guess, based on my own familiarity with this industry, that at least as many arbitrations involving not only wages but many other issues have occurred since 1949. I think it is true that in the history of those cases will be found "the largest body of primary arbitration experience in the United States."

Our first two discussants are leading spokesmen for transit management and for transit labor in matters of collective bargaining and interest arbitration. Both are professionals and acknowledged experts in their field. They are noted particularly for their skill, versatility, and effectiveness in arbitrating contract disputes, as those who have been exposed to their expertise will attest. I should also mention that these two gentlemen have appeared as adversaries in nearly all the transit arbitrations that have occurred in this country in recent years, and with highly satisfactory results for their principals.

ARBITRATION OF NEW CONTRACT TERMS IN LOCAL TRANSIT:

THE UNION VIEW

MR. HERMAN STERNSTEIN: Happiness is having Big Steel and the Steelworkers agree to new contract arbitration a week before you deliver a paper on new contract arbitration at an Academy meeting. Hopefully, new relevance is thereby proclaimed for the process as practiced for 75 years in the transit industry where employees are represented by the Amalgamated Transit Union. Although it functioned well, new contract arbitration has not heretofore spread widely even to that part of transit where Amalgamated is not the bargaining agent. That it has not been more widely adopted is, in my opinion, most unfortunate, attributable largely to long-held and deeply felt prejudices rather than to evaluation of the facts and of performance in the transit industry.

Transit contract arbitration has frequently been attacked within the industry, by management as well as by the employees. Such attacks have typically been expressed in the same clichés as are used to justify the prejudice found elsewhere in industry. Arbitration has been called an impediment to peaceful negotiations because it offers an easy device to escape responsibility for making bargaining decisions. Arbitration has been characterized as

"weak with power" because it vests enormous power (a "blank check") in an impartial arbitrator. Arbitration board sessions, we are told, usually degenerate into little more than a glorified auction to achieve a majority. The process also has been assailed because it has no agreement as to the standards to be applied; a game, it is called, played without ground rules.

In examining the facts against which such arguments and prejudices are to be measured, I start with what is to me the jugular. Is arbitration a viable substitute for a community-crippling strike? In transit where Amalgamated is the bargaining agent, strikes are almost unknown. Contrast, if you will, the frequency of transit strikes in systems, whether privately or publicly owned, where Amalgamated is not the bargaining agent, as in New York City and Philadelphia. Actually, strikes by Amalgamated locals occur almost only when the employer refuses to arbitrate.

Next, when arbitration has been used to resolve a dispute over new contract terms, subsequent contracts *are* negotiated. Arbitration does *not* become a crutch relied on in contract after contract.

As to the "blank check" charge, my experience shows it to be wholly without substance. I have been the union-designated arbitrator in 19 new contract or pension cases in the last four or five years. Six of the awards were unanimous. Two others were actually two-man awards; that is, an impartial arbitrator was not called in. One is not yet decided. Of the rest, six had dissents in relatively limited areas, and four resulted in very significant dissatisfaction for the aggrieved party. But in the larger sense, making the necessary allowances for human differences and frailties, no one of the awards could fairly justify giving up arbitration as a process. And the parties have not given it up. There are even now pending at least three cases in various stages of maturity.

The question of appropriate standards is also one which must be addressed. My own reaction may be stated simply. I have rarely seen a major dispute over *the facts* as to a significant issue which the arbitrators were required to decide. Differences between the parties have inevitably been with respect to *the standards* to be applied to those facts. Absent a difference between the parties as to appropriate standards, there would be no new contract arbitration.

It is interesting to note that although most objection to arbitration appears to come from the labor side, arbitration awards in transit have been responsible for many of the employees' most significant advances. For example, in 1934 the five-day, 40-hour week was established, with maintenance of pay; in 1942, equal pay was obtained for women doing the same work as men; and a trusteed, funded, actuarially sound pension plan was established by arbitration in 1945.

In summary, existing prejudices against voluntary arbitration of new contract terms have no factual basis. Such attacks as have been mounted in the transit industry have in reality been directed at results in a particular case, by the party who felt aggrieved. They have not offered a challenge to the process, which continues to be viable.

