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.

SHERMAN CARMELL: Thank you very much, Alex. After two days of theoretical papers, I would like to preface my statement by saying that I am speaking entirely as an advocate. I hope to explain to you my position as a labor advocate with regard to the arbitrator, the courts, and the Board. Suffice it to say I speak only for those I represent, the labor unions.

First of all, our purpose is not to discuss whether there should be a multiplicity of litigation; that is, whether a union or a dischargee should have two or three bites at the apple. The fact is that it does. Whether there should be an amendment to Section 10 (a) of the National Labor Relations Act, as proposed by some people, is an academic question. The proposed amendment would allow an election of remedies or require an election of remedies. In this respect I commend to your attention brother Morris Myer's recent article in the *Labor Law Journal* in which he espouses that theory. It is lovely, but it is theoretical at the present time. I think we must accept the unquestioned supremacy of the Board. The Board would not cede jurisdiction to arbitrators or to anyone else even if it were empowered to do so. It won't do so perhaps because it can't, perhaps because this would not be in the public interest, but basically because of that wonderful progression known as the bureaucratic law—what you get you do not give away under any circumstances. Accepting that proposition, I want to say that as a labor advocate I would not want to see the Board relinquish any of its jurisdiction, but I say so for the following reasons.

I subscribe wholeheartedly to Bob Howlett's position as to the duty of a labor arbitrator. One of the major attractions of arbitration to a union is the supposed avoidance of the technicalities and delay that are involved in a court of law. This applies very well in 95 percent of grievance cases, the run-of-the-mill discharge, the run-of-the-mill reprimand, the run-of-the-mill case. You can get your arbitrator selected, get your hearing, and get your decision in 60 to 90 days depending upon the proclivities of the parties. Ninety-five percent of the cases do not involve a union security discharge, or as we refer to them the 8 (a) (3) case, or the refusal-to-bargain case, the 8 (a) (5) case.

At the present time I find the arbitration process entirely ill-suited to the 8 (a) (3) and 8 (a) (5) cases. I find it ill-suited because

the arbitrator refuses to come to grips with the statutory issues. As long as he refuses to take the statute into account, he refuses, in effect, to end a case. And if he refuses to end the case, why should we rely on him? What the arbitrator asks of us as union counsel is to go through a futile exercise. To take a unilateral work change or a seniority placement case which has 8 (a) (3) or 8 (a) (5) overtones to an arbitrator who will not decide the case is absolutely absurd; and to expect intelligent people to do that is likewise absurd, particularly when we know we can get both bites of the apple. If you want us to file our grievance, we will, but we don't file it necessarily because we want you to decide. We file it because we have two time limitations and we don't want to lose one of our opportunities. The time limitations are generally five days or ten days in the contracts and six months before the Board, so we generally file these together. We will take our choices and we will take our chances.

Another reason why the arbitration process is ill-suited to these cases is in the area of expertise. As a union attorney, I feel that most arbitrators do not have a feeling for the problem of the union as the bargaining representative of the employees. By that I mean that the arbitrator will not look at the political problems which are not in the case itself but which are always in the background and affect the status of the bargaining representative. This is why a discharge case lost by a union is not too significant whereas one won by the union is extremely significant; the union has given the company its lumps when it wins the case, whereas when it loses the case the arbitrator "done hooked us."

There will be a lot more discharges, there will be a lot more reprimands, and if we lose a case, we will even it up somewhere along the line. But the heart of the union lies in its status. Officers must maintain status in the eyes of their members, and the most important aspect affecting status is the unilateral change, or what the union considers to be a unilateral change, in working conditions.

In a recent case, for example, an employer changed the labor grade of a job while arbitration was pending. The union took the position that it would go to the Board with the question of this change. Although we could have gone to the arbitrator, the arbi-

trator under his decisions as we read them would have given us a very sterile residual-rights interpretation of the agreement. He would have said, "You have a very strong management rights clause. Show me in the contract where the company cannot do this." We assumed, therefore, that the arbitrator would hold that the company was allowed to act as it did. We went to the Board also because we needed a quick remedy. We needed a quick remedy in the sense of a political remedy to show that the employer could not get away with this while this long, involved arbitration case was pending. The region issued a complaint saying that the employer under these facts, after having agreed to arbitration, could not downgrade the status of the union in the eyes of its members by making unilateral changes in job conditions.

The issuance of a complaint was a significant victory for the union. We now have a subdivided case; the Board has the question of the unilateral change, and the arbitrator has the question of the ultimate placement. It's somewhat absurd that we should be running across the street constantly with the same case, but this is the fact of life as it stands. If *Spielberg*—and I only parrot Bob Howlett here—has any significance at all, it has significance in the plea of the Board for the arbitrator to take the case and decide it. If arbitrators wish to decide only easy cases, then that is all they will get. And the arbitrator with guts will be the one who will have the business. We read the decisions of arbitrators, and we know those who will tell us that they will not look at the statutory language. If you won't do it, we don't want you; and we are not going to choose you. I can accept an arbitrator only if I know he will reach the heart of the collective bargaining agreement. The heart of the collective bargaining agreement is made up of the National Labor Relations Act because it was negotiated under the principles of the Act. Arbitrators are doing a disservice to their profession, in my opinion as an advocate, by constantly failing to come to grips with statutory issues.

Collective bargaining agreements are negotiated with the idea that 8 (a) (5) is there, that 8 (a) (3) is there. Since we are aware of *C & C Plywood,* we do not put everything on the table for negotiation. When we come to the table, we know the cases that give the employees or the union its 8 (a) (5) rights, so why put them in the contract? If the arbitrator will follow the *Spielberg* doctrine

to the letter, it will: *one,* induce the parties to use arbitration more often than not; and, *two,* induce industrial stability. Otherwise, as in the Teamster contracts, we are going more and more to a joint grievance board for contract interpretation. If we can't come to agreement, then we will strike.

And, finally, as an advocate, I believe that you will be performing the service for which you are engaged, and that service is to provide a single and complete remedy for a dispute and to put an end to it as quickly and as thoroughly as possible.

CHAIRMAN ELSON: Thank you, Sherm, for confronting so directly and candidly the issue we have before us today. Our management representative is Willis S. Ryza. He is a member of the firm of Pope, Ballard, Uriell, Kennedy, Shepard & Fowle, one of the leading law firms of Chicago representing management.

Mr. Ryza has the additional advantage of having been on the staff of the NLRB and brings to this discussion both that background and his long background as a management advocate.

WILLIS RYZA: I think Sherm and I can agree on one thing—we are both advocates—and that is that if it were in my client's interest to get two bites at the apple, I would certainly argue for that system. If I could get three, I would want that, too. In cases of this kind, however, both in arbitration and before the NLRB, the union loses nothing. It has every reason to seek relief simultaneously before an arbitrator and the NLRB. And if the union is successful in either forum, who is going to pay the bill? Only the employer.

