CHAPTER 6

DECISIONAL THINKING

NEW YORK PANEL REPORT*

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Preface

The following report of the New York Panel on Arbitral/Judicial Decision Making is based on certain premises which, we believe, should be set forth at its outset in order that what follows may be properly understood. The panel, while recognizing that different *conclusions* might be reached by either judges or arbitrators in a given fact situation, has regarded this element to be irrelevant to the purposes of this study. In that regard we have deemed the question of a precise result in a particular case (frequently affected by the different metes and bounds of judicial and arbitral authority and source of law) to be beyond and apart from the method, if any, by which that result is reached by the adjudicator.

This is, of course, a distinction which has particular importance when the litigation before either the arbitrator or the judge involves both the "law of the contract" and "external law," that is, the Occupational Safety and Health Act, the National Labor Relations Act, Title VII of the Civil Rights Act, or the duty of fair representation as developed by the courts and by the National Labor Relations Board. In such situations, we believe, differences may well and presumably do exist as to arbitral and judicial rulings as, inter alia, scope of inquiry, ad-

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missibility of evidence, and authority to grant or deny relief. We do not believe these differences, founded on such matters, reflect an arbitral/judicial variance in decision-making; rather, they reflect the boundaries of the decision which can be made.

We have also found, in our discussions, that the panel members, whether adjudicators or counsel, can perceive no significant distinction between the decisional processes of law-trained and nonlaw-trained arbitrators. Our conclusions, accordingly, refer to arbitrators generally without such a division within their ranks.

The bulk of this report, further, is based on the premise that the mechanics and form of the forum are, inextricably, factors that may bear upon the making of the final decision by either a judge or an arbitrator. We have, accordingly, cast the report's findings in the framework of the three major divisions which mark the progress of a claim through litigation, that is, the prehearing, hearing, and posthearing stages. As stated by one panel member, "It is difficult to isolate the decisional process and focus only on what the arbitrator or judge thinks about from the time testimony is completed until the time he writes an opinion. Differences in procedure affect the role of the advocate in the two tribunals, the material available to the trier (whether arbitrator or judge), and the decisional process. Indeed, the method of articulating the result may itself reflect some of these differences."

Finally, while not unknowledgeable of such scholarly research and literature as exists in this field of study, we have not attempted to prove or disprove the various theses which have been advanced therein. We have felt it our mandate, instead, to offer only those reasoned conclusions which we could reach from our own collective and individual experience.

I. Prehearing Procedures and Processes

The Choice of the Forum and of the Adjudicator

Any choice between having one's claim or defense determined by an arbitrator rather than a judge and/or jury may well not be one realistically available to a party to a collective bargaining contract as of that point at which a dispute actively arises. Given the fact that an almost overwhelming percentage of collective bargaining contracts in this country designate

grievance arbitration, to one degree or another, as the forum in which disputes as to interpretation and application of the contract must be determined, one can assume that this choice and its consequences have been settled well before litigation arises.[1] That choice, as a consequence of the *Steelworkers Trilogy*, only rarely offers opportunity for later reflection and rejection.

It can reasonably be asked whether this choice (however voluntary at the moment) of the forum nevertheless subsumes a prior, deliberate choice as to different methods of decision-making. Justice Douglas's paean to arbitral virtues in the *Trilogy*, even shorn of its rhetoric, can be interpreted as support for such a proposition with its emphasis upon the arbitrator's presumed singular knowledge of the "law of the shop," the "therapeutic" value of arbitration, and the proposition that arbitration is not a substitute for litigation but for industrial strife. Indeed, Justice Douglas states that it must be the expectation of the parties that the arbitrator's "judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished."

Despite this description of the arbitral function as one ranging appreciably beyond the limits of judicial discretion, it was the consensus of the panel that arbitrators, generally, are not granted, nor rely upon, the power to determine intuitively what is best for the parties. Rather, the selection of arbitration as the dispute-settlement device is founded on an expectation of greater experience and expertise among arbitrators as to matters of industrial relations, experience and expertise to be used as a guide to determining what the parties have agreed to do in their contract rather than an independent determinant of what is "right." If so, it is an adjudicator experienced in the type of dispute at hand rather than a different type of ultimate adjudication which is being selected.

Much the same conclusion, in the opinion of the panel, must be reached as to the impact on decision-making resulting from selection of a particular arbitrator to serve either ad hoc or for the term of a contract. The selection is, of course, within the

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[1]This "choice," of course, may well not have been made by an individual pursuing an individual claim under the contract.

control of the parties rather than one more often than not imposed upon them by the mechanics of the court system in the case of a judge. Again, however, it is the consensus of the panel that, while a more informed judgment may be sought, such party-controlled selection rarely has effect upon the *method* by which decision is reached.

Pretrial Preparation by Counsel and Discovery

It was the consensus of the panel that, with obvious exceptions for unique cases, preparation of counsel for a judicial proceeding tends to be far more extensive and thorough than that engaged in for arbitral proceedings. The question naturally arises as to whether this assumed greater degree of preparation has ultimate bearing on the manner in which final decision is reached.

The panel's discussion did not reveal any perceivable difference in arbitral/judicial decision-making resulting from the degree of pretrial preparation (or, for that matter, the relative skill of counsel) except when such pretrial preparation occurs in the form of discovery procedures, basically available only in the courts. As summarized by a panel member: "In essence, there are no pretrial procedures in arbitration. The parties seek to have the arbitrator arrive at the hearing with a mind that is tabula rasa. They want him to have no impression at all concerning either the facts or merits of the suit.

"On the other hand, in most state proceedings and in all federal proceedings, pretrial discovery, orders for pretrial conferences, discussions with counsel, rulings on discovery requests, familiarity with motions, and the almost universal requirement of pretrial briefs bring the trial judge to trial date with a familiarity with the facts and, in most cases, with a grounding in the applicable law. The trier who has such a background will inevitably have some impressions about the validity of the parties' positions before trial."

This presumably deliberate choice of parties and their counsel as to what the adjudicator will know about the dispute before a "hearing" takes place unquestionably allows the judge, as contrasted with the arbitrator, an opportunity to make earlier judgments. The question remains whether it allows better or different judgmental processes. It would seem safe to state that the extent to which this provides a judge with more solid

grounds on which to determine admissibility of evidence, or the degree of its relevance or materiality, must necessarily affect the judgmental process. Although even this difference between arbitration and the judicial process may be obscured in trials by a judge without a jury, the "I'll take it for whatever it is worth" response by many arbitrators (and corresponding lament by opposing counsel), with its resultant doubts as to the corpus of evidence which will result in reasoned judgment, is avoided.

On the appellate level, the judge is further assisted, prior to any actual argument, with far more—that is, the trial judge's opinion, the briefs of the parties on appeal, and, possibly, a transcript of the proceedings below. It would seem inescapable that these aids must narrow both fact and law questions to the degree that a far more finely honed decision is possible.

As was made clear in the panel's discussions, the impact of the foregoing must, however, be considered in the context of the comparative range of expertise brought to an individual case by the adjudicator in the two forums. While the precise subject-matter of an individual case presented to an arbitrator may range from nuclear power plants to baseball salaries, from complex incentive plans to sparsely stated provisions for premiums for "dirty" work, not to mention the enormous diversity of situations allegedly constituting "just cause" for discipline, the individual cases arise in a single field of jurisprudence, the common law of the collective bargaining contract. By contrast, a judge either on the trial or appellate level will encounter a diversity of laws from admiralty to wills with no common denominator. The proposition can be argued, with considerable force, that prehearing procedures available to the court are far more required by the need to become an instant expert in a multitude of fields rather than factors in how an individual decision is actually made.

Settlement Before Hearing

It appears to the panel that there is substantial reason to conclude that far more cases are settled on the "courthouse steps" as contrasted to those resolved in the corridor outside the arbitration hearing room. If such is true, as we believe it to be, that fact might reveal some difference in the decision-making process as perceived by counsel for the parties. At a minimum, it may disclose some indication as to how judges and arbitrators

view their functions, that is, as decision-makers or problem-resolvers.