Voluntary arbitration of new contract terms in transit owes its origin to the conviction of William D. Mahon (the Amalgamated's international president for over 50 years, beginning in 1893) that the unions should exert every possible effort to avoid causing the public to suffer the inconvenience of a strike. As a result of Mahon's initiative, the international constitution established a requirement that each local union offer to arbitrate any dispute before a strike will be sanctioned. That constitutional provision continues in effect.

An important part of the history of arbitration in transit was contributed by O. David Zimring, who founded the Labor Bureau of Middle West in 1921. Zimring brought talent and imagination to the arbitration process in transit, and he deserves much of the credit for its success and durability over the years.

Although there was some movement toward subsidy, guaranteed return, and even municipal ownership after World War I, and more after World War II, large parts of transit were privately owned and operated through the 1950s. A significant move toward municipal (or state) ownership and even operation has occurred since then. Most of those changes in ownership were made under statutes which specifically authorized (and in some cases, mandated) the government agency to offer arbitration of disputes over new contract terms. Not infrequently such takeovers by government took place in the wake of strikes called when the private owner refused arbitration proffered by the union. The

Urban Mass Transit Act was passed in 1964, embodying a federal determination to prevent further deterioration of the nation's mass transit facilities. Section 10 (c), later 13 (c), was included and made certain that contract arbitration would be continued, subject to U. S. Department of Labor approval. The legislation reflects the determination at both the state and national levels to retain, in the public sector, the bargaining patterns established in the private domain.

Management has from time to time taken the position that the transfer from private to public ownership created a whole new "game," and has offered arbitrators a whole new "game plan." In fact, present operation is in part contracted out to operating companies whose top people are the former private operators. The part which is publicly operated recruited a large proportion of the former private operators. And almost all, however owned and operated, still use John Dash in negotiations and in arbitrations.

Small wonder, then, that local unions are not really persuaded a change has taken place in the parties' positions in bargaining or in arbitration. As employees of a private management in the past, they were told their hopes were too high when they sought to compare themselves with employees on publicly owned properties. The public employers, they were told, had nearly unlimited access to funds. Today the same employees are being told by many of the very same management people that because they are now public employees, they aspire to too much when they seek continuation of the progress in wages and working conditions they made as employees of private enterprise.

The employees state simply that the cost of food, shelter, clothing, and education for their families did not change on public takeover, nor did their other needs and hopes. The need for an arbitrator to fashion new rules and conditions fairly and equitably similarly did not change.

Locals of the Amalgamated are autonomous in most respects. They negotiate their own agreements, locally. Nevertheless, most Amalgamated contracts contain arbitration clauses applicable on a continuing basis to all disputes. The international strongly favors the continuing clause voluntarily arrived at well in advance of the time of possible conflict; that is, well in advance of the

time one side or the other may have a temporary, but controlling, economic advantage.

The voluntary, continuing clause can and should be distinguished from compulsory arbitration, established by law or by an outside power. In our private governments, we can live with arbitration which is required as a result of our mutual agreement to forgo the opportunistic advantage of a temporary increase in economic power. But we can also abolish it if it fails to allow acceptable and durable results. Knowledge of the existence of the power to change and to abolish contract arbitration is one of the essential elements in making contract arbitration in transit acceptable where compulsory arbitration is not. It reflects the human desire to have alternatives. It is a long time since a management and a local agreed to abolish contract arbitration. But they have, and it was done in arbitration. More recently, in an arbitration proceeding, a management and a local union agreed that a voluntary, continuing arbitration clause could be added to the agreement.

As I have stated, contract arbitration in transit is not a product of the relatively recent move to public ownership. More important, its continued use is not inevitable regardless of the results it achieves. It happens that in Boston, Chicago, Washington, Pittsburgh, and some other cities where arbitration has been used periodically, you see relatively high wages and relatively good working conditions. However, you will also see good wages and working conditions in other cities where arbitration is not used. I suggest to you that strikes and lockouts do occur in public employment. The New York City and Philadelphia transit systems are publicly owned and operated. The Long Island Railroad, owned by the State of New York and operated by the New York Metropolitan Transit Authority, recently had a strike which lasted six weeks during the heaviest traffic and shopping season of the year. And we have had strikes of teachers, sanitation workers, and hospital workers, and even police and fire department slowdowns.