We have heard a lot about sterile application of contracts and of the law, and here I begin to differ with Sherman. I believe that anyone who is involved in this field has to consider the background, theory, and historical development of collective bargaining. He should also understand the practical nature of the collective bargaining process. Accordingly, if arbitration is to serve a useful function in industrial relations the decisions of the past cannot be ignored.

In any event, I am sure that few of you will be surprised to hear that many management representatives are seriously concerned with the trend of recent NLRB decisions involving the

interrelationship of the Labor Act and arbitration. Unfortunately, this concern will not be diminished by the views which were expressed today by General Counsel Ordman or by Mr. Howlett.

As I understand Mr. Howlett's paper, his position is that an arbitrator has a responsibility and a duty to give controlling weight to Board decisions and that an arbitrator has an overriding obligation to shape his award so that it will withstand the scrutiny of the Board.

Mr. Ordman, on the other hand, has made it extremely clear that the Board's discretionary power to defer to arbitration will not be exercised affirmatively unless the Board, and its General Counsel, can reasonably anticipate that the arbitrator will accept the rulings of the NLRB without question.

I am certainly willing to concede that the possibility of conflicting decisions would be diminished if these views were followed. Indeed, under these circumstances, the friendly accommodation might become a reality and the "happy marriage" might even be consummated. Most management attorneys, however, would probably view it as a shotgun wedding. As an advocate of management's interests, I think the price for such an accommodation is much too high.

To management, collective bargaining is a unique arrangement which is supposed to leave the parties with the authority to decide what they want to put into their contracts and to decide and control effectively how their contracts are to be interpreted and applied. Within this framework the Labor Board, as management views it, has several limited, albeit important, responsibilities. The Board should, of course, establish an election procedure through which employees, free of coercion, can exercise a choice as to whether they do or do not desire collective representation. And in this context I am not talking about the *Bernel Foam* doctrine which substitutes an administrative edict for the ballot box.

Normally, the Board's election procedures and decisions have little to do with the problems which usually come before an arbitrator. The election, after all, is conducted only to determine whether any collective bargaining is to take place. The Board's election-case decisions, therefore, seldom regulate or control an

arbitrator's authority to interpret or to apply a negotiated contract in a given way.

If the employees do choose a collective bargaining agent, then the Board also has a responsibility to exercise its authority in those cases where either party refuses to bargain in good faith while attempting to *negotiate* an agreement. I underline the word "negotiate" for there is a basic difference in requiring the parties to bargain in good faith and in dictating to them how a negotiated contract is to be interpreted and applied.

Additionally, the Board should, in my judgment, invoke its remedial powers whenever management or labor intimidates, coerces, or discriminates against an employee who chooses to exercise his rights, either in favor of or in opposition to collective representation.

This is obviously an oversimplification of the Board's responsibilities and functions, but it was nevertheless a generally accepted rule before 1960 that the Board had little, if any, business dictating to either party what the terms of a contract should be or how a contract was to be interpreted or administered. Within this framework, arbitration became the most commonly accepted method for settling contractual disputes, and the Board, as a matter of policy, refused to interpret contracts.

As long as arbitrators and the NLRB observed and recognized these mutually exclusive areas of concern, the arbitration system worked quite well and we achieved the accommodation of which we hear so much. Under such a division of responsibilities the occasional overlapping of authority between the Board and an arbitrator did not, in my judgment, pose a serious threat to collective bargaining, and it did not place in issue the future usefulness of arbitration.

In the past, the Board did, of course, entertain some discharge cases which were also subject to arbitration, and in some of these cases conflicting decisions were issued. But normally a decision of the NLRB in a discharge case does not establish a rule of contractual interpretation which an arbitrator is required to follow, as a matter of law, in future cases. Thus, whether one is considering "just cause" within the framework of a contract or "discrimina-

tion" within the meaning of the Act, the decision seldom turns on the application of a given rule of contract construction. To this extent the conflicting decisions in discharge cases did not materially impair the collective bargaining process.

The same was true of the Board's unit-determination, accretion, and jurisdictional-dispute decisions. In cases of these kinds, the Board's decision will seldom involve the application or interpretation of the substantive provisions of the contract. These cases concern themselves with the initial organizational question of who will or will not represent given employees and whether a contract does or does not cover given work. The resolution of such questions does not concern itself with the matter of how the substantive provisions of the contract are to be applied.

So up to this point—and as to this type of case—I have very little argument with the Board's assertion of its jurisdiction. But even in such cases I believe that excellent reasons could be advanced to support the position that the Board should always defer to arbitration whenever a final and binding arbitration clause is available. I further suggest that this rule of deference should be followed whether or not the union chooses to invoke the arbitration clause. In this sense, it should be remembered that collective bargaining is based on the establishment of a collective relationship under which individual rights are presumably preempted by the "collective good." If the collective-relationship concept is to be respected, the union's decision not to advance a case to arbitration should be respected. Instead, under the current Board decisions, the concept of collective representation is quite often ignored on the ground that the individual's rights under the contract are paramount. It seems to me to make better sense for the Board to follow a rule under which it will consistently defer to arbitration unless it can be shown either that the parties to the contract are engaged in fraud or collusion to deprive an employee of a statutory or a contract right or that a specific controlling provision of the contract is clearly illegal and repugnant to the purposes of the Act.

In my judgment, however, management's main concern is not based on the type of case which I have mentioned. We are seriously concerned instead about some of the recent rulings of the

Board under which the Board is demanding the acceptance of given rules of contract construction as the price of deferring to arbitration.

These demands have been enunciated under Board decisions dealing with the interpretation of the employer's bargaining duty under Section 8 (a) (5) and Section 8 (d) of the Act. In the last three or four years the Board has completely ignored its earlier decisions which held that it was not the proper function of the Board to adjudicate contract disputes. For example, the Board in *United Telephone Company of the West* made it extremely clear that the Board would not entertain a contractual question even if an interpretation of the contract was necessary to determine whether an unfair labor practice had been committed.

Times have certainly changed, because today the Board is knee-deep in cases involving contractual interpretations. To a large extent this has come about as a result of the Board rulings which hold that management cannot change any condition of employment unilaterally unless the authority to do so is specifically contained in the contract.

These rulings if followed by arbitrators would, in effect, write into every contract, as a matter of law, the most stringent past-practices clause—which even the Steelworkers would like to get into their contracts—and would require arbitrators to reject the residual-rights theory of managerial authority in deciding any grievance.

I am sure that some of you may be thinking that as an advocate for management, I must be overstating the case. If so, I suggest that you carefully ponder the remarks of Mr. Ordman, which appear in his paper on pages 64 and 66.

