hour. Similarly, even maverick arbitrators in certain cases manage to suppress strong activist propensities. They view their role basically as judicial. When they intervene actively, they do so with the calculation of a high-wire tight-rope walker, well aware of the prospects of success and the perils of failure.

The active-passive dichotomy is even more accentuated in the propensity of decision-makers to encourage settlement of a case. Of course, judges often perform this role in pretrial proceedings, and the activist judge or arbitrator may choose to do so during the trial or hearing. Ordinarily, even an activist arbitrator will not attempt to mediate a dispute unless he perceives (usually based upon prior experience with the same parties) that the parties will be receptive to his efforts.

In the *typical* case, it may be difficult to tell an active from a passive trier by his conduct. Even in some unusual cases, one cannot tell them apart. But there are occasional instances in which the philosophical differences actually determine the manner in which the trier conducts the case.

V. Interaction of NLRB, Judicial, and Arbitration Proceedings

Trial judges rarely consider NLRA issues and almost never have occasion to resolve on the merits NLRA issues of fact or law. Thus, both federal district judges and state trial court judges are reasonably well insulated from consideration of the kinds of NLRB-related issues concerning which arbitrators and NLRB personnel find a *Collyer-* and *Spielberg-*created common ground.

NLRB decisions are reviewed by federal courts of appeals, and only in respect to extraordinary matters like injunction requests and procedural questions on the enforcement of subpoenas and similar types of matters do trial judges become involved in NLRA proceedings.

Federal district judges and state trial court judges could become involved in *Collyer-Spielberg* and other arbitrator-NLRB-related issues in their capacity as decision-makers in actions to compel arbitration or to enforce arbitration awards. But ordinarily those proceedings are not trials de novo in the sense that witnesses are heard and credibility and other issues of fact are resolved. An arbitration-enforcement proceeding is more akin to the judicial appellate process.

Even so, federal courts of appeals are required by the NLRB to examine the "record considered as a whole" for "substantial evidence" to support "findings of the Board." The flow of decisions continuously discloses that the judges of the various federal circuits do actively engage in fact-finding (in contrast to rule-making), sorting through the evidence, disbelieving this witness credited by the Board, accepting the account of that witness that has been rejected by the Board. Thus, to the extent that identical fact situations are encountered by arbitrators and the NLRB, so also do court of appeal judges perform fact-finding functions relative to them.

Thus, our panel of arbitrators, judges, and lawyers actually considered questions of law commonly considered by federal appellate courts reviewing NLRB decisions and the kinds of questions of law ordinarily considered by trial judges considering arbitration-enforcement issues.

On the questions considered, there was little disagreement among the panel members, particularly on matters concerning structural differences between the arbitration, judicial, and NLRB administrative processes. For example, no one disputed that with rising federal court caseloads (with Title VII cases highlighting the rate of increase), judicial proceedings are generally slower than arbitral proceedings. The NLRB's caseload also continues to rise each year, and the combination of administrative and judicial proceedings required to complete an NLRB case that is fully litigated through the judicial appellate process makes that process slower than the arbitration process. But general comparisons must be made with some caution. Most NLRB unfair-practice filings are disposed of quickly by voluntary withdrawals or other settlements, following the investigation the NLRB personnel conduct to determine whether an unfair-practice complaint should issue. Thus, the exceptional long and drawn-out NLRB judicial proceeding may not always be fairly compared with "expeditious" arbitration proceedings.

Nor was it disputed by the panel members that fundamental differences exist between and among NLRB, judicial, and arbitral structures. Yet, arbitrators, despite their pay-per-case status, view their responsibilities as decision-makers much as do judges. For example, the panel considered the question of whether a union unable to pay arbitration fees following a *Collyer* deferral to arbitration could prevail upon the arbitrator to decline jurisdiction on the ground that the NLRB "can now reas-

sert its jurisdiction and hear the case." Most panelists agreed that the arbitrator in that circumstance should not refuse to hear the case; another panelist suggested that the union, situated as the hypothetical union, would not reveal its financial condition until the arbitrator's bill arrived. But that would defeat the purpose of the union's plea of poverty at the outset of the case: to get back to the NLRB as quickly as possible, in hopes of becoming the beneficiary of a fairly quick and inexpensive (to the union) NLRB disposition that favors the union.

As arbitrators, all panelists would have proceeded with the arbitration if the union had walked out of the proceedings following the arbitrator's decision to hear the case, despite the union's plea of inability to pay arbitration costs.

The question of whether the "special competence" of arbitrators should be considered by the NLRB in *Spielberg*-type cases, as it is considered by federal district judges in Title VII cases (per note 21 in *Gardner-Denver*), did not quite get off the ground. All panelists agreed with the view of one panel member that *Gardner-Denver* incorrectly presupposed that federal district judges, in determining what weight to give an arbitrator's award, had the capacity to determine the "special competence of particular arbitrators" to hear Title VII cases. Since, in that respect, NLRB members have no greater powers of discernment than federal judges possess, NLRB members and other NLRB personnel are similarly incapable of measuring the "special competence of particular arbitrators" in determining what weight an arbitrator's award should be given in a *Spielberg* setting.

The panel considered the reasoning of arbitrators and the NLRB in "concerted activities" cases. As arbitrators, all panelists would have upheld the stern discipline of an employee who endangered fellow employees in his attempts to bring unsafe working conditions to the attention of a safety inspector. The fact that the NLRB had held to the contrary in a "concerted activities" unfair-practice case would not have led any panelists to sustain the grievance. It was an almost unanimous view of the panel that the interpretation of "just cause" provisions in collective bargaining agreements need not—and possibly should not—be influenced by NLRB interpretations of the "concerted activities" provision in NLRA Section 7. Disagreement with the NLRB centered on what appeared to be a subjective rather than objective standard employed by the NLRB in concerted-activities discipline cases. Similarly, all panelists felt that an arbitrator should

order the reinstatement of an employee who was discharged after protesting to the company president (with a loud voice and a finger shake) the union's failure to grieve his wage dispute with the company. All panelists felt that an objective rather than subjective standard should govern cases in which employees refuse to perform work for reasons of safety. Thus, as arbitrators, all panelists would prefer to apply the rule that for "just cause" purposes a concerted work stoppage would constitute grounds for disciplinary action on determining that employees could not have reasonably believed that a job danger existed.

VI. Fair Representation[33]

The duty of fair representation is of legislative and judicial origin. In *Steele* v. *Louisville & Nashville Railroad,* in 1944, the Supreme Court read into the Railway Labor Act the rule that a union that had been certified by the National Mediation Board as the exclusive representative of all members of a craft was forbidden to discriminate against some of them because of their race. In 1964 the National Labor Relations Board adopted the same principle in the *Hughes Tool* case under the National Labor Relations Act.

These landmark decisions, and many others as well, were concerned with racial discrimination. Nowadays everybody, excepting members of the Ku Klux Klan, would agree with the principle that a union acting either alone or jointly with an employer cannot discharge its duty to represent employees in the bargaining unit fairly if it discriminates against those who are black. To the best of my knowledge, neither appointment to the bench nor selection as an arbitrator is conditioned upon membership in the Klan. It is fair to say that judges and arbitrators, if faced with this issue, would respond to it in exactly the same way. This is clear and simple. Everything else about the duty of fair representation is muddled, controversial, and troublesome.

In recent years there has been a small flood of cases involving the duty that have gone to the Labor Board, to the courts, including the Supreme Court of the United States, and to arbitrators. They bespeak trouble. The uncertain state of the law is admirably summarized in the recently published collection of

[33]This section was submitted by panel member Irving Bernstein.