Some parameters may be of interest. In the last few years our office has processed five or six transit new contract arbitration cases a year. On the average, new contract cases have taken nine to 12 hearing days to present, while pension cases have taken three to five days. In addition, there are three to five days of long,

rough executive sessions, sometimes referred to as "nut cracker" sessions. This is *not* a meaningful way to describe a "typical" case; there is no typical case. We have had a contract case which took 32 hearing days, and a pension case with 20 hearing days.

The hearing days are relatively full ones—five to six hours a day and sometimes more. The stenographic transcript runs 175-200 pages per day even though most evidence is documentary in form. Thus, in addition to a transcript of 2,000 pages for a hearing of 10 or 11 days, there will be more than 300 formal exhibits, many of them multipage, comprehensive analyses of collective bargaining results over a long period in many areas. Too often, comprehensive posthearing briefs are filed by both sides.

Transit arbitration is tripartite. Occasionally employer-designated partisans come from skilled in-house staff. Most often they are highly skilled professionals hired for the purpose. The management case is always presented by highly skilled professionals, usually John Dash, assisted in some cases by legal counsel. Where the Labor Bureau presents the union case, we usually supply both the union partisan arbitrator and the advocate.

In a contract case, it is not unusual for a tripartite board to be faced with resolution of issues in the following categories:

1. *Basic wage and salary rates, cost-of-living escalation, job class differentials, and reclassifications.* Transit wage setting is probably less complex than many others in that, typically, only a single rate need be determined—the hourly rate for the top-rated operator. The parties themselves, in most cases, accommodate all other changes in wage and salary schedules to change in that single rate.

The cost-of-living issue provides a major battle area today, as it has for some years. Full percentage quarterly cost-of-living escalation is an Amalgamated bargaining objective; it was achieved on many of the larger properties many years ago. Clauses providing less than full protection are being improved. Both the achievement and improvement of escalator clauses have been accomplished through the arbitration process. In those cases where such clauses were modified, whether by agreement or in arbitration, they are being reinstated and improved.

2. *Working conditions common to most industries.* These include vacations; holidays; sick leave; insurance; jury duty; bereavement leave; safety; hospital, medical, and surgical care; and the newer ramifications such as dental, eyeglass, and prescription drug programs. Also customarily present are the issues of premium pay for daily and weekly overtime for hours outside of regularly scheduled hours and for hazardous and undesirable assignments. Seniority is of greater significance than elsewhere because of its special value in a single-rate wage structure. Call-in pay, guarantees, and minimums are frequently in dispute.

3. *Working conditions peculiar to transit.* These are the most complex issues, relating to the scheduling of service and to employees' assignments. Transit schedules provide different starting and quitting times for almost every operating employee (75 to 80 percent of the work force), and about half of the assignments contain an unpaid break or interval. Problems abound of compensation for time elapsed between first report and final release, payment for travel time between assigned points, recovery time to adjust for delays and for personal needs, intervening time between assignments, all in a context of whether an employee may be separated from the vehicle he is operating. We've had cases where a knowledgeable impartial has succeeded in assigning his two partisan arbitrators, as a subcommittee, the task of resolving these issues. That gambit has worked, largely because the partisans were reasonable and had no acceptable alternative.

In pension cases, or in contract cases which include pension issues, both parties customarily address the need for the plan, or for the changes, the shortcomings of the existing agreement, and the plan's history, both in terms of its stated provisions and of their effect on yields as the plan has changed over the years. Changes in the Social Security law and their effect on retirement income introduce additional complexities into such proceedings.

In the larger cities, both parties usually bring in actuaries to review the costs. Not uncommonly, we deal with complex assumptions of interest, salary schedules, and age at retirement.

So much for history and parameters. I turn now to the function of the impartial. If there is a most important key to successful arbitration, it must be acceptability. Now, you may ask, how can

we recognize the result which will be acceptable? What point of view? What procedures? What magic touchstone is available to enable us to separate the gold from the phony?