Neither do I take any comfort from the Board's usual declaration that it will recognize and give effect to a clear and unequivocal contract provision providing for the waiver of bargaining rights during the term of the contract. In other words, if you really want the union to waive its bargaining rights for the term of the contract, then say so in the contract, and say it clearly and unequivocably.

But let me give you a specific example of what happens in that kind of case. In 1951 the Board in *Jacobs Manufacturing Company* considered at length the question of the waiver of bargaining rights. And you will remember that in 1951 we did not have the Eisenhower Board. In the course of the Board's opinion it was stated, and here I quote:

> If the parties originally desired to avoid later discussion with respect to matters not specifically covered in the terms of an executed contract, they need only so specify in the terms of the contract itself. Nothing in our construction of Section 8 (d) precludes such an agreement entered into in good faith for closing future discussions of matters not contained in the agreement.

The Board then set out in a footnote a contract provision between the United Auto Workers and General Motors. It stated that this was the kind of contract provision which would accomplish a waiver of bargaining rights during the term of a contract.

The road to glory was supposedly paved for management attorneys. All we had to do was copy that language, get a union to agree to it, and we were home free. Well, in the now-famous *C & C Plywood* case, the employer's attorney apparently did his homework because he negotiated that kind of contract. He obtained for his client the language which the Board said would constitute an unequivocal waiver of future bargaining rights. The *General Motors* clause was followed verbatim. Yet, the Board in its *C & C Plywood* decision gave absolutely no effect to this waiver clause. Indeed, the Board's decision did not even mention the previous ruling in the *Jacobs Manufacturing* case, and while I have only hurriedly leafed through the Board's brief before the Supreme Court, I did not find any reference to the previous ruling in the Board's Supreme Court brief.

Apparently we have three groups of advocates: those of labor, of management, and of the Labor Board. It would seem to me that candor and honesty would have required the Board at least to advise the Justices of the United States Supreme Court that the waiver language had been approved by the Board in the *Jacobs* decision. Under these circumstances, I suggest that any attempt by management to negotiate a waiver of the bargaining-rights provision might very well be an exercise in futility. And from all of this it appears to me that the avoidance of conflicting decisions

between the NLRB and arbitrators would require arbitrators to accept fully the Board's current rules of contract construction under which the theory of the residual rights of management must be rejected. Thus, if management makes any decision which is challenged by the union and there is no authority in the contract for management to exercise this function, then under the law management must automatically be found by the arbitrator to have exceeded its authority under the contract.

There may be some companies that would be prepared to submit contract disputes to arbitration under these conditions—but I don't know of any.

What effect, if any, does all of this have on management views of arbitration? Well, as an advocate and attorney representing management, I think it is quite proper for me to try to limit the avenues which may expose my clients to possible liability. Accordingly, if the Board continues to apply its contract-interpretation rules, arbitration can only serve to expose my clients to liability in two different forums. If we happen to win before an arbitrator who chooses to disregard the Board's rules, we accomplish nothing. For, as Sherman has said, all the union has to do is file charges before the Board. In any event, I seriously doubt whether arbitrators are equipped and, indeed, whether many of the lawyers who present arbitration cases are equipped to interpret NLRB decisions under the Board's ever-changing views of the Act.

Indeed, with this fluid situation in the Board's interpretation of the law, you may very well find yourself trying to apply one set of rules today only to see them revised in the following week. Within the past month we have had that happen on unit questions, on craft severance, and on inclusions and exclusions from bargaining units. There may be some arbitrators who have the legal background, training, and current knowledge of Board law to decide a case to the satisfaction of the Board. In my experience, however, there are many, many more accepted arbitrators who would not be able to apply the rules and decisions of the NLRB and yet have provided excellent service for both labor and management. If we get a decision from such an arbitrator we will probably find that the Board will disagree with it, and we will have accomplished very little.

The procedural differences, the availability of judicial review in a Board proceeding, the differences as to burden of proof, and some of the other differences which Professor Meltzer discussed previously will also cause many management attorneys to question the wisdom of proceeding through arbitration if the client's interest is going to be jeopardized again before the Board.

I am sure that I share with you the hope that the difficulties which I have referred to will not come to pass. As matters now stand, however, I am compelled to conclude, and I think in the company of Professor Meltzer, that the NLRB should enforce the Act and you should enforce the contracts as we present them to you. If we want arbitrators to provide us with legal opinions and constructions of the Act, we will probably employ you on a consulting basis and pay you a legal fee. Most management attorneys and most management clients that I represent are not interested in the psychiatric approach to arbitration. We are not asking you to weigh our moral conduct. We are not asking you to judge whether we have or have not violated the Act. We have a very simple proposition. Because we can achieve labor peace by obtaining a no-strike clause in exchange for arbitration, we come to you and say, "Here is a contract provision. Interpret it." If you have so much pride that you do not want to issue a decision which the Board may not accept, then turn down our cases.

CHAIRMAN ELSON: Thank you, Bill, for that forthright statement of the management position.

I think one thing is becoming quite clear early in this discussion, and that is that we are unlikely to arrive at a consensus today, at least among the parties to the arbitration process.

My Co-Chairman is Bernard Cushman, Special Assistant to the General Counsel of the National Labor Relations Board. He may want a few minutes to react to these two statements, particularly from the point of view of the Board.

BERNARD CUSHMAN: I want to start off by saying that I think Bill is right that the NLRB takes on the role of advocate. Certainly it does. It's the advocate neither for labor nor for management but rather for the public interest. With regard to what has been said in general about some of these problems, I don't want

to take time by restating what Mr. Ordman's paper says, and consequently I will assume that you have read it. Certainly, under Section 10 (a) of the Act and under the Act in general, the Board is an administrative agency charged with the duty of enforcing public rights; and the Act states that the power of the Board in the exercise of that authority is not to be affected by contracts made between the parties or any other means of adjustment that may be established by law or otherwise. In the discharge of its duties the Board, well before the trilogy, took into consideration the fact that one of the central components of the national labor policy is to place the parties in a position where they can establish machinery for the settlement of their own disputes.

Besides the rights of the union and of the employer, there are the rights of the employees to be considered. The law is very explicit. One of the more recent cases, the *United Aircraft* case in the Second Circuit, makes it clear that there are certain rights which aren't waivable by a union and an employer and which, under the statute, the Board must enforce. To those who have had questions about this I recommend the reading of that particular decision.

Specifically, I think you should look at this subject in perspective. The Board attempts to give as much free play as it can to the arbitration process. The *Spielberg* doctrine is the mechanism by which the Board attempts to accommodate the arbitration process, as utilized by the parties, to the public mandate as set forth in the machinery of the Act for the enforcement of the public rights contained in it. Obviously, the Board, when an unfair labor practice charge is filed with it, cannot without reservation simply delegate to the parties the determination of a question as to whether or not the duties and obligations set forth under the statute have, in effect, been met.

