clause which permitted premium-pay increases.

We start with a prima facie case involving a unilateral change in terms and conditions of employment. The defense was that, because the parties' agreement permitted it, this was not a statutory violation. For the purpose of determining the statutory violation, we decided the contract clause was not a defense, that it didn't cover this particular unilateral change, that even though it would have covered an individual change, it did not cover the group adjustment.

Let me remind you again of the safety valve you talk about. The court can and in this case did review the Board's contract interpretation. The court could have disagreed with it.

HERBERT BURSTEIN: You started with the conclusion, you say, that any unilateral change in terms and conditions of employment, in the absence of express contractual language, is a violation of the National Labor Relations Act. Of course, it is axiomatic; it is self-evident. In the *Acme* case, as I recall the opinion, there was a zipper clause—a clause that buttoned down everything, and said that, whether or not you had discussed the matter during the course

of collective bargaining, no matter could be the subject of further negotiation.

The arbitrator might have served this useful function; the history of the collective bargaining process itself would have been useful in determining whether or not the language reflected precisely the intention of the parties. On its face, when it was said that nothing further could be discussed or negotiated, an issue was raised which is the typical grist for the mill of the arbitrator. What the Board did was to walk in and say, "I am going to examine this agreement," and then, "I find the clause itself doesn't constitute a waiver of the statutory rights." You have now arbitrated that agreement. You have reached the merits of the dispute. That is precisely what was done. That is not the function of the Board.

JOSEPH GROSSMAN: It seems to me that the discussion with respect to the supervision of arbitration awards by the court and the function of arbitrators with respect to the NLRB has been too general to be meaningful. That is because the questions have been posed in too general a fashion. I think, for example, that the question of what the Board wants to do with respect to arbitration awards is a very different question from what an arbitrator ought to do with a statutory problem.

Even if we accept the *Spielberg* doctrine and assume that the Board, when confronted with a charge, must inquire into the arbitrator's award to determine whether it is repugnant to the policies of the Act, I question whether it necessarily follows that an arbitrator, faced with a statutory issue, ought to decide it, or that he ought to apply statutory criteria in deciding issues that arise under the contract. For example, take a situation in which the union and the employer are parties to a contract containing restrictions on subcontracting which are arguable 8 (e) violations. If I represented one of the parties to that contract, I would urge upon the arbitrator the position that he ought not to determine whether that clause is valid under the Act, unless perhaps its invalidity is clear beyond dispute. His job is to interpret that clause, and for the very reason which you, Mr. Chairman, suggested at the outset of this discussion. That is, if he determines that the clause is invalid, and therefore denies the moving party's grievance, there is nowhere for the moving party to go. If the arbitrator is wrong on that, the moving party is through.

HERBERT BURSTEIN: No, he is not. You have a remedy. If you have an award that is palpably in violation of the Act, you have a remedy in the courts.

JOSEPH GROSSMAN: I am a union representative. I claim the employer is in violation of the subcontracting clause. The employer says, "Maybe I am; maybe I am not." But he is in violation of 8 (e). I, representing the union, urge upon the arbitrator that he should interpret the contract and leave the interpretation of Section 8 (e) to the Board. If the arbitrator ignores my argument and decides that the clause is in violation of Section 8 (e), and denies my grievance on that ground, I have nowhere to go. I can't go to the courts, presumably, or if I can, I have a very difficult argument.

If the arbitrator decides that the clause is valid and grants the union's grievance, then obviously the Board can still get the case. Either the employer or the neutral party who is injured as a result of the award can file a charge with the Board, and the Board will decide whether the arbitrator was right.

If the arbitrator decides in favor of the employer but not on the ground that the contract favors the employer, I doubt whether the union can go into court.

Clearly, neither party could go to the Board with that situation, because there is no violation of the Act, and I cannot see how the union could get such a case into court.

HERBERT BURSTEIN: I don't represent unions, but I will be happy to take the case.

JOSEPH GROSSMAN: That is comment No. 1. Comment No. 2: It seems to me, with respect to the function of the arbitrator in applying the contract, that the various fact situations that have been adverted to during the discussion are so different in nature that they aren't really in the same ball park. What is required is some analysis of the very different policies involved in a case where the arbitrator considers whether a discharge should be sustained in a situation, indicated by Mr. Ordman, in which the employer had one reason for a discharge and the employee contends the discharge was because of union activity; and in a situation where scope of unit or accretion is involved; and in a situation where the question is the validity of the contract language itself. To lump

all these together and talk about the functions of an arbitrator, or the functions of the Board, is wrong.