I recognize the difference between the function of an arbitrator in a grievance case, or in contract interpretation, and the function of an arbitrator in a new contract case. The new contract arbitrator is a legislator. The grievance arbitrator is a judge, making most decisions against predetermined standards. A grievance arbitrator calls his shots as he interprets the contract and the facts. The "interest" arbitrator is legislating for the future, without predetermined standards against which to make measurements.

Permit me, please, some words of caution. Most transit new contract cases involve the largest locals because, unfortunately, the smaller locals often feel they cannot afford arbitration. And when I speak of acceptability as *the* key to successful arbitration, I have in mind primarily those collective bargaining situations which meet certain conditions.

First, the relationship between the employer and the union must be mature; they must have lived together for a substantial time. Their bargaining must have been informed. The paths the parties followed in their settlements must have been proven durable over a period of time. So, too, the routes which they have travelled.

Second, acceptability cannot be applied to situations where, for whatever reasons, wages and working conditions have been substandard; that is, below minimum wage levels for the community or out of line with living levels generally accepted in the industry and the community. The existence of patent injustice cannot be justified by practice or acceptance. It is a prime function of arbitration to correct inequities, not to perpetuate them.

Third, acceptability cannot be applied where there has been a drastic change in management or in union representation or leadership. For example, several private transit operations tottered near bankruptcy during the last years before public takeover. In such situations, wages and conditions immediately before the takeover were often severely depressed—sometimes over a substantial period. In such situations, an arbitrator must, of necessity, look back beyond the immediately preceding years to gain a view of what was fair and acceptable.

Finally, the viability of our national economy is based on progress by those in the work force, not retrogression. Acceptability has not and should not be used to justify retrogression.

The road to acceptability rests on two elements: the standards the arbitrator applies and the fulfillment of the tripartite process.

The standards used in making awards in particular contract arbitration cases are vital to the process; when you are determining the living conditions of a hundred, a thousand, or perhaps tens of thousands of working men and their families for a period of one to three years, you had better be sure of what you are doing.

Historically, arbitrators have let themselves become involved in finely drawn discussion of productivity, living-wage budgets, and ability to pay, in almost unbelievable detail. Arbitrators have also let themselves work over abstruse arithmetical computations in seeking answers. They have sought to compute the percentage of establishments in which a particular condition existed. One of the poorest performances I can remember was an arbitration award which accepted the relationship between annual averages of wages to begin with and then relied on 10-year moving averages in the search for a mathematically perfect answer.

Whatever devices neutral arbitrators used in this area—whatever the results they came to—their awards ultimately were worthless unless the economic relationships they achieved proved to be acceptable and durable.

A relatively recent award in transit substantially destroyed a cost-of-living clause that had been accepted by the employees and by the management for nearly two decades—even with a change in company ownership. At the conclusion of the award's three-year term, the management and the union entered into a voluntary agreement restoring the clause. The very considerable credentials carried by the board's members did not lend any permanent truth to a glaring mistake. Wisdom in making fair and durable awards is not certified or insured by any set of qualifications, degrees, or academic affiliations. The touchstone, I repeat, is acceptability—what the parties will take, accept, live with, and retain in their continuing relationship.

Now, assuming you have determined that the case is one where

acceptability *is* the key to a fair award, how do you recognize the "acceptable" and "durable" result? Your very best bet is to look at what the parties have done in the past. When you make this overlook, try to do it from the point of view of the negotiators at the time they made their decisions. What did they know then? What could they then guess or estimate for the future? Given a competent presentation of the historic facts by competent protagonists, their viewpoint is not difficult to gain. And if the adversaries don't offer this view to you in their direct presentations, push them. Make them show you the facts that counted.

This leads me to the other vital characteristic of successful contract arbitration determination—the tripartite determination. The tripartite executive session produces the result that can come no other way. Here the participants bring to play all of their personal and professional qualifications—their competence and, of course, their integrity. Sometimes you don't know about the integrity of an individual until you meet with him in a tight, bitterly contested executive session—what I have referred to as a "nut cracker." For what it's worth, we try to insist on individuals who are members of the Academy. We have, in a few cases, been successful in getting that criterion written into the arbitration clause. We believe that the badge of the Academy is the best guarantee we can get that integrity can be assumed.