In the unilateral-action area, to which some reference has been made, you can get a fair idea of what the Board's position is if you refer to the *Cloverleaf* decision, which is perhaps the beginning of what I like to call the Board's explication of the statutory-interpretation/contract-interpretation dichotomy. There the Board was faced with a question of a refusal to bargain. It said that with respect to a matter where you have a unilateral action not

covered by the agreement and there hasn't been any notice to or negotiation with the union, if it is an issue which turns primarily upon the statute and if the action has been unilateral and encompasses wages, hours, or conditions of employment, then the statute has been violated. On the other side of the coin, *Cloverleaf* indicates that when the issue turns primarily upon an interpretation of a specific contractual provision unquestionably encompassed by the contract's arbitration provisions and coming to the Board in a context that makes it reasonably probable that arbitration of the contract dispute will also put at rest the unfair labor practice in a manner compatible with the principles and policies of the Act, the Board will defer to the arbitration process.

If one is a careful student of the cases, he will analyze such cases as *Smith Cabinet,* a comparatively recent case, which is cited in one of the footnotes in Mr. Ordman's paper. In this case the proposition was this: Under an incentive pay system provided for in the contract, the employer could reduce the rate if the rate for a group over a two-month period exceeded 50 percent of the standard hourly rate. A dispute arose when, under this factual situation, the employer reduced the rates below the point where employees were assured of earnings at least 50 percent above the standard hourly rate.

The Board said—I am paraphrasing—in this particular situation that there was dispute involving a contract interpretation and that it was a matter which the Board would not determine but would leave to the parties under their contract procedures. So, if you do have a dispute concerning a substantial contract question, and if there is nothing else involved in the case, the Board will ordinarily stay its hand.

The Board *will* exercise its authority when the matter clearly is not covered by the contract or where the contract defense raised is insubstantial. That was the type of problem in *C & C Plywood.* I call to your attention, moreover, in connection with the remarks that have been made, that in *C & C Plywood* the Supreme Court cited the very language which I have paraphrased for you from *Cloverleaf* and which is compatible with the trilogy. It might also be said that the Supreme Court has cited with approval the general position enunciated by the Board with regard to that type of

approach as an instrument for the effectuation of the national labor policy. You do have, therefore, the Board attempting—and I think with success—in the application of this statutory-interpretation/contract-interpretation dichotomy to give free play to the arbitration process and, at the same time to preserve the statutory mandate.

You may have other situations in which the conduct challenged is so subversive of the principles of the Act that the Board will feel compelled to act without regard to whether there is an arbitration provision in the agreement.

Speaking not for the Board but for myself, if you have a contract in which the wage rate is, let us say, $2 an hour and the employer decides unilaterally, with no discussion with the union, to cut that rate to $1 an hour, is it enough for the employer to say, "Mr. Board, you have no business in this picture. There is an arbitration procedure in the contract; let the union use that"?

Ordinarily, a case won't arise quite that nakedly. There may be other facts to be considered in the context of the situation. But this would seem to be a question which is central to the statutory scheme, and raises the question of whether there is a violation of Section 8 (d) which prohibits any modification of the agreement except in accordance with the procedures provided in the statute. A unilateral modification during the life of the agreement is one which the statute expressly prohibits in defining the collective bargaining process. Section 8 (d), it seems to me, also precludes the very kind of conduct which I have posited to you, and whether the Board in that situation should exercise its discretion to stay out of the picture seems to me to be open to question.

But I didn't come here to defend the Board as such. I came here, I hope, to try to explain the reasoning behind some of the decisions and how these decisions fit with the arbitration process.

Some problems are more central to the statutory scheme than others. And it may be the more difficult for the Board to leave such problems to arbitration alone. Let's take an accretion question. Accretion questions are among the most difficult problems with which the Board has to wrestle. Let us suppose a situation exists in which the contract provides that any acquired facility shall be

covered by the agreement, and let us suppose that the contracting employer acquires a facility at which there is another labor organization. No change has taken place. Let us also assume, to make the situation a little more harsh, that it's a union that has been certified by the Board. The arbitrator in his award says, "I have read the contract, and it applies to any acquired facility; therefore, the employer must recognize the contracting union at the other facility even though there is existing another union." The query should not be how much utility the arbitration process has in that instance. Instead, the query should be: What should the Board do—indeed, what *can* the Board do—about this critical issue except, when an unfair labor practice is filed, to proceed without regard to the fact that there is an arbitration provision in the contract itself?

I might also say to Mr. Ryza that if he examines the Board's brief in *C & C Plywood* more closely, he will find that the zipper clause to which he referred is cited in the Board's brief at footnote 17, and if he will refer also to footnote 16 he will find that *NLRB* v. *Jacobs Manufacturing Co.* is also cited in connection with the material that is set forth at that place. The Board did not conceal from the Supreme Court its previous decisions, and I don't believe it would resort to that kind of process. It never has and it never will.

One can also assume, it seems to me, that the Supreme Court is able to find decisions which are in point on its own without help from anyone. The Court has demonstrated that. Occasionally some parts of the Supreme Court decisions seem to surprise both parties.

We don't have much time left, and I don't want to engage in a defense of what the Board does or does not do in a particular situation. What you came here to do, I think, is to discuss the papers of Mr. Howlett and Mr. Ordman. I anticipated my role as a minimal one. I have participated in meetings with arbitrators at various places. They have heard me before, so there is no need to hear me any more. I prefer to confine my role to attempting to answer questions about the cases that have been cited in the various papers and about problems in which you may have an interest. My answers will be confined only by the caveat contained in the

story I am fond of telling about the little boy who was asked in an examination paper, "Who is Socrates?" And he said, "Socrates was a very great man. He was a wise philosopher. He went around giving advice. They poisoned him."

CHAIRMAN ELSON: Thank you very much Bernie.

We have some time remaining. I hope that we can have a good discussion from the floor on the provocative issues before us and in the light of the three very good statements you have heard. The first issue that I would like to present for discussion can be phrased as follows: Should the arbitrator pass upon an unfair labor practice issue in the case before him? Should he write an award that will dispose of the issue? There are three possibilities: first, the situation where the parties specifically submit the issue; second, the situation where the parties make clear that they don't want the arbitrator to decide the issue; and third, and the most common situation, where the parties do not make clear their desires.

I would like to have you people in the audience discuss these questions in the context in which I have presented them.

DANIEL KORNBLUM: My question is directed to Mr. Carmell. Let us assume that we have a *C & C Plywood* situation where we have a contract with an arbitration clause. The employer effectuates a unilateral improvement in wages. May I ask, in light of your remarks, what effective remedy the arbitrator can provide in such a situation? I assume that if the issue were presented to the Board, there would be an unfair labor practice finding and an order to bargain. The Board might also order the company to cease and desist from its unilateral practice. Is this kind of remedy within the purview and province of the arbitrator?