As was stated during the panel discussions: "In federal court, and in many state courts, settlement discussions are held at the pretrial conference. We must focus on the nonjury case because, typically, federal judges are less active in attempts to settle nonjury cases. However, even in such cases, it is common practice for the judge to inquire about settlement possibilities.

"On the other hand, some arbitrators diligently avoid any settlement discussions. It is my perception (perhaps erroneous) that the few arbitrators who do encourage settlement discussions are usually those who have a long-standing acquaintance with the parties and that the typical ad hoc arbitrator, who has only an occasional case with them, would avoid initiating any such discussion." The number of arbitrators who are alert to (and seize upon) opportunities for mediation rather than final adjudication is not easily quantifiable. Some, unquestionably, exist and are presumably known to the parties who select them as such.

It can be argued—and hotly disputed—that an arbitrator who attempts, successfully or not, to mediate a satisfactory settlement as compared with rendering a judgment thereby indicates a disposition for a different bench mark—that is, an acceptable result—for decision-making. If so, this would, on the face of it, be a trait shared by much of the federal bench in view of the settlement procedures noted above. No such conclusion has been drawn by this panel. The question remains, nonetheless, whether mediation may, for either arbitrator or judge, have carry-over effect if decision ultimately must be made.

II. Hearing Procedures and Processes

It was the firm consensus of the panel that the very atmosphere and setting of a trial as contrasted with an arbitration hearing may have some, if not appreciable, impact upon the decision-making process. As summarized by a member of the panel: "The difference in atmosphere plays a role both in the testimony and the role of the trier. In the typical arbitration, the arbitrator seeks to have the parties accept him as merely primus inter pares. He sits at the same table, and at the same level with the parties. There is no pomp and no circumstance. On the other hand, in the courtroom the judge sits in a paneled room,

clad in black robes with an American flag behind him. Inevitably, the proceedings are much more formal—apart from whether or not rules of evidence and procedural rules are followed.

"This difference in atmosphere may also affect the role of the trier. Typically, the parties are suspicious of the arbitrator. The arbitrator must, except when he is well known to the parties over a period of years, observe a super-sanitary atmosphere. On the other hand, the layman is less inclined to view the judge as potentially subject to influence. This attitude, originating at the outset of the proceedings, is nurtured by the difference in trial." To this, however, a caveat must be added: "Obviously, these observations apply to the judge-tried case as compared to the arbitrator-tried case. No comparison can effectively be made between arbitration and the jury-tried case. To the extent that comparisons can be drawn, however, the role of the advocate in trying a case before a jury is much like the role of the advocate in trying a case before an arbitrator. Here the jury is 'sanitized.' The jury is completely uninformed about the case and must be educated by the advocate, and the result is not at all likely to turn on precedent. Indeed, the appeal to equity and conscience may be even greater than in a case tried to an arbitrator." Other, more particular aspects of the courtroom/hearing room comparison are as follows:

The "Parties" to the Action

The formal "parties" to a judicial action are, of course, identified as such through the various pleadings and are subject to known judicial rules as to opportunity to be heard. While in the early years of labor arbitration the same certainty might have been true (without formal rules as such), the development of the doctrine of fair representation since the 1940s has made the matter a far more complex one. Many of the issues will be the subject of a separate paper for this Annual Meeting where considerations of substantive law will be more the focus of attention than herein. The panel believes, however, that specific attention —in the context of comparative decision-making—should be paid to the question of the third "party" involved in arbitration hearings.[2]

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[2]While such "third party" questions could arise in other contexts than the duty of fair representation, such as jurisdictional disputes, the panel restricted its discussions to the areas indicated.

Union and management counsel can and do legitimately disagree as to the degree, if any, to which an individual employee involved in a particular dispute should be allowed to participate in an arbitration hearing. It can be fairly argued that a proceeding which, by contract, is established for union-employer litigation should not (and, indeed, cannot) be made into a tripartite contest. Conversely, the strains of compliance with the obligations of the duty of fair representation can easily justify union wishes that the individual employee not later be heard to state that he or she was not given a proper and full hearing.

It is not the mandate of this panel to resolve that question. It is possible to conclude—whether or not with complete certainty —that the somewhat ambiguous status of "parties" other than the contracting union and employer may well make the decision-making of arbitrators more difficult than that of judges in such situations. Such difficulty, if it exists, may have more impact on the time and care which might be devoted to decision than on the method of reaching such decision.

Apart from the time and care involved in reaching a decision, there is the underlying question of whether such three-party situations may impose a greater burden of independent inquiry on the part of the arbitrator, that is, deliberate probing as to matters not covered by either union or company counsel. Or, from the opposite point of view, is not the arbitrator, unlike the judge, restricted to the determination of those matters which the contracting parties have indicated they wished to resolve? The panel has no consensus (or firm lines of disagreement) to offer in this respect. It would appear that these problems, perhaps only dimly understood at this juncture, remain to be resolved on an individual basis by arbitrators acting according to their own individual predicates. The same may well be true of trial court judges, although the place of the individual employee as an acknowledged litigant may make the task of such a judge more traditional in concept.

Rules of Evidence

It is a commonplace that arbitrators, unlike judges, are not bound by the rules of evidence observed in courts. Such evidentiary restrictions were developed over centuries of Anglo-American judicial experience as a consensus (however varying over the years) of what constitutes a reliable basis for decision.

In the area of criminal prosecutions, some added stringency as to what may be included in a record may well have resulted from the concept that it is not what is probable, but what is certain which can be relied upon to determine a contest between the state and an individual where life or liberty may be at stake.

It can be argued that, at least compared with criminal cases, the basic function of arbitration is to explore all that can be asserted on either side. The fear of the arbitrator was, in the words of Dean Shulman, not that he would hear too much but, rather, too little. Objections of "immaterial," "irrelevant," "not best evidence," "hearsay," however, are not uncommonly heard in fervent utterance by counsel in the average arbitration case even when "counsel" has not been admitted to the bar. It can reasonably be assumed, accordingly, that parties to an arbitration are not necessarily requisitioning an unlimited search for "truth" when they commission an arbitrator to determine a dispute.

No expressed consensus was formally noted (or sought) as to the panel's conclusions on the possible effect of the lack of binding rules of evidence in arbitration upon the decision-making of the arbitrator. It would appear, however, that any arguable "warping" of decisions resulting from broader, more relaxed standards of what is to be considered as part of a record is not perceived as a major problem or affecting, of itself, the arbitral-judicial method of reaching final conclusion.

III. Posthearing Procedures and Processes

A considerable amount of scholarly inquiry has been published by academicians, judges, and arbitrators as to the nature of the decision-making process. That process has been described as sometimes "analytic," sometimes "intuitive," and, even, sometimes "apocalyptic." It is the consensus of the panel that a single arbitrator or judge may well use only one or, at times, all of such methods in making a determination. None of such methods, however, appeared to the panel to be a matter of judicial as contrasted with arbitral thought-process; as was remarked in our discussions, "It is the individual personality, not the title, which determines."

This section of the panel's report is directed, instead, to what happens after the hearing during the period when the trier of the case is attempting to reach and formulate a decision.

Timing of the Determination: Bench Decisions

One difference in arbitral/judicial procedures should be noted at the outset: today in many judge-tried cases in federal court, given adequate pretrial preparation, the judge is prepared to and does hand down an oral decision at the termination of the hearing. For various reasons, this is almost never done by arbitrators. In some instances, the judge's oral decision may, in the event of an appeal, be supplemented by formal findings. If there is no appeal, these oral reasons are likely merely to be transcribed and made part of the record.

Obviously, the thought-processes of the decision-maker are affected by his preconceptions concerning whether or not he is likely to be able to, and wants to, render a decision at the hearing or whether he is likely to take the matter under advisement and study it. In many instances, in court-tried cases, posttrial briefs are not being utilized. Of course, where the matter is taken under submission by a judge, and posttrial briefs are filed, then the differences in the decision-making process are less pronounced.