That is also generally true in the judgment of competence. Academy members are accepted as competent professional arbitrators. However, competence in grievance arbitration is not necessarily a qualification for a contract change problem, and the experience of many Academy members has been confined to grievances and contract interpretation work. Certainly, it takes an intelligent, fair-minded individual to qualify for this work, and lawyers are especially trained for it. But the legislative techniques essential in contract arbitration call for other qualifications. I would list the following as essentials:

1. *Open-mindedness.* We may be trying to enter new fields; we have no precedents. But we have new problems, and an objective may be equitable even though it has never been done before. Our Congress was open-minded when it enacted the NRA, the Social Security Act, the Medicare program. The time for those changes had arrived. We believe that the competent contract arbitration board must be able to recognize similar needs in its approach to

the issues in a contract change case. As the late George Taylor put it in an award in 1947, "If arbitration in the utility industries were to be based strictly upon maintaining an established industry pattern, static working conditions would obtain. The award of two paid holidays to the operators recognizes, in a small way, that new ground can be ploughed through arbitration as well as through strikes."

2. I think that some *mathematical know-how* is needed. We don't need computations of 10-year moving averages (although if you enjoy experimenting with them, feel free to do so). But we do hope that you will recognize arithmetic relationships that have existed in the past and may still be appropriate. We live in a day when they teach set theory to high school algebra students, but I have met arbitrators who, in all other respects, could qualify as Supreme Court Justices, but who, lawyer-like, are incapable of applying simple percentages to wage rates accurately.

3. *Diligence.* We expect you to do your homework. We want and expect neutral arbitrators to have mastered the positions of the parties before they enter the executive session.

4. *Toughness.* We expect a willingness on the part of the impartial arbitrator to do battle for his position when he has arrived at it. There is nothing worse than the arbitrator who pronounces an *ipse dixit* and stops there. He refuses to go to the record to support his decision; he looks for no principles or facts to back up his award, or will refuse to accept a refutation of his mistakes. I don't want arbitrators who put their arms around your shoulders, quote the Bible at you, saying, "Come, let us reason together," and then do what they intended to do anyway, even though you show them they are dead wrong.

These are the key qualifications, as I see it: open-mindedness, rudimentary mathematical know-how, diligence in studying the record, and, most important, toughness—the toughness which is part of professional integrity.

This statement should not be construed as an effort to restrict or impair your vision and freedom of approach when you accept contract arbitration assignments. We need imagination and new points of view. As I have already indicated, we want professional arbitrators in our work. Many arbitrators start from university affiliations and retain such affiliations as they expand into arbitra-

tion assignments. The learned academic viewpoint is useful. It keeps us in line with many of the new trends that are sweeping the world and helps point out new directions for our consideration. But don't lose sight of our world as you help us with our problems.

There are areas in industry and in the public field where collective bargaining has not matured to the point where the relationship between the parties can be viewed as truly civilized. Any form of peaceful machinery that can be tried in such an environment is probably better than the unending strife prevailing in their deep jungle. In transit, we don't live in a jungle. We know our history, we respect each other's competence, and we are dedicated to finding the fairest answer to our problems—always, when possible, through the orderly process of arbitration after negotiations fail.

In a recent transit arbitration opinion, our distinguished and very able chairman, Harry Platt, said:

> ". . . the disparate conclusions urged upon us by the parties' expert witnesses, using the same statistical raw material, demonstrate the caution that must be used in drawing factual conclusions from the statistical evidence. Despite the difficulties inherent in the process, however, the use of such statistics is not improper. Probabilities guide men in their everyday affairs and evidence of statistical probability may likewise be considered in determining the questions presented."

Both partisan arbitrators dissented in part. Harry's resolution of the dispute was not possible over the table, but the parties accepted the award. If, again, resolution is not possible at the table, I feel reasonably certain that they will resort to arbitration.

And so I end as I began. Experience teaches that new contract arbitration is reasonable and has worked in transit. Hopefully, in the not too distant future, the same will be said of steel. And then, who knows?

INTEREST ARBITRATION IN PUBLIC TRANSIT

MR. JOHN A. DASH: It is customary, before a group as distinguished as this, to express one's appreciation for the opportunity