MR. HARRIS: I think there is too much generalization. I think the situation Mr. Grossman posed is also overgeneralized. Take a situation where the union is demanding work under the union-recognition clause in the contract. It happens that another union demands the same work. The union prosecutes a grievance under the contract.

Here there are two problems. First, the employer defends his action on the ground that the contract is violative of Section 8(a) (3) and, therefore, the provision is null and void. There is a question whether the arbitrator can grant any remedy. Second, the arbitrator won't have before him the most interested party in the matter if the case goes to arbitration. Assume the employer has, at the stage of the grievance procedure before arbitration, filed an 8 (e) charge with the Board. Shouldn't the arbitrator, if the case goes to arbitration, exercise a sort of reverse *Spielberg* doctrine on his own and grant a request by the employer, or perhaps the other union, to defer a decision until the Board has had an opportunity to rule on the basic issue involved, namely, whether or not the contract clause, as applied, or as the union seeks to have the arbitrator apply it, is violative of 8 (e)?

CHAIRMAN FRIEDMAN: It is sometimes hard for people in ivory towers to get down to brass tacks. Suppose you couldn't rely on someone up in the ivory tower and went to court and asked the court to stay the arbitration in view of all the circumstances you described? Do you have any idea what the court might say?

MR. HARRIS: I think a substantial argument can be made that the Board has, at least, primary jurisdiction in this area to decide the basic question, and the court itself should stay arbitration.

CHAIRMAN FRIEDMAN: That would solve the problem.

MR. HARRIS: Assume it doesn't arise that way. What if the parties come in and ask the arbitrator to defer?

CHAIRMAN FRIEDMAN: My offhand reaction is that the arbitrator should fulfill his office under the contract. His office is to apply and interpret the contract between the parties.

MR. HARRIS: If the federal statute says that clause is null and void?

CHAIRMAN FRIEDMAN: If something is null and void—and this was not discussed too much today—no matter what an arbitrator does to the contrary, it is not enforceable.

MR. HARRIS: Should he rule on the merits of the clause, or decide whether the union is entitled to the work, apart from the legality of the clause?

CHAIRMAN FRIEDMAN: As a general matter, I don't think the arbitrator should rule on the legality of the clause. He is confined to the contract. That is the only thing that gives him jurisdiction. If the clause is illegal, if it is a contract that allows a crime to be committed, there are safeguards. I don't think the safeguards are supposed to emanate from the arbitrator.

MR. HARRIS: If you decide that the union should get the work, what interest are you fostering in that direction?

CHAIRMAN FRIEDMAN: There are many ills not only in the world, but in labor relations, which will not be cured by the arbitrator. In fact, there may be ills that are not cured by the Board. I would say, further, there are many ills that are not cured by lawyers. That is sacrilegious, I know, but I think the arbitrator has a limited function, and that is to apply and interpret the contract, period.

Just to make it very clear, take a contract which has an out-and-out seniority clause simply saying that the most senior person shall get the job, and a man without a license bids for a driver's job. Although he may have seniority, the grievance will be denied. There is no arbitrator in the country who doesn't read into a collective bargaining agreement the implicit requirement that no one will be assigned a position that he cannot perform. In other words, even though you have a simple seniority clause, no arbitrator will say, "I will give this man who doesn't have a driver's license a truck driver's job."

MR. HARRIS: That case is different because the statute you must interpret really forms the basis of your determination. In a certain sense, the statute is integrated in the contract. Therefore, that situation is not similar to the one I suggested.

A REPRESENTATIVE OF THE MACHINISTS' UNION: I want to try to get some legal advice today. I am not going to pose a question to any individual on the panel. I know I will probably be as confused when I am through as when I walked in.

We have a problem in the San Diego area. It is not a new problem; it has been around for a few years. We are involved with an employment agency which refers skilled trades people to various other agencies. They then send the people into plants where we have labor agreements. The employers take the position that they are subcontracting the work.

There isn't any doubt that the work the people going into the plant are doing—for example, that of tool and diemaker—is skilled trades work. The work is very specifically spelled out in the recognition clause as belonging to the Machinists' Union. To complicate the question further, we have union-shop agreements in the San Diego area, whereby any employee working in a unit, doing unit work, must join the union as a condition of employment.

The question is: Do we go to the courts? Do we go to the Board? Or do we arbitrate this kind of issue? I am now ready to accept any free legal advice I can get from the panel.

CHAIRMAN FRIEDMAN: Would you like advice from a management lawyer or a union lawyer?