Findings of "Fact" and "Law"

In connection with the trier's effort to reach a decision, a distinction must be drawn between "facts," that is, the reconstruction of events, and "law," the rules applicable. To some extent this distinction is artificial, but the difference can be critical as to arbitral/judicial judgment. In deciding what were the "facts," that is, the historical reconstruction of what the trier thinks actually happened, it would seem that both the arbitrator and the judge follow the same criteria. In the event of a conflict in testimony, they each must evaluate credibility. This is not done by "rules," but based on experience, a priori assumptions, "intuition," and human and subjective factors. Documents either confirming or disproving the testimony of a witness receive much the same kind of evaluation. Here differences from one case to another depend more on the personality of the trier than on the process. There are arbitrators who are technical and legalistic in their judgments, just as there are judges who follow these processes. On the other hand, there are judges who lean much more to subjective and elastic equitable principles in trying to ascertain "the facts," just as there are arbitrators who do this.

When we turn, however, to the rules that are applied, we find important differences. Judges tend to rely on precedent, a "paper trail" to proper result. Even in an area where there is no precedent, they seek to draw analogies. They look at law books. In a typical arbitration case, there will be little precedent. To the extent that there is some precedent (other than a prior interpretation of the same collective bargaining agreement between the same parties), this precedent is not binding on the arbitrator; it is merely information concerning what other arbitrators have decided. Therefore, by its nature the arbitration process, subject only to the terms of the collective bargaining agreement, leaves much more latitude for equitable considerations.

In noting the lack of *binding* precedent, this is not to say that "precedent" in the form of evolving concepts of basic guidelines have not been developed by arbitral consensus. It is a consensus rather than precedent as such which has led to the development of such basics of industrial relations as progressive discipline, the place of "practice" in interpretation of the contract, and the separation of misconduct connected with or unconnected with the work situs, among others. Yet these are guidelines which, in many respects, serve the same purpose as legal precedent.

Judgment and Opinion Versus Opinion and Award

The functions of the written (or oral) opinion of the trier appear to us to be different.

The arbitrator seeks primarily to use his opinion as a device to educate the parties. Ancillary to and, to some extent, a part of this is his effort to convince the losing party that the arbitrator understood his position and had a rational basis not to accept it. To some extent the arbitrator must, at least subconsciously, be influenced by the compatibility of his decision with accepted principles of labor-management relationships and its impact on the continuing relationship of the parties.

On the other hand, in the "typical" judge-tried case (as contrasted to the atypical case involving an institutional decision with a continuing relationship), the judge pays little or no attention to the impact of the decision on the parties, although he may be to some extent concerned with its precedential value. A primary focus of the judge's opinion is to expose the reasoning that he has followed for judicial review. While it may be desirable for the opinion to be completely comprehensible to the

parties, its evaluation will usually take place not by the parties, but through other judges.

The judge will seek in his opinion to demonstrate that there is a rational basis for the result, but in doing so he is less concerned with convincing the loser that he has understood the loser's position than with demonstrating that a lawyer-turned-judge would render the decision this way. To a much larger extent, therefore, he will rely on precedent, accepted style, and professional notions of craftsmanship.

An arbitrator does not, in the typical opinion, seek to impress his peer group. His primary audience consists of the parties. On the other hand, when rendering opinions, particularly in significant cases where the opinion is likely to be published, judges have a tendency to seek to be craftsmanlike in their opinion-writing. This means not only that precedent will be relied on, but authority will be cited. The structure and thrust of the opinion will differ.

None of the differences discussed above would enable a bystander to predict a difference in result in a given case. If, for example, credibility of witnesses is the only serious factor in the case, despite all of these differences, the result is likely to be the same given equally experienced arbitrators and judges. Where, however, the issues turn not about who is to be believed and who is not to be believed, but upon application of rules to a relationship, then differences in result may be anticipated.

NEW YORK PANEL DISCUSSION

Chairman Christensen: We have been engaged in what I suppose would be called a search for truth, or a search for how you search for truth. I think we can get an immediate argument as to whether or not arbitrators or judges actually search for "truth."

In making our report and doing our studies, we proceeded on the basis of several premises which I think should be made very clear at the outset. It did not take much more than an initial meeting for us to realize what is perhaps a truism: that arbitrators and judges, either contrasted with each other or in each group alone, very possibly will reach different conclusions in any given fact situation. We did not construe our charter as a mission of finding out to what degree the group of arbitrators and judges involved would reach different conclusions in an individual case.

We felt that the answer in any particular case is going to be profoundly affected by the metes and bounds of the authority of the arbiter or the judicial determiner, and that these different metes and bounds of our authority, and the sources of law on which we operate, were really beyond and apart from the study we thought we should do, which is to examine how we make decisions and to what degree, if any, an arbitrator and a judge —circuit court or trial court—as determiners of fact, might operate differently in the decisional process.

As a slight digression in our researches and discussions, we looked at the question of whether or not, looking at arbitrators, there was any difference that we could see within the decision-making process of those who were legally trained (or, as the phrase has been used, "illegally" trained)—that is, whether there was any difference in the methods of decision-making employed by law-trained and nonlaw-trained arbitrators.

Our conclusion was that we did not find any difference of note whether the arbitrament resulted from the arbitrator being law-trained or not law-trained. So, generally, the conclusions we have reached in our discussion refer to arbitrators without deference to any such distinction. We believe that the manner in which litigation is conducted—the forum, the situs, the arena itself—can have impact at various stages on how a decision is made, and certainly molds the process of decision-making. What

we have done, accordingly, is to divide our research and our report into three basic areas: first, prehearing matters of procedure and of the forum; second, the hearing itself, whether it be in an arbitration room or in a courtroom; and third, the posthearing process.

As stated by one of our panel, it is difficult to isolate the decisional process and focus only on what the arbitrator or judge thinks about from the time testimony is completed until the time he or she writes an opinion. Differences in procedure affect the role of the advocate in the two tribunals. The material available to the trier, whether arbitrator or judge, and the decisional process—indeed, the method of articulating results—may itself reflect some of these differences.

Panel Member Howard: I find only one dilemma in attempting to formulate any conclusions on the similarities and differences between arbitral and judicial decision-making. We found very little discernible difference between arbitrators and judges in their decision-making functions, notwithstanding certain differences in procedures and processes. Yet these two decision-making systems with little discernible differences in their decision-making role have in recent years, I think, given some evidence of highly divergent results. Take the case of *Hussman Refrigerators.* How can we explain that judicial decision-making reached the results which I think no arbitrator—certainly no experienced arbitrator—could possibly have reached? Remember that it was a seniority and ability case, and its essence was that the court was convinced that the employer could not fairly and adequately represent the interests of the successful, but junior, job candidate. Arbitrators since time immemorial have relied on the employer to represent the interest of the successful, but junior, job candidate. It may be an oversimplification just to say that this is a bad decision, though I have heard it condemned quite roundly by arbitrators and advocates alike. I think it may be an oversimplification to call the decision nothing but a sport.

What I'm interested in is whether or not there are differences that really exist in the context of decision-making between arbitrators and judges which, notwithstanding a very challenging effort, we have not been able to discover. Notwithstanding the unanimity of our findings, the bottom line seems to be that in recent years there have been increasingly divergent results.

Judge Rubin: Sometimes divergent results come from divergent presentations. I'm reminded of the story about the father

who was going away from home on a business trip, perhaps the National Academy, and he called his two sons, 12 and 10, together and said, "I want you to be men and show your mother you are men while I'm away." He left them to their devices. So the next morning when they came down to breakfast, Mother said to the older boy, Johnny, "What would you like to have for breakfast?" and Johnny responded, "Damn it to hell, bacon and eggs." Down with the trousers, a paddling, and he went back to his room. Then she turned to the younger brother and asked, "What would you like for breakfast?" And he pounded the table and said, "Damn it to hell, you better be sure it ain't going to be bacon and eggs!"

I'm not troubled by the divergence in results. It seems to be inevitable that when you have two processes that are designed to serve different functions, that are operated by personnel selected differently, you must accept the notion that the results will be divergent, because the functions are divergent and the people are divergent.

Indeed, to put it another way—and I happen to have served in three capacities—you might well expect that precisely the same decision-maker who is cast as an arbitrator with one question that has some overlap with another question might reach an apparently conflicting decision in an arbitration process from the one he would reach, cast as a judge, in deciding perhaps a slightly different question with a slightly different thrust. Perhaps we have been overly concerned about identity of outcomes. I think if we get overly concerned about that, we will lose something of great value, which is a great dissimilarity of process, and to the degree we try to make the arbitration process like the judicial process so that the judicial process will accept the result of the arbitration process, inevitably in every single instance we will lose a great deal of value.

It seems to be inescapable, therefore, that we will emphasize those inherent and unique attributes of arbitration that make it of great value as a private forum as distinguished from a public one, an expeditious as distinguished from a deliberative forum, and a process that seeks insularity and quick resolution as distinguished from a process that seeks the ultimate right result at whatever expense and whatever length. We will emphasize those inherent attributes even though it may result in some instances in a discordant result.

So I feel, in this respect, it is important that both those who

utilize the arbitration process, and the arbitrators, resist this temptation to make the two processes alike so that one procedure will always approve the results reached by the other.

I have been thinking about two aspects of the decision-making process that I think we neglected to cover. One is the effect of advocacy. If the advocate, whether lawyer or layman, made no difference in the outcome, why do we have advocates? If the same decision-maker always reaches the same result with or without skilled advocates, why bother? On the other hand, if the side with the best advocate always won, why have a hearing at all? Now, we know that somewhere between these two extremes lies some impact on the decision-maker by the quality of advocacy. This is a rather elusive part of the thing. We didn't talk very much about it. As I was listening to Ted Jones this morning, I began to reflect: to what degree is my reconciliation of the inevitable resolution I am presented with as a decision-maker affected by the quality of the advocacy? It seems too inevitable that all of us who have had some role in decision-making will conclude that that has some effect, and although we try to discount it—we do try to say, "Now, I am not going to decide in favor of the best advocate or the best lawyer or the best nonlawyer in this situation"—there is some intrusive, though perhaps not always conscious, role of advocacy. I wonder what effect that has on the decision-making process, both of arbitrators and of judges.

A second question that I think is important to consider, and one Ted did not touch on nor did we, is: what is the impact of the review of decisions on the decision-making process itself? Let me rephrase that question a little differently. To what degree do I change my decision or slant my decision in a certain way because I know I will or will not have my decision reviewed by someone else? It seems to me that it is important, particularly for arbitrators, to resist the temptation to put something in the decision that will make it more palatable to a reviewer, and thus to alter the decision for the sake of review palatability.

I would distinguish that from making an articulate statement of the true reasons for the decision. I take it that any person who is obliged to reduce his rationale for decision to writing ought to try to give a rational and coherent statement of the reason. If we anticipate that someone else will review it, we may want to emphasize to a greater degree the facts that entered into our decision-making—to articulate them more clearly. But I would

distinguish between clarity, lucidity, and development, which I consider desirable attributes, and the inclusion of factors otherwise extraneous, or the slanting of decisions, to satisfy the demands of review. And so what I guess I'm saying in the context of arbitration is that I would urge arbitrators not, for example, to concern themselves with what a court may feel is the union's duty of fair representation in deciding the issue before them. I think essentially it is sufficient for the arbitrator to decide the issue presented without worrying about whether on another day the union will be able to justify the manner in which it had conducted its duty.

Panel Member Barreca: I think you know by now from what's already been said that basically this group concluded that there were very few significant differences in the decision-making process between arbitrators and judges. I suppose a natural consequence of that is what we have seen over the years, and that is an increasing formalization of the arbitration process. Many of you in this room, I'm sure, will recall that the late Dean Shulman in 1955, in his Harvard lectures, said that the objective of the parties was to keep the law out of the arbitration process but, mind you, not the lawyers. And at about the same time Professor Cox, speaking at the University of Michigan, said that the real intention of the parties was to keep the lawyers out as well as the law. I think Howard and I both can testify that our clients have been unsuccessful on both counts. And those of us who are members of the legal fraternity are, I suppose, thankful for that fact.

But, on the other hand, as we look at the arbitration process, in my view the greatest danger that exists to arbitration may well be the increasing formalization of it. There are increasing indications of greater and greater interest in discovery before arbitration takes place. There is increasing concern over the rules of evidence in the arbitration process. Much of this is driven by court decisions—by the decisions in *Alexander* and *Anchor Motor Freight.* All of these things tend to drive the arbitration process toward greater and greater formality.

As I understand the value of labor arbitration to the parties and to the individual employees, it is speed, expense, and informality, the things that are the time-honored attributes of the arbitration process, which are in danger to the extent that the arbitration process attempts to mimic the court system. That doesn't mean that we don't need to be concerned about the

fundamental issues of due process and about the fundamental considerations of rough justice, as we used to speak of them in the arbitration process. But while there are similarities in the processes by which the individual decision-maker may arrive at a decision, there are great differences which should remain in the processes themselves.

Panel Member Schulman: I was listening very carefully to Ted Jones this morning and sort of scratching my head and saying to myself, "Can I imagine myself going back to the people I represent, the union officials, and trying to translate to them what Jones was saying this morning?" I must tell you that I would have a lot of difficulty. I don't think I would last as much as two minutes with them. They are more direct people; of necessity, they have to be. I certainly appreciated Ted's comments this morning, but I'm a pragmatist in these matters. You have to be when you are an advocate for labor organizations. I have spent my entire professional career at it—40 years—and come out of a trade union movement as well. I went to college and law school as a result of the trade union movement in the thirties in which I was active.

We don't think there is, fundamentally, any difference in the decision-making process. We agree that the result may be different. There is a justification for that. But the approach to the subject and the approach to arbitrators, from my point of view as an advocate, is different. You size up who is going to be the hearer of the facts; you try to get an insight on the individual; you try to "get a book on him"; and you try to cast your case with that in mind.

Your witnesses are then prepared accordingly. You anticipate what your opposition is going to say. You try to rebut. You may try to emphasize certain facts. You may deprecate the position of the other side and show the fallibility of it. These are advocates' points of view as distinguished from the decision-making process.

But the arbitration process is a totally different process. It is not as new as so many people like to think. It goes back religiously, historically, in my faith. We have had the senior rabbi for generations deciding issues at dispute between parties. Maybe the standards he used were a little different, but the process of arbitrating is not unusual.

Within the field of labor relations, you have something else; you bring to it a different cast. You know that labor organiza-

tions for many years, particularly craft unions, tried their own grievances without joint participation; they disciplined their own members without employer participation and, upon analysis, suspended, fined, and expelled—the same function an arbitrator performs. Those labor organizations of a craft nature have a long history of doing that.

My last comment concerns the question of the arbitrator's accountability. I think every institution has to look at accountability, the quality of what is coming out, the degree of policing, the degree of obligation to render a quick decision, which was the whole purpose of arbitration. There are cases that take six, seven, eight months, not because they are complex but because the arbitrator is busy, or the people can't get together, or some other things like that.

Chairman Christensen: Some of the comments that have been made remind me of two things. It was hardly a radical member of the Supreme Court, Mr. Justice McReynolds, who made the comment, "The law is not made by judges nearly as much as it is made by lawyers who argue before judges."

One of the reasons we have two advocates on the program is that it has been suggested that as advocates, whether lawyers or not, you really play a vicarious role as an arbitrator or as a judge because, in deciding whether to go to arbitration or not, or to go to court or not, you probably make an informed judgment as to what are your chances of success. In fact, you go through a decision-making process for it.

Judge Rubin mentioned that people who go to either arbitration or the courts accept a difference in results. This is really where we started in our search. We went right back to the choice of the forum and the adjudicator. Does the fact that someone goes to arbitration rather than to a court mean that the person expects a different type of decision-making? Now, you can fairly say that the decision to go to arbitration really was placed upon both management and labor by the United States Supreme Court from the *Trilogy* on. The panel felt that there was still an element of choice here, and we probed into what that choice assumed.

Every arbitrator with any sense of misgiving as to wisdom before going to sleep at night, of course, repeats Justice Douglas's statement that he or she is wiser and better able to judge, and also is comforted by the fact that Justice Douglas said that an arbitrator's judgment will reflect not only the contract, but

such factors as the effect upon productivity of a particular result, and the consequences to the morale of the shop and the judgment as to whether or not tension will be heightened or diminished. The panel did not think that advocates, judges, or arbitrators would agree that what an arbitrator really does, in the sense of going beyond the intuitive, is to enter into a judgment of what the effect on morale will be.

We concluded that selection of arbitration, either broadly or specifically (and you have to exclude the individual who may be there by choice of the union and employer) is probably more founded on an expectation of expertise in this particular field than on any real thought that a different decision-making process will produce a different decision.

There is a second part of this particular problem. It is possible that the selection of arbitration vis-à-vis the judicial method of dispute resolution is the selection of an individual arbitrator, and here perhaps there is more of a problem. Do the parties make book on a particular arbitrator and, if so, can they collect on the book?

Judge Rubin: Let me just qualify one thing you said, Tom. I hope that what I said was that parties must accept the possibility of a different result, not that they do accept a different result. I think that emotionally, obviously, most people would expect the same result by whatever process, but a different forum does necessarily by its very nature imply the possibility of a different result.

Chairman Christensen: The selection of an individual arbitrator implies the selection of a particular result.

Judge Rubin: Yes. As you recall in our report we said that in some instances the personality of the decision-maker, whether that decision-maker was clad as judge or arbitrator, had more impact on the decision than the difference in the process.

Panel Member Barreca: I think we also have to be careful with respect to the process itself. Certainly as advocates on either side, when we are selecting an arbitrator, we obviously will try to select the forum most favorable to our point of view. I think that is a perfectly natural kind of thing for individuals to do. Which means that the arbitrators who are probably going to be most successful in the long run are ones who call them straight, because they are most likely in the long run to have the respect of the parties who are doing the selecting.

But there is another dimension to this. We keep talking about

comparing arbitrators and judges, sort of on the basis that the parties have that kind of option. I think that Dave Feller has expressed the view, in most of the things he says, that "Arbitration is really an alternative to industrial strife," which is a different dimension of the issue and which suggests, perhaps, that that factor has to be taken into account when we are talking about the procedures and the process itself.

Chairman Christensen: I don't know that I'm going to let you go with just that. I would assume, putting it perhaps too simplistically, that both of you get a list of arbitrators from the AAA or FMCS, and you go down it and pretty readily pick out from among those you know those you think would be more sympathetic to your position. Let's say it's a discharge case. You know X is a former prosecutor who won't look kindly on anything that resembles a crime. You know Y is a retired minister, and he holds the charity of his church. So you make your selections, but I would warrant—maybe you will disagree with me—that you cancel each other out. What you end up with is the lowest common denominator, and frequently somebody you don't know anything about.

Panel Member Schulman: I would be in accord with that. That has been my experience. You fence with each other, you look for advantage, and you do wind up with really an unknown. In some instances it's been very fortunate, other times unfortunate.

Chairman Christensen: Why are you any better off in an arbitration room than before a politically appointed judge?

Panel Member Barreca: I think I have to take issue a little bit with Howard. I think it is true that it is possible, particularly in the ad hoc selection process, that you frequently wind up with someone whom you don't know at all.

But I think the statistics of the FMCS, and the AAA as well, tend to indicate that a small group of individuals, relatively small compared to the total number of people who are in the process, hear a very substantial number of the cases. That says to me, at least, that the parties do tend to select people whom they believe they can trust to make an honest decision. I know there are a lot of new arbitrators; I have been involved in the arbitrator development process.

One of the first questions you get from someone new in the situation—and I'm going to paraphrase it—is, "How do you keep your scorecard equal?" Well, that, in my judgment, is a mistake that new people in the process frequently make in think-

ing that there is some kind of scorecard that determines whether or not they are selected. It is really the quality of their decisions, because if it now is a scorecard situation, and you have a critical case and you are faced with whom you are going to pick for an arbitrator, but you don't know whether it is "your turn" or not, that can be fatal!

Mr. Joseph Krislov: If the parties feel that they end up with the lowest common denominator because of arbitrator panels, why don't they go toward the permanent arbitrator?

Panel Member Schulman: From some of the comments I have had from labor representatives, there is first of all a distinction, of necessity, between the types of cases which go to arbitration. In some cases, someone's got to take somebody off the hot seat. That is one class of the two. The other cases are of a serious nature. From the labor point of view, to have a permanent arbitrator for those which are very important, very crucial to what we felt we bargained for, to the administration of the contract, we may very well, if we had our druthers, have gone out and gotten what we collectively thought was an erudite, able, and experienced person who has been around and who understands the trappings and the workings. But for the run-of-the-mill, for this fellow getting off the hot seat, labor organizations are not apt to put everything before one person. They will take their chances, given the two different propositions I gave you, with an ad hoc situation.

Sure, the ad hoc situation poses problems. In serious cases, my experience has been quite varied. I have had no problem with ad hoc selection. Maybe I'm a great believer in advocacy. Maybe I'm a great believer in the fact that you get your chance to present your issue, lay it out, show them the righteousness of your position, the injustice of what is happening here, the consequences, the significance of it. To that extent I have found that I can go with the present ad hoc situation. I hope that has been some answer, some aid to you.

Mr. Jim Farrell: I'm not clear on the element of choice involved here. If you have a collective bargaining agreement that requires that any question of interpretation or application will be arbitrated, what is the element of choice?

Chairman Christensen: The choice was in writing that contract. There is specifically a choice for management or labor.

Panel Member Barreca: There is also, of course, the choice of whether you're going to go ad hoc or permanent umpire or

permanent panel. I think those of us who represent large corporations which may have a series of collective bargaining agreements probably have a whole panoply of different types of approaches for arbitration—a separate panel, the AAA or FMCS, or some other way of selecting an arbitrator. There is a whole series of choices here. But I certainly would agree that since the *Trilogy,* at least to the extent to which the parties have agreed to arbitrate, the choice of whether it is going to be arbitration or some other forum is certainly not there, or not quite the same.

Mr. Alan Walt: The effect of the rules of evidence, or the failure to apply them, on the decisional process: I wonder if you think it has a substantive effect. I know that judges sitting without juries do not apply the rules of evidence as strictly as they would with a jury; nonetheless, they certainly do honor them, and I think it gives them perhaps a more limited record.

On the other hand, most arbitrators, regardless of their training, lawyers or nonlawyers, favor a loose presentation where the parties can present what they think is relevant, important, and material to the issue, and in the decisional process we weed out what we think shouldn't be considered. Is there a difference in the decision we are going to get as a result of that?

Chairman Christensen: One of the obvious areas in which arbitration and courts mainly differ is, of course, the pretrial stage—preparation and discovery. There seemed to be somewhat of a consensus of this panel that you are more likely to have more in-depth preparation for any judicial trial than for an arbitration. That may or may not be true in a particular situation. But there is no question that the availability of discovery techniques in courts, and their nonavailability in practically all arbitration situations, could conceivably have an impact on the decision-making. Judge Rubin knows that there are virtually no pretrial procedures in arbitration. He says that the selection of arbitration, by deliberate decision of the parties, is to have an adjudicator with a mind that is pretty blank at the outset.

Panel Member Barreca: Sometimes at the end, too.

Chairman Christensen: Present company excluded.

Judge Rubin: There is no assurance that on the bench you would get a different kind of mind.

I would like to respond briefly, however, to that last question because my impression would be that statistically you would get less than one different result in a thousand cases. I think this business of the rules of evidence has been exaggerated really out

of proportion. Let's not talk about rules of evidence as they exist in common law a generation ago. We take the best distillation of current thinking on the rules of evidence, the Federal Rules of Evidence, which have been in force for about six years. We see, by and large, that they are designed to keep out of decision-making those factors which really are not germane; they do not logically have probative force.

It doesn't make much difference if you let them in. If you let them in in a short hearing like an arbitration hearing of the kind normally conducted, you may protract the hearing a half hour or so. You won't really influence the decision-maker because he knows that that is not really of probative value. I don't believe adherence to, or lack of adherence to, rules of evidence has much of an impact. I think it is more of a solace to the inexpert person who has not been trained in a law school to let it all come in and say, "Well, I will weigh it at the end."

Chairman Christensen: Where do you stand as to that factor?

Panel Member Howard: I don't think it has that much effect in arbitration. I don't see a problem.

Panel Member Schulman: I would like to get back to the question about someone looking over the arbitrator's shoulder and the arbitrator making a decision with that in mind—the review. The whole purpose of the arbitration institution, as I see it, was to get the answer from the arbitrator and having the arbitrator calling it as he sees it. The question of review of fair-representation cases should not move us away from the very footing of the arbitration process. The courts, a minority to date, have forced a sort of hysteria. A particular circuit comes down with a decision, as in the *Hussman* case, and everyone starts wailing about it. But that is just one circuit, one of many, and it should not deter the arbitrator from "calling it as he sees it." That is what I think the labor organizations have bargained for, and that is what I think the arbitrator should do.

Chairman Christensen: Companies and unions almost invariably resist having anything before the arbitrator before the hearing starts, a complete reversal of the courts, and it puzzles me. I think that that conceivably could have impact on the decision-making. It is almost impossible to rule on relevancy when you don't know what is relevant.

Mr. Jack Leahy: In a case I had recently, at the hearing all the witnesses stood up and were sworn in at one time. The hearing proceeded. The union presented its case. Time for lunch. At

lunch someone approached me and told me that two witnesses who had been sworn were not represented by either party. They were employees who took a day off from work at their own expense, and they were there and they wanted to testify. This was after testimony had already been completed. I got together with the other two attorneys and directed that they be permitted to testify. Then we allowed the two witnesses, without representation whatsoever, to present their testimony and be cross-examined. Up until the time those two witnesses went on, it looked like a 49 to 51 percent case. After they presented their evidence, it went completely in another direction. As a result, the union did not win the case.

The arbitrator is faced with this: Does he or does he not admit these strangers? The parties who were represented in the case have an interest in not having them there, they are paying the arbitrator, it is their case—but in walk the strangers. We could very well have a civil rights case, or that sort of thing. What are your reactions as far as the arbitrator's authority, and your pleasure at having such people admitted to testify?

Panel Member Schulman: Envision a situation where two attorneys are trying a case before a judge in a federal court. They are presenting their evidence. In walks a stranger who says, "Judge, I want to testify." The attorneys get up and say, "We don't want him. This is our case. We are trying our case. We decide who our witnesses are." The court would say to that individual, "Thank you very much, but go home."

Now with respect to arbitration, you are there by virtue of a contract between the union and the company who are the parties to the contract. They will present their case. If the parties themselves agree to put this person on, then it is their judgment of value, not your judgment of value.

You just take the evidence as I present it. If I were one of the parties there and if I had agreed that this witness could testify and participate, then I am going to be bound by his testimony as you evaluate it. It could very well have been that if I were one of the attorneys, I would have said, "I don't want that man in there. I don't want his testimony given." I think you would be bound by that. I think you would just have to say, "You are representing the union, the party to the contract. It is your case. You are handling your case." If management wanted to put him on as its witness, then it is management's witness. That would be my approach.

Panel Member Barreca: I feel equally as strong, maybe even stronger, about that particular aspect of the situation. I think that arbitrators perhaps have become too concerned about what might happen to their decision after they make it, worrying about whether or not the union has breached its duty of fair representation, or worrying about what might happen in a civil rights suit, and so forth. I think the Supreme Court has spoken in *Alexander* about one aspect of that issue.

On the other hand, I think that if the arbitrator assumes that he or she is able, in a matter of a day or two, to find the ultimate truth beyond that which the parties are willing to present to the arbitrator, it almost becomes arrogance in a way. The fact of the matter is that the process is a two-party process, and if the arbitrator really believes that his ability to find the ultimate truth transcends what those two parties are willing to provide, it takes on a dimension which, in my judgment, is kind of unreal.

(Second Day)

Chairman Christensen: We have viewed our charter to be to try to determine whether what goes on in the mind of the decision-maker differs for a judge and for an arbitrator. Our ultimate conclusion was that the ultimate thought-processes are probably just about the same. If they vary, they vary because of the personality of the decision-maker, whether he or she be judge or arbitrator.

At one of the small workshops that were held for arbitrators and judges on Wednesday morning, one of the items caused several cardiac arrests among the arbitrators present. It was the question of the disciplinary case in which the company, for reasons best known to itself, announces, "We call the grievant as our first witness," and the union immediately vigorously objects.

Now I had thought that while there is a difference among the arbitral community as to whether or not the union's objections should be overruled and the grievant indeed called as the first witness, the vast majority would say no to the company. But what caused the incipient cardiac arrests was the statement, with some sense of outrage and astonishment, by the judge in the room that in that case he felt the company had been denied a full and fair hearing, and he thought that award was probably reversible. Many of us started counting back the number of cases in which we had become suddenly vulnerable. I think it is an apt

point at which to start, because it does illustrate the completely different sense of what is "due process" in the courts and in the arbitration room.

I do not draw an exact parallel to a criminal trial. It's not a Fifth Amendment situation or something like that. But I do draw from that, and my reasoning is that the company has the burden of showing the evidence on which it acted at the time it did and that that evidence must stand apart and away from the testimony of the grievant at this stage. To a judge, I suspect, the absolute opposite is common experience. Any party has the right to call those individuals, hostile or otherwise, who might sustain the position being advanced.

Panel Member Howard: I am interested in whether there would be any difference between how a law-trained arbitrator would carry this out and how a nonlegally trained arbitrator might do it. For instance, I think we are probably in complete agreement that in 95 percent of the cases we would not allow that to happen. But we might reach our decision on different things. I might say, "Is it fair?" I don't know all these legal principles. In fact, I think that gives the nonlegally trained arbitrator an advantage because he can always throw up his hands and say, "I don't know what you're talking about." But suppose the parties said, "But we have always done it this way." Should the arbitrator impose his standard of fairness on the parties?

Without that latter, I would probably say no. The employer took the action; in fairness, let him tell me why he took it. Then later I want to hear maybe from the grievant, or if the grievant doesn't want to testify, I may be able to draw some inference from that. But I think the responsibility is on the employer's back, unless somebody says, "Well, look, we have always done it this way. Nobody's ever complained before." And if that had been the way they had treated it, I would say that the union's vigorous objection at this time might be out of place.

Judge Rubin: I'm curious, Wayne. Why is it unfair to do it one way rather than the other? I don't see how you resolve that particular question on whether it is unfair or fair. It doesn't offend my moral sense of value to do it one way or the other.

Panel Member Howard: I would say that I would put myself in the spot of the disciplined employee, and I would certainly want to know why I was disciplined at the outset before I felt that I had to meet any defense of that.

Judge Rubin: I have one more question. I assume what you are trying is the employer's state of mind?

Chairman Christensen: In part—or the state of his or her record.