SHERMAN CARMELL: I believe the arbitrator could provide an effective remedy. As I understand Mr. Ordman's statement of the Board's rules there could be a meaningful determination if the arbitrator ruled on the issue of whether the union did waive this right during bargaining—as the Board did in *C & C*. For example, as I understand Mr. Ordman, if the arbitrator said, "I believe on the basis of all the evidence, the union waived this right," even though the General Counsel might have come to a different conclusion on the basis of the facts, the Board would defer to the

arbitrator's decision. This is not to say the Board might not review the facts and say, "We are going to overrule the arbitrator because the statutory issue is so substantial."

DANIEL KORNBLUM: I think you are neglecting the important facet of my question. If the arbitrator is sincerely convinced that the company violated Section 8 (a) (5) by unilaterally increasing wages, what remedy could the arbitrator effectively provide in this situation? That is what I am asking.

SHERMAN CARMELL: I think his remedy is to find that the employer has violated the contract, to rescind the increase, and to order that there be no further violations of this kind. In that manner, the arbitrator returns the situation to the *status quo ante,* just as you would return a man to work with backpay if you found that he had been unjustly discharged.

CHAIRMAN ELSON: I think I should state for the record, Sherm, that Mr. Ordman didn't go quite so far as to say that the General Counsel would give the same weight to the arbitrator's award involving statutory issues as he would in the case of a discharge.

SHERMAN CARMELL: Well, I interpreted him to say that there is a difference as far as the statutory issue goes, but all things being equal—this might apply only to the 8 (a) (3) case—the arbitrator's award might require a return to the *status quo ante.*

CHAIRMAN ELSON: Do you have any more comments? Feel free to express your opinions as well as to raise questions. This is the purpose of the workshop.

STAN OBER: Mr. Cushman, in regard to the accretion question, what possible role could the arbitrator have in deciding this question when it's clearly a question of unit determination?

BERNARD CUSHMAN: I wouldn't attempt to be so presumptuous as to tell arbitrators what they should do. There is obviously a sharp cleavage among arbitrators on this question. I was addressing myself to the Board's role. Some arbitrators, for instance, will not order any act which will result in the commission of an unfair labor practice. Not all arbitrators, as is clear from the discussion, agree in the situation that I hypothesized. Obviously, assuming no other changes, everything would remain the same as it had been.

To say that, because of the operative impact of an after-acquired-facility clause, the employees of the other facility must be represented by the contracting union would clearly violate the provisions of the Act in several respects.

You have an 8 (a) (1) violation, and you may very well have an 8 (a) (2) violation with regard to the union at the after-acquired facility if it were demanding representation rights. Under the assumption you have made, because they represent employees there, you may very well have an 8 (a) (5) violation also.

What the arbitrator could do or would do about this situation under his contractual mandate is a question not free from doubt. Some arbitrators will simply not consider and deal with the statutory problems. That is, they require commission of an unfair labor practice by saying to an employer that he must, because he has contracted to do so, recognize the contracting union as the bargaining agent of the newly acquired facility.

These arbitrators can rationalize their position by saying that this is what the contract says, and if the provision is illegal—as you heard Professor Meltzer say, and as I have heard some very distinguished arbitrators say also—let the Board worry about the matter when it receives a charge. Other arbitrators may attempt to resolve the statutory issue by saying that the contract itself incorporates, by operation of law, statutory law.

All I am trying to point out is that the Board has gone to the extent of attempting to accommodate the arbitration process as much as it can, but it cannot delegate to arbitrators the question, free from review by the Board, of whether in the accretion situation the result is consonant with a demand of the statute. That is what *Spielberg* means when it talks about an end result that is not repugnant to the policy of the Act.

TRACY H. FERGUSON: I don't share all of Mr. Ryza's views, and I am curious to know his answer to the question just addressed to Mr. Cushman.

WILLIS RYZA: I think I tried to state in my opening remarks that I have no serious argument with the Board's exercising its jurisdiction as to unit questions and on accretion questions in particular because, frankly, the arbitration process was not originally set

up, and is very seldom designed, to cope with problems of this kind. However, it is different when we talk about other matters, such as raising wage rates, changing schedules, and subcontracting, where the Board says that the arbitrator is compelled to follow its rules of contract interpretation, because the Board asserts that if the contract is silent, management has no authority to exercise its management function unless there is a waiver of bargaining rights in the contract.

BERNARD CUSHMAN: The point I want to make, if I may have a minute, is that I sometimes assume too much because many people, unlike myself, are not constantly dealing with cases which arise under the Act. I assumed that the people in this audience were familiar with the Supreme Court's decision in *Fibreboard*. *Fibreboard* was a situation in which there was contractual silence. Under the circumstances of that case, the Court said there was a duty independent of the contract to bargain about the question of subcontracting. That is a Supreme Court decision. How the Board can ignore that decision escapes me.

WILLIS RYZA: Let me raise an interesting question. You are an arbitrator, and you have the *Fibreboard* situation in front of you in the form of a grievance claiming that the company violated the contract by subcontracting. You are convinced that you must decide the entire case. So you search the Board's authority and you find that unfair labor practice charges have been filed with and dismissed by the Board. You then apply that interpretation of the law, only to have a new Board membership reopen the case on its own motion a year later and hold that there is a duty to bargain.

I suggest to you that, if you are good enough to be able to anticipate all the changes in the Board's substantive rules on the application of the Act, you are better than most attorneys are in trying to do the same thing.

BERNARD CUSHMAN: I would say, in fairness to Bill, that sometimes these changes have come rather quickly.

CHARLES KAUFMAN: Mr. Ryza has said about what I wanted to say on this matter. Part of the problem is, I believe, that the Board in many of these matters acts like the little old lady who didn't know what she was thinking until she said it. I also believe that

accretion cases and representation cases are not central to the major problem—the one that Mr. Ryza mentioned—the unilateral action on the part of the employer to change wage rates, to subcontract, to change the work schedule—something along that line. This is the guts of what many of us deal with when we arbitrate. If arbitrators attempt to determine what the Board will do, they will have to make psychiatric studies of each new Board member. I really believe that arbitrators have enough to do in attempting to interpret and apply the contract—and on many issues the contract is silent—without worrying about what the Board would do.

Finally, I want to say that I believe the Board's view on this matter has been very unrealistic in light of customary union-company relations. As far as day-to-day operations under a labor agreement are concerned, the Board is much more sensitive to a failure to discuss than is the union. At least, that has been my experience, and I believe it has been that of many arbitrators as well.

