III. PANEL DISCUSSION

Moderator: Jerilou Cossack, NAA member from Lafayette, California
Panelists: George Nicolau, NAA member from New York City
Michel Picher, NAA Member from Toronto, Ontario

From the floor: I have a question for either panelist. My question spins off a point that Arbitrator Nicolau made. Do your thoughts with regard to *functus officio* not only depend on the length of time that the arbitrator believes that he or she can retain jurisdiction but also the nature of the question that comes up—and I'm thinking not of discipline cases where you may have a relatively narrow question to decide but rather in contract interpretation questions where you're dealing not necessarily so much with an individual as with language in a collective bargaining agreement that may affect more than just one individual?

Nicolau: If I'm dealing with a disciplined employee, I don't know that I have to retain jurisdiction for a long period of time. If it's a matter of contract interpretation, as in the last case that I described, we set no time limit on it because we don't know how long it's going to take those parties to come up with guidelines, if ever. But I do not think that retention of jurisdiction in that type of situation would give me the authority to decide other grievances based upon that particular contract provision.

Followup: I was just probing to see how far that stretches.

Nicolau: I don't think I would stretch it beyond the particular handful of grievances. Let the parties come up with a solution. If somebody else comes along and says this ought to apply to me or I want to put another twist on it, that's OK but I don't think I could come in there and say, "Hey it's my case."

Picher: I would agree entirely. I think that if I do a case that involves the interpretation of a call-in pay provision and I retain jurisdiction because I've had, let's say, a group grievance of 50 employees, I'm there to deal with those 50 employees. But I'm not announcing that I'm the call-in pay arbitrator for the balance of the contract—I think that's overstepping.

From the Floor: I think that possibly that last question explains why the AAA decided that they didn't want the arbitrators to retain jurisdiction. There was a famous case involving the Social Security Administration where an arbitrator decided to retain jurisdiction

in order to get 200 more cases on the same issue and he decided that he was the one who was going to decide those. I think that was when the AAA decided to abandon this idea.

Nicolau: That'll probably be why they'll still be watchful of abuses.

From the Floor: My understanding as a relatively long-time member of the postal service panel is that the postal service and their unions have a policy that we retain jurisdiction over disputes that arise out of an award that we have rendered. They come back to the arbitrator who rendered the award. My question is to the previous questioner: Is my understanding correct? Could you share with us the decision process that the parties go through?

Response from the Floor: I have had one personal experience with one of our very well-known arbitrators who issued a decision that both parties didn't quite understand and they had to agree to go back to that arbitrator and get what amounted to a clarification. That's the only experience that I've had in that situation. I can't go behind that to give you the answer to your question. I think our concern is giving arbitrators almost unreviewable authority.

From the Floor: I think we would all be comfortable with retaining jurisdiction if the parties asked us to and I suspect increasingly there's recognition that retaining jurisdiction is becoming relatively common if the subject isn't touched upon in the course of the hearing. On the other hand, what if the parties: (1) specifically state they wish jurisdiction *not* be retained by the arbitrator handling the dispute; and (2) what if the parties address this issue and there is a disagreement among them as to whether the arbitrator should retain jurisdiction? What is the scope of permissible discretion?

Picher: In Canada, because of the law: it "ain't" the parties that are going to decide on the retention of jurisdiction. We have two statutory examples, one in Manitoba and one in Quebec, that essentially say that a board of labor arbitration retains jurisdiction to resolve all disputes and that the board does so whether it expressly reserves that authority and whether or not one of the parties disputes that reservation. I want to throw out a rhetorical question because it's fun to comment on the U.S. situation. I do agree with what George said and Dunsford's thesis, but it seems to me that if two parties with a dispute come to an arbitrator and ask that arbitrator for a final and binding decision, the completion of that decision is implicit in that contract.

Nicolau: I don't think there's any legal basis for prohibiting you from retaining jurisdiction on a matter that you've heard, even if both parties object to it. I've never been faced with that. I probably wouldn't retain jurisdiction when that kind of thing happens but I would have no hesitancy retaining jurisdiction if one party objects and the other one doesn't. If I feel that it's some issue that might come up and I'm the one that heard it, I would have no hesitancy in doing it.

Picher: In the area of interest arbitration, here is one thing that I've done to try to avoid the problem of disagreement or interpretive problems. I've been the umpire in the railway industry for some years and I sometimes have cases that involve millions of dollars and I sit alone—I don't have nominees that I can use for informational purposes. To avoid problems of interpretation with the parties' agreement, I write a draft award, I don't sign it, I'm very careful now as to what I put in my award of course, and I send it to both counsel to be shared with their immediate advisors and ask if I've missed something, if I've misstated something, if there is something in this complex problem that I don't understand that's going to screw up your operations for 10 years. I give them five days to get back to me and, after they do, we talk about it. That's been quite happily received by both sides. It's understood we're not going to rehash the case, but if I'm going to cause you problems in understanding, what I'm saying is let's get it out now.

From the Floor: This may be repetitive, but at the end of the hearing when you say to the parties "I'm retaining jurisdiction" and one party says to you that "I don't think you have the right to do that and I will not honor it." George, I understand that what you'll do is say, "Well I think I'm right and I'm going to retain it regardless of what you say." Now suppose you issue your award and in the last sentence you retain jurisdiction and sometime later the winning party comes back to you and says that the losing party won't even meet with us to talk about the remedy, and you correspond and can't get them to agree. What do you do? Can you schedule an ex parte hearing and hear the winning party's evidence, and issue a new award that the losing party will ignore, forcing the winning party into court to enforce it? My last question is if you do hold an ex parte hearing and issue a new award, who pays the arbitrator?

Nicolau: The answer to the last question is nobody. I haven't seen such a case and, by the way, I avoid that scenario because I never ask the parties whether I can retain jurisdiction. I go away and

write my award and if it's a case in which jurisdiction ought to be retained, they find out when I put it in the award.

From the Floor: Suppose the winning party can't get any cooperation?

Nicolau: Well, you know, you can come back for an ex parte hearing. Eventually it's going to go up to court as to whether my doing that was proper and of course you want to give as much notice as you can to that individual. But if you've got jurisdiction, then the party that doesn't want to play can't really interfere with that process in a way that would prevent the process from coming to a conclusion.

From the Floor: There are a certain percentage of cases where the arbitrator sustains the grievance, issues a remedy, and for a variety of different reasons the losing party, and in most cases it's the employer, delays or fails to comply with the award, and the union comes back to the arbitrator to enforce compliance. From the union advocate's point of view, to the degree that I can write letters and set up a case and say to the employer or the employer advocate that when I go back to the arbitrator, I'm going to ask for some additional remedies—I'm going to seek interest if it wasn't awarded, I'm going to seek costs of the arbitrator and the court reporter to the degree, and maybe attorneys' fees. