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.

essays edited by Jean McKelvey under the title *The Duty of Fair Representation.* Another complication is that, given the litigiousness of Americans as a breed and the unfortunate propensity of many people to try to get something for nothing, the rule encourages frivolous claims. Still another is that unions, fearful of being held to have defied the duty, are prone to process grievances that they know have no merit. Finally, for the present purpose, which is, presumably, to contrast the conduct of judges and arbitrators, there is no basis for the comparison because they play different roles. Since this is a meeting of arbitrators, I shall confine myself to the problems that arbitrators confront and simply wish the judges Godspeed.

The typical arbitration involving the duty of fair representation in my experience is at best troublesome and at worst a prelude to litigation. This is because an adversary system designed for two contestants is not comfortable in accommodating three. The eternal triangle is designed for the TV soap opera; it does not fit into the arbitration hearing room.

Among the difficult problems are the following: Is the grievant a "party" to the proceeding? If the parties are represented by counsel, which is usual, do the attorneys for both the union and the grievant speak? Is the grievant's adversary the employer or the union? Or both? Suppose the employer refuses to go forward until the question of the grievant's status is resolved. Can the arbitrator compel him to do so? Does it make sense to proceed ex parte? Who files the brief? If the grievant loses, is the award final and binding upon him? Who pays labor's share of the costs—for witnesses, for the hearing room, for the transcript, for the arbitrator's fee?

I am not sure that there are any satisfactory answers to these questions. But I have devised a procedure in some half-dozen cases with which I have wrestled that seems to work out reasonably well. It can be called the "one voice rule."

The basic theory rests on the national labor policy and the collective bargaining agreement. That is, the union is the certified and exclusive representative of all the employees in the unit, including the disaffected grievant. Unless there is conclusive evidence to the contrary, the union is presumed to be acting in good faith as the grievant's representative. The arbitrator is the creature of the collective bargaining agreement. It is the sole source of his authority. Thus, he has no power to make the grievant a third party to the proceeding. Nor does he have

authority to compel the employer to proceed before the party question is resolved. If there is insistence on such a position, the arbitrator should withdraw, putting pressure on the moving party to resolve the matter in the courts.

If the arbitration, in fact, goes forward, the union and the grievant shall speak with only one voice, which is the union's. Actually, counsel for either the grievant or the union may speak for the union, but only he is allowed to speak, both orally and in writing. The attorneys shall have time to caucus. The award, of course, is binding upon the union.

This arrangement will win no awards for neatness or the elimination of loose ends. All I can say for it is that thus far, at least, it has worked for me.

VII. Conclusion

As Justice Powell stated for a unanimous Court in *Alexander* v. *Gardner-Denver*,[34] judges interpret the law of the land and arbitrators interpret the law of the shop. Despite these important differences, the decision-making process of judges and arbitrators is much the same.

The principal function of trial judges and arbitrators is "fact-finding," a term that does not convey an entirely accurate impression of the process that occurs at the conclusion of a trial or hearing. Facts are not simply "found"; they usually must be "extracted" from the conflicting testimony of witnesses who, like most of us, have different perceptions of external events—differences compounded by the passage of time and fallibility of human memory. While triers of fact apply well-established credibility guidelines in the resolution of contradicting testimony, "fact-finding" remains a highly subjective process both as to witnesses who relate the facts and decision-makers who construe them. In addition, the interpretation of ambiguous language may add another element of uncertainty to the outcome of a contested case.

Once the case record is completed, the decision-maker mulls it over, then subjects it to an intensive scrutiny and examination. Eventually, as we have noted, a guiding idea, a tentative conclusion, will be crystalized.

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[34]415 U.S. 361, 7 FEP Cases 81 (1974).