WILLIS RYZA: I would like to ask Mr. Cushman a question. Assume that I am representing an employer and I sit down with union representatives. I say to them, "All right, we want to conclude a contract, and we will agree to everything that is written in it, but if it's not in the contract, we reserve it. Let's work out language to do this." Assume the union agrees to include the *Jacobs* case language. Will the Board still say that any unilateral action by the company is a violation of the duty to bargain, and, if so, is the Board then taking the position that we cannot waive bargaining obligations during the term of the contract?

CHAIRMAN ELSON: If it weren't for the fact that a panel member is asking the question, I would say we are getting away somewhat from the basic issue, that is, what the arbitrator's role should be. Bernie, perhaps you will respond to this question.

BERNARD CUSHMAN: I will within our time limitations; it's difficult to put this matter in perspective in a short time.

I believe the Board, particularly with regard to the subcontracting question, has subsequent to *Fibreboard* given very serious consideration to what I think are the very real problems that have been raised in the bargaining process in this particular area. In-

deed, I think the Board has drawn upon, in the subcontracting area, much of what arbitrators have contributed in their own way in resolving subcontracting cases. Thus, in the post-*Fibreboard* period, the Board looked at a number of factors in *Westinghouse Electric Company*. The Board pointed out in this case that in the *Fibreboard* line of cases, where the Board found unilateral contracting out of hourly unit work to be a violation, the contracting out invariably involved a departure from previously established operating practices which effected a change in conditions of employment, or resulted in a significant impairment of job tenure, or could reasonably be said to have lessened work opportunities for those in the bargaining unit.

Those of you who work in the arbitration field—and that includes both union and management practitioners as well as the arbitrators—will find a familiar ring in these criteria.

I think the Board has attempted and is attempting to be mindful of the sensitive problems that are present in this area.

WILLIS RYZA: Is the zipper clause going to be a waiver of bargaining rights or, as I understood Mr. Ordman to say, is the Board going to say that anything which is not specifically covered in the contract must be bargained for? If the arbitrator then applies the Board's rule, must he find any unilateral action by the employer not specifically authorized by the contract a violation of the contract?

BERNARD CUSHMAN: I cannot attempt to answer on behalf of the Board. If you will permit me, I will give my personal views rather than those of the Board.

I think the rule with regard to unilateral conduct has two parts. The first is when the contract is silent about a particular matter. I am inclined to doubt that the inclusion of a zipper clause will be very helpful in insulating unilateral conduct against a charge before the Board. Again, where it is argued that a particular contract provision permits the employer to engage in unilateral conduct, I doubt very much that a zipper clause will be an aid to the employer who claims he is insulated against an unfair labor practice charge unless the contract clause is very clear. Incidentally, there is no reason why this should not apply equally to a union that engages in unilateral conduct.

Where, however, you have a zipper clause, a history which shows that the matter was negotiated, and a clause which raises a substantial claim, I believe the Board is likely to stay its hand. I think that is as far as I can go. I hope this is responsive to the question.

WILLIS RYZA: It certainly is. Thank you.

ROBBEN FLEMING: I have a question for Mr. Carmell. I believe there is some inconsistency in two things you said. I understood you to say at the outset that you believed there were areas of expertise for the NLRB and areas of expertise for the arbitrator, and that perhaps it was desirable for arbitrators to stay away from certain kinds of cases in which the NLRB was more expert because of its greater experience. But then I understood you to say that if arbitrators weren't going to take on these issues, then they were backing away from something they should be doing. It seems to me you can't have it both ways. Either there are areas of expertise in which the NLRB ought to be primarily involved and areas in which arbitrators ought to be primarily involved, or arbitrators ought to take on everything. If arbitrators are asked to take all cases, those who are not lawyers and who are not carefully following all of the labor cases will say that they aren't up to date on NLRB cases. I believe that would create a problem. I am wondering which way you would prefer it if you could have your choice.

SHERMAN CARMELL: Both. As to your first point, I say that if the arbitrator will not apply Board standards as to waiver in 8 (a) (5) situations or as to pretext or as to the majority status of the union, then he has no expertise and I don't want him to decide these cases. If he is merely going to give a sterile reading to the contract—what is not given away specifically is automatically reserved to the employer—and that is as far as he will go, then I want the Board, I want the dichotomy. If the arbitrator will take upon himself to become familiar with the Board standards and use them to decide a case, then I will be happy to go to arbitration.

As to your second point, many of the Board members have not been lawyers; many of the Board's field agents are not lawyers. I believe the area which arbitrators are concerned with is rather narrow. The basic principles of *Fibreboard,* which are recent, and

the basic principles of *C & C* are all along one central line. True, the Board may change its mind, but all of these cases have been taken to the Supreme Court. I don't believe it's too difficult for a nonlawyer to review them.

On the 8 (a) (3) matter, that is very simple. Was it a pretext or was it not a pretext? What is the true basis of the union activity? And finally, although more difficult, the unit questions in *Carey* and in the *Westinghouse* series have now been reversed by the Board in its series of three cases, but they have then set out in one, two, three order, at least for today, the standards for craft severance. These may be difficult to apply in a particular situation, but the rules are clear. I don't think it's an impossibility. I think the man who is a professional arbitrator certainly has both the intellectual competence and the stamina to determine and to apply these standards.

CHAIRMAN ELSON: Any further questions?

DANIEL KORNBLUM: Perhaps Mr. Howlett would address himself to this remark: It has been said that every collective bargaining agreement subsumes existing law. That is, of course, a very glib generalization because an agreement does not always subsume.

I do not think an arbitrator has the power that an agency or a court possesses to deal with statutory matters. And this is the thing that bothers me. There will be situations which undoubtedly involve unfair labor practices, and the Board has devised all kinds of remedies. But this is what the agency was set up for. I don't believe, however, that arbitrators are cloaked with such authority under the contract to order such remedies.

We also have the bothersome question of preemption and things of that kind. It's true, of course, that private parties can confer the power on the so-called neutral to do a lot of things, but we have many instances where we have uninformed parties who don't state the issues precisely. And issues develop which may indicate unfair labor practices, particularly in the area of new issues which were not even thought of at the time the contract was concluded. The NLRB said as far back as 1937 that there is a duty to bargain about new issues when they arise if they affect wages, hours, and working conditions. But is it the prerogative and the responsibility of the arbitrators to assume that power?

ROBERT G. HOWLETT: My feeling is that the arbitrator does have this power, and he does have the obligation to apply the National Labor Relations Act, as well as all other law, unless the parties tell him they don't want him to do so. If that occurs, you might be well advised to say, "Why didn't you go to the Board in the first place?"

They can go to court, of course. But I think we should tell them to exhaust their remedies under the contract first. I think we have the power, I think we have the right, but we may be declared wrong by the National Labor Relations Board, by a court, or by another administrative agency which may be involved.

MARK L. KAHN: I think I can best pose my question with a somewhat different example. Take the situation in which a collective bargaining agreement is filed as Joint Exhibit 1, you hear the case, you retire to the solitude of your study to contemplate and render justice, and you then discover in the collective bargaining agreement a provision cited by neither party which appears to you to dispose completely of the issue with which you were presented. Since this paragraph has been submitted as part of Joint Exhibit 1, do you or do you not give it consideration?

I present this in terms of the question we have been discussing. I would like to know whether the arbitrator should rely upon the advocates to call to the attention of the arbitrator—to educate the arbitrator—the relevant law the arbitrator is expected to be cognizant of and to what extent. Or should the arbitrator conduct independent research into the developing law that may bear on the questions raised in the hearing? And should the arbitrator, regardless of whether either or both parties have raised these surrounding legal aspects, base his decision on them?

CHAIRMAN ELSON: I will ask the panel members to comment on this matter.

SHERMAN CARMELL: If the arbitrator wants to know whether this clause might have Board ramifications, he should ask the parties at the beginning of the hearing, "Do we have any problem here that is going to involve any Board decisions? Any Board standards?"

CHAIRMAN ELSON: Mr. Kahn is assuming that he doesn't become aware of the clause until after the hearing.

SHERMAN CARMELL: If he learns of the clause at that time and has worries about it, I think he can bring the parties' attention to it by a post-hearing motion.

MARK L. KAHN: I may have confused the issue. I really asked two questions. I thought I made the point in the first question that a decision should not be based upon a clause in the agreement cited by neither party. If I am surprised to discover this apparently relevant provision in the collective bargaining agreement which has not been cited by either party, and if I think it's of tremendous significance, then, at least, I should contact the parties and suggest a reopening of the hearing to determine why this clause was not mentioned.

In the same way, I don't believe I have any business leaving the hearing and then making an independent investigation to uncover matters in the developing labor law which might have a bearing upon my decision when neither party indicated that such a consideration should affect my decision.

SHERMAN CARMELL: I see nothing wrong in your approach. If neither party cited Board precedent, never raised the issue, then don't rely on it. I think that under those circumstances there is nothing wrong with the arbitrator's deciding it as a straight contract issue. That was his submission.

CHAIRMAN ELSON: Would you agree with that, Mr. Ryza?

WILLIS RYZA: Yes, but let me probe the problem. The arbitrator's decision will depend upon how the issue is submitted to him. Quite often the company and the union may have a problem which concerns both of them—and I'm not talking about collusion or fraud to try and get rid of some employees' interest—and they go to the arbitrator and say, "This is the question we want you to decide: Did the company violate Section 7 of Article 4? If so, what relief, if any, should be provided, period." At this point I don't believe the arbitrator can, on his own, apply another provision unless it sheds light and meaning on the contract provision which he has to interpret.

The question whether an arbitrator should take it upon himself to do research into the law should be handled in the same manner. If the parties do not submit their arguments and their views to the arbitrator, I don't believe he has any responsibility—in fact, I think he would be going beyond his responsibility—to decide the issue on that basis. It may do more harm, quite apart from unfair labor practices, to the relationship that was brought to him.

MR. GREENMAN: If I may have a second bite of a different type of apple, I would like to ask Mr. Carmell, and then, perhaps, Mr. Ryza, if he disagrees with what Mr. Carmell would do under these circumstances.

Suppose, during the course of an arbitration proceeding, the casual remarks or the rulings of the arbitrator indicated that he would not consider Board decisions bearing upon the issue before him. What recourse would you have then—withdraw from the proceeding and take it to court?

SHERMAN CARMELL: As a curbstone opinion, I would not take him to court and say he should apply the federal law to the case. If I felt strongly that the agreed-upon submission was one involving only a contract interpretation and, as Bill has stated, for reasons of administration I didn't wish to raise any of these other issues, I do not believe the arbitrator should base his decision upon any of the Board cases. I would wait and see what he finally did in his award. That is really going to be the gut issue—how he does it and why he does it.

WILLIS RYZA: I don't disagree, but if I were sitting where Mr. Carmell is sitting, I would do exactly as he says. I would file charges and wave Mr. Ordman's paper specifically in front of the arbitrator. If he didn't follow the Board rulings, I would go to the Board and say, "Prosecute."

SHERMAN CARMELL: I assumed the union did not want to raise the Board issue. I assumed from the question that the arbitrator had raised the issue of the Act.

MR. GREENMAN: I know of an actual case in which a management spokesman cited Board decisions. The arbitrator indicated that he wasn't going to consider Board rulings. If this occurs, can either party withdraw from the arbitration proceeding up to the date the award is handed down?

SHERMAN CARMELL: If one party contends that the National Labor Relations Act should be applied, the arbitrator must consider that just as he considers any other legal argument and apply it if it's applicable.

MR. GREENMAN: If he says he won't, do you take your papers and walk away?

SHERMAN CARMELL: No, that is not necessary, because the arbitrator's award will not receive a hospitable reception before the Board. As long as he renders his award within six months, you can make up your mind when you see it. If you don't like it and feel there has been a statutory violation, you can walk across the street and file a charge. You will be in good shape, in view of *Spielberg,* because the arbitrator will have had the issue raised specifically before him and will have ignored it. How any management lawyer could convince the regional director to defer to that award is quite beyond me.

LEE BURKEY: Mr. Chairman, it would seem to me that arbitrators might think a long time before they go down the interesting road of applying NLRB policy because the next step would be to apply the policy of the Wage and Hour Administrator, or the policy of the various agencies which are now administering civil rights. It would seem to me if the arbitrator follows that road, we are taking a direction that Professor Meltzer thought should not be taken. As I recall his remarks, he unequivocally stated that it was not the function of the arbitrator, however sophisticated in matters of law, to endeavor to interpret the law or public policy or the policies of the various states through their statutes.

I don't know that I agree with all he said, but I agree a great deal more with what he said on that point after having heard your discussion this afternoon.

WILLIAM F. SPAULDING: I would like to ask someone, perhaps Mr. Howlett, this question: Assume that you have a typical discharge arbitration involving participants in a strike, a typical situation in which the strike occurred over a grievance and, therefore, the employer could be presumed to have the right to discharge. The union, however, cites *Mastro-Plastics,* the Supreme Court decision which says that if the purpose of the strike is to

protest unfair labor practices, it is a protected activity even though it is in violation of the contract. Will the arbitrator determine whether, under the NLRA, the incident that sparked this strike was an unfair labor practice? Will this subvert the grievance and arbitration procedure which the union could have used to vindicate the NLRA policy by urging that this was a prearranged strike within the meaning of the contract and that the employer therefore lost his right to discharge these people?