Panel Member Barreca: Interestingly enough, while I know that some of my associates would call the grievant first in a discipline case, I personally have never done it. But it's not been on a question of fairness; it's been a question of strategy as an advocate. I don't want the grievant to be my witness. I want the opportunity to cross-examine the grievant as a hostile witness. So it is to me a strategy question rather than a question of fairness.

Panel Member Schulman: I view the arbitration process from the point of view of the individual—what he understands this whole process is all about. My experience has been that employees look at the arbitration process totally differently than they do at the judicial system. They look at a different forum, a very convenient and informal forum where there is a fellow sitting up there, or a girl sitting up there, who is going to hear the issues in the matter. You are going to give him raw justice.

Now, viewed from that perspective, I think that what Wayne is saying is making a lot of sense. It would appear to me that it's not fair, not within the common lexicon that we as lawyers think of as due process and fairness. But to the individual employee, he is being pilloried, and within that context, it has to me a substantial degree of unfairness. When you look within the context of our judicial system, we have pretrial discovery, and all the factors are out before the hearer of the facts—depositions of the plaintiff (who is the grievant), his story; you've got the other side's story. So you can make a comparison.

Chairman Christensen: I can't resist commenting on something Wayne brought up, which rather puzzles me, because I would agree with him that when the parties say, "This is the way we have always done it," we say, "Sure, this is your ballgame." Then I looked over at Judge Rubin and I thought: Suppose he got in disfavor in the Fifth Circuit and was told to go out and try a small criminal case in Steubenville, Ohio, and he got there and it was a murder case and the prosecutor called the defendant as the first witness. Judge Rubin, I assume, would raise his eyebrows at that point. And suppose he were told, "Judge Rubin, this is the way we have always done it in Steubenville, Ohio."

I really would like to know whether I misread the industrial community, as I sometimes do. Is there almost a solid premise in our community that it is up to the company to prove its own case?

Mr. Paul Rothschild: I think that talking about calling the grievant is very useful, but should an arbitrator permit a discharge where the company cannot make a prima facie case without calling the grievant as a witness?

Panel Member Barreca: I think it might be interesting, Tom, to hear if there are any lawyers here who follow the practice of calling the grievant first. I'm told by some who do that the reason they do it is to prevent the grievant from misrepresenting the situation after he has had an opportunity to hear all the other evidence and change his story. I don't know whether that is true or not.

Mr. Bill Lubersky: I have done it on more than one occasion. I think the purpose of the arbitration hearing is a search for the facts, not a search for the decision. That comes after you have gotten the facts out. There are many trial methods by which to get the facts out honestly and accurately. If I had a grievant who I believe would like to stretch the truth, I may want to get him nailed down before he has had a chance to tailor his evidence to what he hears. I think it is an appropriate method because you are searching for the truth; it is not a matter of some kind of moral ethics. He is in there because he claims he has been wronged. If he claims he has been wronged on the basis of some kind of fact situation, you've got to find out what that fact situation is. This is a trial technique designed to get that fact.

Panel Member Schulman: Don't you get the opportunity to nail down the truth when the grievant testifies? He is going to testify, and he may have a story whether you put him on first or he goes on last. Really, what technical advantage is it to you?

Mr. Lubersky: Well, this probably happens in one case out of fifty, but sometimes it is important to find out what he will say about a given fact situation before he has heard what everyone else is going to say so he can tailor his story to make the best excuse. I think we have all seen that happen.

Chairman Christensen: Don't you get that, though, in the process of the grievance procedure itself? What little pretrial discovery we have is going to be in the grievance procedure.

Mr. Lubersky: You have to realize that there are many cases that go to arbitration where there has been really no grievance

procedure at all, just a pro forma meeting and disagreeing. That happens regularly.

Panel Member Howard: I would agree on that, and particularly in a discharge. In order to expedite, they very frequently skip all the intervening steps of the grievance procedure. I can't understand why management would want to put the grievant on first. If he is going to stretch the truth, he is going to fit his story to the story of company witnesses who have gone first. He would be more apt to be trapped if he were on later than on first.

Mr. Lubersky: That may or may not be in any given case, but this choice still ought to be part of the arsenal that's available to present a proper case. If management makes a mistake, if they make a tactical mistake by calling the grievant first and it hurts them, that's their responsibility. What is the reason that there is something sacrosanct about the grievant testifying only when his lawyer calls him instead of when somebody else calls him? Part of that query is due to my background as a lawyer. In the courtroom you know that anyone is fair game as a witness.

Panel Member Howard: Maybe because we don't like the context of an arsenal in the course of an arbitration hearing.

Mr. Lubersky: That is semantic. You are searching for the truth. People lie. People lie on the witness stand. People lie under oath, or they stretch the truth or have different versions of the truth. Two of us see the very same thing. We, in complete honesty and good faith, give different stories of what we have seen. The whole purpose of the hearing is to find out what the facts are, and that is not always an easy process. I found that in discharge cases very frequently it is much more difficult than in contract interpretation cases. So whatever methods there are, isn't the best method the one most likely to get the truth out?

Panel Member Howard: Yes, but who should be the judge of that, the management attorney or the arbitrator?

Mr. Lubersky: I don't think that the arbitrator is the one who makes the decision as to what kind of procedures we are going to follow in the hearing. I'm not suggesting that it isn't his judgment, but I am suggesting that he is making an erroneous judgment if he doesn't let me do it.

Judge Rubin: I think the discussion indicates the reason why I suggested that this is not a question of due process at all. In the Wednesday seminar we discussed this question, and the judges reacted with the feeling that to deprive management of the "right" to call the grievant as the first witness offends due

process. That, I submit, is an erroneous judgment. What we are dealing with is a question of trial strategy, and we might even have a debate about its wisdom. To put it in perspective, let me suggest to you that even in court in a nonjury trial, there is no absolute right to call any witness in any given sequence. The Federal Rules of Civil Procedure make it quite clear that the trial judge can govern the order of proof. Now, commonly, if this kind of case were presented in a court, the judge would let someone call a witness first under cross-examination. He is not obliged to, no more, I think, than the arbitrator is obliged to. But it would seem to me, in a given case, I would not as an arbitrator react with a knee-jerk: management can do it, management can't do it. I would want to know why you want to do it in this case. Is there some unusual significance, something that really affects the decision-making process: Keep in mind that these questions about people changing their stories may be very good tactics before a jury, where you have inexpert and uninformed triers, but when you are trying a case before an arbitrator, I would take it that he ought to be pretty adept at detecting whether there is this kind of change in a story. So if one side strongly objects and the other side has no good reason to advance for why I ought to overrule that objection, I'd say, "Well, let's wait and see." Now, I do think there may ultimately arise a question of due process, but that relates to something that has only been touched on. That is whether management is precluded from ever calling this witness. At the tag end, management persists and says, "Now we want to call him." Do you bar management from calling the witness then, absent a pending criminal proceeding in another forum and a claim of Fifth Amendment rights?

Mr. Harry Swartzen: I think a judge doesn't have the flexibility that an arbitrator has. Judge Rubin, when he considers a case, must consider the statutes. I assume that the statute is the same in its meaning and application in New Orleans, in Dubuque, Iowa, or wherever. Right, Professor?

Chairman Christensen: Right.

Panel Member Howard: So the law is the same, but not so for arbitrators. An arbitrator learns new law wherever he goes. The language may be the same, but the application is Humpty Dumpty. You have to use the law of the shop, and the same words have different meanings in different locales, and the meaning of the language is based upon the practice and experi-

ence and the mutual intent of the parties. So there is a basic distinction. The judge has to apply the law irrespective of geographical areas or persons. An arbitrator has a great deal of flexibility.

Chairman Christensen: Over the years, in England and then in the United States, we built up a body of rules that are legal rules, but really reflect a judgment of what should be depended upon to make a judgment.

For example, all the rules of hearsay, of best evidence, of relevance and all of that are legal rules. They do speak, however, for an awful lot of thought churning over the centuries as to what you can depend upon in deciding what is truth. If that indeed is the quest we are on, if the court of which you are a representative has said it is improper to reach a decision on hearsay, how can we justify an arbitrator's doing the very same thing?