EVERETT LEWIS: We represent a few machinsts: It is not the most uncommon arbitration around. It is one of the easiest subcontracting grievances to win, really. Where the work of the subcontractor is being performed in the same place where the employees covered by the contract formerly performed that work, unions generally contend that it is a violation of the recognition clause and the likelihood of a violation in the situation you describe are very good. There are quite a few awards dealing with that subject.

HERBERT BURSTEIN: I wish I had a couple of clients out in San Diego who could get away with this. One could make a real bundle out there. That is the easiest case I ever heard of. You may have a clause in your contract which prohibits arbitration and permits them to do that.

RODY P. BIGGERT [Attorney, Chicago, Illinois]: I have a question for Mr. Ordman. In line with the discussion today, and based upon

the Supreme Court's recent rulings, if the Board is going to interpret contracts as an edge to its remedy in 8 (a) (5) cases, where will it get the expertise to do this, which according to the Supreme Court in the trilogy cases only arbitrators are supposed to have?

I might ask this question in terms of an incentive dispute. These cases are often more complicated than any other grievances, and some arbitrators are experts in this area. Where, in this situation, will the Board acquire the necessary knowledge and expertise to resolve the issue?

ARNOLD ORDMAN: I am looking to the language of the Supreme Court to answer both the question of the management representative and part of the question you raised. We should be clear about what the Board does on a contract issue. I think Justice Stewart covered it very explicitly in the *C & C Plywood* case. He said:

> . . . in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer.
>
> [The Board] has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus the Board, in necessarily construing a labor agreement, has not exceeded the jurisdiction laid out for it by Congress.

HERBERT BURSTEIN: There is a footnote there.

ARNOLD ORDMAN: The footnote preceded that—when the Court talked about the Congress withholding from the Board generalized power to determine the rights of parties under all collective agreements. The footnote comes just before that:

> Congress was also concerned with the possibility of conflicting decisions that would result from placing all questions of contract interpretation before both the Board and the Courts.

And if there had been an arbitration agreement here, I believe the Court would have added that. As Mr. Justice Stewart said, "The courts have no jurisdiction to enforce a union's statutory rights under Section 8 (a) (5) and (1)."

HERBERT BURSTEIN: That is in the *C & C* case. I sometimes find the footnotes more exciting than the text. Speaking of *Acme,* it says, "To substitute a pay plan was a determination on the merits."

ARNOLD ORDMAN: There is no question about that. The Board had to make a determination on the merits to see if there was a violation of the statute. In other words, had the union forfeited its right?

RODY P. BIGGERT: Isn't that the same as saying breach of contract? A union contract is a bilateral contract, and I think it is illegal to make a unilateral change in a bilateral contract.

ARNOLD ORDMAN: Where the terms and conditions of employment are covered by the contract, the change in the terms and conditions of employment will be both a unilateral change and a breach of contract. We frequently have situations where there is a bargaining representative and no contract, such as an interregnum, when unilateral changes wouldn't be a breach of contract to breach.

EVERETT LEWIS: I want to address myself to the problem of *C & C Plywood* and *Acme.* Nothing very startling happened when the Supreme Court came down with these decisions. The Board has been doing for years and years, 15 at least, exactly what the Supreme Court accurately described. In order to decide whether an unfair labor practice has been committed, the Board very frequently interprets the contract. There is nothing very surprising about that. That is point number one. So why get exercised about *Acme* and *C & C Plywood?* They haven't changed anything.

In the second place, you are too worried about these unilateral changes resulting in unfair labor practices. If *C & C Plywood* had had the decency, the politeness, to discuss this matter with the union, there wouldn't have been any charge. Perhaps one of the lessons management can get out of this is to be a little more polite and discuss proposed changes with the union. When you know about something in advance, you bargain about it. It doesn't mean you can't do it. It just means you have to be civilized.

Someone suggested that these two cases will result in unions filing charges every time there is a unilateral action by management that may be susceptible of being construed as an 8 (a) (5)

charge. The answer to that is obvious. No union official in his right mind wants to wait around three years to get a determination on such an issue. Arbitration provides a much more expeditious means of getting an adjudication as to whether a company had a right to change a shift starting time from 8 to 8:30 o'clock. No union official that I know is going to file a charge and wait for the two and a half or three years, or whatever it is in time, that will be consumed in processing those charges through enforcement. What you are concerned about, therefore, is just theatrical rather than practical.

MR. GELLER: I have a comment on that. I think the two cases did change the law to some extent. In the courtroom a residual right doesn't exist any more.

Next, I would like to ask a question of Mr. Ordman: If the contract is silent on a particular matter and the company goes to the union and says, "We want to do thus and so," and bargains with it but no agreement is reached, and the company then institutes this change during the contract term, would that be an 8 (a) (5) violation?