I ask the question particularly in the context of the typical garden-variety grievance where the employer has made a unilateral change in shop operations. It may be that the Labor Board would hold under *Fibreboard* that this was something over which the employer had an obligation to bargain. Yet it is this kind of problem for which the grievance procedure is used every day.

I am wondering if Mr. Howlett would hold that an unfair labor practice strike occurred? And if he did so, would he reverse the discharge on that ground?

ROBERT G. HOWLETT: As a matter of fact, I have had such questions, and I have placed the blame on the employer for them.

WILLIS RYZA: Let me ask a question. Let's assume that a charge was filed and fully investigated by the regional director. The charging party was advised to withdraw the charge because the regional director, not the Board, found no violation. The charging party refused to withdraw the charge, and the company comes into the hearing with a letter from the regional director which clearly indicates that as far as the Board is concerned there was just cause for the action. Would you give equal weight to that or do you consider the matter *de novo?*

CHAIRMAN ELSON: Let's treat that as a rhetorical question.

WILLIS RYZA: It was an actual case. If arbitrators have to abide one way, shouldn't they also abide the other way?

ROBERT G. HOWLETT: I think the answer to that is easy. When the regional director is the prosecutor, he is not a judge.

SHERMAN CARMELL: I would like to comment on the question that was posed. In order to determine whether the discharge was justified, the arbitrator must apply both the law and the facts. With

deference to Mr. Burkey and Professor Meltzer, I just don't see the point of an arbitration process in which you determine whether the men were properly discharged and ignore *Mastro-Plastics,* because the union can go across the street and file an unfair labor practice charge. The Board then, let us say, issues a complaint, it's sustained, and the men are reinstated with backpay. It makes the arbitration process an exercise in futility. There is more and more reason not to go to arbitration if you are not going to come to grips with the issues.

I think you will find that instead of using arbitration, unions will use the Board. They will strike the employer on the basis that he committed an unfair labor practice, and you will be two years away from a decision.

Understand one thing, if you will. The union takes a chance when it goes to arbitration. It is willing to sacrifice the expertise of the Board and the possible two-years-later reinstatement with backpay in order to get a quick decision from the arbitrator. If the union comes to you and says, "Please decide the case, apply the law, we know that we are going on a one-shot deal because the Board will give deference to this award. In an 8 (a) (3) case why the hell won't you do it for us?"

CHAIRMAN ELSON: I believe we will now have to bring the discussion to a close.

JAMES C. HILL: I don't want to add anything. I want to ask two questions which I am rather certain are a little naive, so they will serve as the last questions.

Suppose, for example, you have a discharge in which the defense is harassment and discrimination for union activity. You are put on clear notice that if the decision does not sustain the grievance, the union will go to the NLRB with the charge. First I would like to ask this: Although it sounds like two bites at the apple, is it the same apple? Is it really the same issue at all? Will there be a decision on the same issue?

You talk as though the arbitrator should know and apply the rules of the NLRB, but in that particular case, at least, the NLRB is an investigative, prosecuting agency as well as a judge. The NLRB may be able to elicit facts which were not brought forth at the arbitration hearing.

My second question is: If you do regard it as the same apple, and these people are parties to a contract which says the arbitrator's decision shall be final and binding, should the arbitrator take on the cases in which he is merely to serve as final arbitrator only if the decision is favorable to the party bringing the grievance?

CHAIRMAN ELSON: Who wants to answer that one?

SHERMAN CARMELL: To whom is it directed?

WILLIS RYZA: Let me try to respond to it, Jim. I don't think it's two bites of the same apple. I tried to make clear—perhaps I didn't—that in a discharge case the question of just cause under a contract may or may not present the same issue that the NLRB will have to decide. So to that extent, I do not argue or find reason to complain if the union or the grievant goes to the Board and says, "I want adjudication of something that may be different from what I presented in arbitration." To the extent that the arbitrator's award may be set aside by the paramount authority of the Board's award, I don't believe there's anything necessarily wrong in that.

SHERMAN CARMELL: To the extent that the arbitrator says, "You must play the game according to my rules, and my rules are that you must not go over to the Board," it is an impossible game to play because the Board has paramount jurisdiction. Its facilities will always be available to a party. There is no case in which you can be certain a Section 7 or 8 (d) violation is not involved. There is no way you can avoid this consideration because, no matter what the grievant says, no matter what he swears and promises in blood to the arbitrator, he can walk across the street and file a charge.

To answer your question specifically. As long as the Board will give deference in cases where all the facts are known, there is no reason why the arbitrator should not decide such a case if the parties ask him to do so. In a case such as the *Precision Fittings* case, which Mr. Ordman talked about, where there are later-acquired facts that should have been presented but were not—either because of collusion between the union and the employer or because of something withheld by the employer—I think we all must recognize that the Board is never going to give away the right to review because the Board is not quite sure who is protecting the employee's interest. In other words, the Board wants to

know that the employee is protected, and it is not interested particularly in the union or the employer. So, in both cases, Mr. Hill, on both questions, I say that you can't have it the way we would like it or you would like it. I cannot guarantee to you that he will not walk across the street and file if he is dissatisfied. However, you take many submissions as you find them, and I am sure they are less than satisfying in most instances.

CHAIRMAN ELSON: Gentlemen, I am going to bring this meeting to a close. We started with a conviction that we wouldn't reach a consensus, and it is quite clear that we have not.

I think the discussion this afternoon of the papers presented, including Professor Meltzer's fine paper, all go to the basic question, and that is: What is our conception of the arbitration process? Many arbitrators, including myself, have been lulled into a sense of false security by a series of "truisms," or clichés, if you will. For example, how private is the world of arbitration? How private is the private law of the collective agreement? These are questions that I think should continue to engage us, and I hope that some of our researchers in the Academy, or among our guests, will devote more time to them.

Let me conclude by thanking the members of the panel for their very fine contributions.

WORKSHOP C*

EDGAR A. JONES, JR., CHAIRMAN
HARVEY LETTER, CO-CHAIRMAN
CHARLES G. BAKALY
STEPHEN REINHARDT

CHAIRMAN JONES: This is a workshop, as you know, devoted to probing the relationship of the arbitrator to the Board and the courts. The purpose of the workshop is to get you people talking, and to get the gentlemen on the platform talking. It is not to

* Edgar A. Jones, Jr., Professor of Law, University of California at Los Angeles, and Member, National Academy of Arbitrators, served as Chairman of Workshop C. Other panel members were: Harvey Letter, Regional Attorney, National Labor Relations Board, San Francisco, Co-Chairman; Charles G. Bakaly, Attorney, O'Melveny and Myers, Los Angeles, representing management; and Stephen Reinhardt, Attorney, Bodle, Fogel, Julber and Reinhardt, Los Angeles, representing labor.