Judge Rubin: Usually the hearsay rule is applied as a criterion for jury trials; we also use it in nonjury trials. But in the courts in Louisiana, influenced by the Civil Code system of the Continent, if an objection is made in a nonjury trial on the basis of hearsay, the customary ruling is, "Well, that goes to the weight." That is just about what an arbitrator does. So I would say that the judicial judgment embodied in the rules of evidence is not that all hearsay is always undependable. It is that, by and large, it is not a very reliable guide in the hands of the inexpert, and it doesn't hurt very much to let it in to be evaluated by an expert. So I would have no trouble sustaining an arbitration award that was based entirely on hearsay, despite the rules of evidence.

Mr. Larry Seibel: I would like to pose a question of the distinction between the way the court may look at something which has the aspects of a penalty as distinct from the way an arbitrator may look at something in terms of fashioning a remedy. A company has a clear provision that says, "You may not take work out of the plant as long as the people in the plant are not fully employed." A year before the contract comes up, the company starts to take work out of the plant. Ultimately, the contract is over. The contract is not renewed. A new nonunion plant is functioning somewhere. Let us forget for the moment any NLRB implications, or what have you. Grievances are filed with respect to the violation of the provision with regard to maintaining work at the plant or contracting out or moving work out while people are not fully employed. You now determine that,

in fact, the company did move work out of the plant in violation of the contract. The people are now scattered all over the countryside; you do not know what damage, if any, has resulted with respect to individual employees.

My question: If an arbitrator looks at something like that and says, "I'm not going to worry about what the individual employee suffered. There was a payroll at the beginning of the period. There was a payroll during the previous year. We know what happened to the payroll during this year. I'm going to use the loss of payroll as the standard for my award."

A court will turn around and say, "Aha, but you have not related that to any specific employee. Therefore it has the overtones of penalty." How may courts, as distinguished from arbitrators, approach that kind of situation where you have a clear violation? You have a sense of what has been taken away, but how would you go about fashioning an award?

Chairman Christensen: I suspect, just off the top of my head, that my award would perhaps cop a plea in a sense. I would probably say, "There is a clear violation and the company is directed to make whole all employees who have suffered loss thereby," simply returning the job of remedy to the parties.

Panel Member Howard: I think I would take the same cop-out you would.

Judge Rubin: In the legal context, that is inescapably the solution. Talk in terms of a breach of contract and then the remedy for breach of contract is to make anyone who is damaged whole, not to impose a penalty beyond the damage. I don't want to be understood as saying that I think no arbitrator can do what you posed in your question; conceivably he could, if that is within his mandate from the parties. But you asked me how I would award damages, and I say you couldn't award damages that way.

Panel Member Barreca: My reaction is much the same. I think it depends really on what authority the parties have given to the arbitrator. I think that probably in this whole question we are talking about, of the process of decision-making, certainly one of the elements that affects is: what have the parties asked the arbitrator to do? And I would presume, if an employer gave that kind of discretion to an arbitrator in that kind of situation, maybe not only that plant should close, but maybe the new one will close shortly, too.

Panel Member Schulman: I subscribe to the remedy you

would prescribe. I would add one other factor to it. I think it is a very easy equation. This is what happens to people who file unfair labor practice charges and you can't locate them and award the damages to which they are entitled. Normally what is done is that the Labor Board, through its Compliance Enforcement Section, undertakes various investigations and so forth to track these people down. In addition to the remedy that Tom prescribed, I would add another factor: The employer is obligated to make all efforts to locate these people so as to compensate them for the damages they sustained. I think that is enforceable; the employer can be held in contempt if he doesn't take all the steps prescribed, and you will then get your remedy. I don't think you take the money, for example, and put it in a fund. It has to go to the people who are adversely affected.

Mr. Alan Walt: Judge, doesn't the federal court have authority, after issuing a decision along those lines, to appoint a special master to handle the remedy? I think this does present a problem for the arbitrator. Do you retain jurisdiction? There's a big split here. Do you want to because of the kind of difficulty that might be involved in each one of these cases in tracking down an individual? What's the best procedure for the arbitrator to follow when there is such a broad brush, where many people may be entitled to monetary damages, where there may be complications involved in each one, where there may be set-off problems? Do you return it? Are you happy with the idea that in each case there should be a new grievant? Does that satisfy? Is that what the parties really want to do?

I have had some remedy problems that are not quite that broad, but they concerned me. There have been a few where they have been more limited, and even where the parties have not directed me to do so, I have retained jurisdiction, but I have wondered whether that was the right thing to do. Also, as I say, the more involved the actual mathematical problem or the location problem becomes, I wonder if it's a good idea for the arbitrator to remain involved.

Judge Rubin: The answer to your question is yes, we can appoint special masters, but no, that doesn't answer the problems. When we appoint a special master, we retain jurisdiction and supervise what the master does.

So I have analogous cases where we get a report every six months, and the report for the first six months has 50 names shown; then for the next six months there are 40 names shown,

and maybe ten years later you end up with five names shown. By this time everybody's sick and tired and they reach some resolution between them on what will be done with the funds for the last five people who can no longer be traced.

Panel Member Schulman: All that we are really talking about is a typical class action. Money is to be paid to a class, and how do you dispense the money? Here a violation has been found affecting a class. All these employees are gone. It would appear to me that the arbitrator should retain jurisdiction. He should so structure his remedy, if need be and if he has it within his power, to appoint someone in the form of master with compensation, or place the burden on the company to do it. The unions are around. They can monitor. They can report back.

Judge Rubin: I think you are right. The primary onus ought to be on the company. But absent some agreement of the parties, I think the arbitrator has to retain some sort of jurisdiction to be sure the company performs its duty.

Mr. Joseph Martin: It seems to me that we arbitrators have a simple solution for this. More frequently and recently the parties have asked me to make sure to state that I retain jurisdiction. So now, at the end of every hearing I say, "If the parties wish me to do so, I will retain jurisdiction over the administration of the remedy." So far everybody says, "Yes, that's a great idea." Both parties like the suggestion.

Panel Member Schulman: You are not alone in that. I have had arbitrators say that to me time and time again.

Chairman Christensen: There is something we should not leave this room without touching upon. If we came close to dissent in the panel, it was over whether or not the arbitrator has a different role than a judge in the sense that he deals with continuing relationships, and this different role would have impact upon how he made a decision. Judge Rubin rightfully challenged the assumption that only arbitrators are concerned with continuing relationships, and he very properly brought out the fact that continuing relationships are not utterly strange to courts. All you have to do is think of a school-desegregation type of matter.

Judge Rubin: I think here, as well as elsewhere, perhaps when we contrast the two adjudicative methods, we emphasize their differences rather than their similarities. It is obviously quite different, whether you be arbitrator or judge, when you are trying to decide whether somebody owed someone damages for

a past episode under a contract that will never be renewed and in which the parties will never see each other again, and whether you are trying to determine the rule that will guide a continuing relationship.

I think that any adjudicative person who has to determine the rule to apply to the continuing relationship has to take into account the effect of his ruling on that relationship. Right now federal courts handle a lot of continuing relationship cases involving institutions, the administration of jails, the administration of hospitals, the administration of homes for the mentally handicapped, and many other institutional cases where, apart from the initial determination that some kind of dominion over that institution must be exercised, there is the problem of formulating day-to-day rules.

In that situation, it would indeed be a stupid judge, as indeed it would be a stupid arbitrator, to say, "I am going to make a ruling I think is good and let the parties live with it any way they like." Obviously, there the judge, like the arbitrator, must take into account, at least to some degree, the impact of his ruling on the parties, its acceptability, its practicality. Now, I don't say that this may be more important in the arbitration relationship and less important in the judicial; those are matters of degree. I'm simply saying that we cannot contrast the two systems completely and say in one the pragmatic concern is important and in the other it is nil.