ARNOLD ORDMAN: There is always difficulty with hypothetical cases. Take an existing term or condition on which the contract is silent and which the employer wishes to change. There is no indication that the parties have reached any agreement on this matter either inside or outside the contract. The employer makes a proposal and they bargain to an impasse. Again, I have to say I would want to know all the facts, but on the facts I have given you the employer, yes, can make the change.

DAVID SELLERS: Is there any difference in these two cases in the Board's authority to construe the contract? That is the first question. And the second, in regard to the hypothetical case, about the bargaining on the unregulated term, is there a decision on that?

ARNOLD ORDMAN: Yes. *Mastro Plastics* was decided by the Court and the *Jacobs Manufacturing Co.* case covers the point Mr. Geller made that we have been taking about.

LLOYD BAILER: I would like to ask the Chairman a question. I know of no pending case before an arbitrator that covers this matter. About 23 years ago the Federal Aviation Agency issued a regu-

lation that no flight crew personnel may be employed in flight activities beyond the age of sixty. The Air Line Pilots, and perhaps the Flight Engineers, protested that clause to the Federal Aviation Agency, which denied the protest. The matter was tested in the courts, and the FAA was upheld. The airline in question—and this is not a hypothetical case—has continued its policy, unilaterally developed, requiring retirement of such personnel at age 60. A grievance is filed and comes before the arbitrator. What would your ruling be? What would you do? Would you confine yourself to the language of the contract which incorporates by reference a retirement program calling for retirement at 65, or would you give weight to the FAA regulation, supported by a court decision, which is the employer's defense?

CHAIRMAN FRIEDMAN: I have to take 10 seconds to answer that. As I understand your case, I think it might be found that that airline pilot had a disability because he had reached age 60, as though he didn't have the strength to crawl on all fours to the airplane. That takes us back to what I said before: An arbitrator will not award a position to someone who does not have the capacity to fill it.

LLOYD BAILER: My question stated that the airline pilot was in good health.

CHAIRMAN FRIEDMAN: The definition of good health in this case has to include the chronological age he has reached. If he has a disability, a disability on the basis of the Supreme Court's ruling, I don't see how you can save him.

By the way, so there can be no misunderstanding, this spur-of-the-moment ruling may be right or it may be wrong, but it would be a ruling based on the contract.

JOSEPH GROSSMAN: Suppose the express terms of the contract were contrary to the statute or administrative regulation?

CHAIRMAN FRIEDMAN: They were in this case, I understand.

LLOYD BAILER: In my case the administrative regulation prohibits the airline from employing flight personnel over 60. But the contract has no age.

ISRAEL BEN SCHEIBER: Milton, I think I mentioned earlier today that we tend too often to take for granted the good things that come our way. Today we have been treated to a feast of knowledge, well spiced with wit, for which I think we should express our thanks.

CHAIRMAN FRIEDMAN: Thank you.

The session is adjourned.

## WORKSHOP B*

ALEX ELSON, CHAIRMAN
BERNARD CUSHMAN, CO-CHAIRMAN
SHERMAN CARMELL
WILLIS S. RYZA

CHAIRMAN ALEX ELSON: Fellow members and guests, this is a workshop, and the primary purpose of it is to get a good discussion going, with those present taking an active role. Because of the short time we have available, I am going to dispense with the introductions that this distinguished panel should have.

We have heard three excellent papers bearing on the subject of the relationship of arbitration to courts and to the National Labor Relations Board. These papers set forth the points of view of the National Labor Relations Board and of arbitrators. For that reason, I thought we should start off by having the parties express their opinions. We don't have any particular order here, but, since most arbitrations begin with the union representative, I am going to ask the union representative to proceed.

We have with us Sherman Carmell of the firm of Carmell and Charone, one of the leading labor law firms in Chicago representing labor unions. Mr. Carmell is held in very high esteem by his fellow practitioners, as is evidenced by the fact that he is the Chairman of the Labor Law Committee of the Chicago Bar Association. It's a great pleasure to have him here.

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* Alex Elson, Member, National Academy of Arbitrators, Chicago, Ill., served as Chairman of Workshop B. Other panel members were: Bernard Cushman, Special Assistant to the General Counsel, National Labor Relations Board, Washington, D.C., Co-Chairman; Sherman Carmell, Attorney, Carmell & Charone, Chicago, representing labor; and Willis S. Ryza, Attorney, Pope, Ballard, Uriell, Kennedy, Shepard & Fowle, Chicago, representing management.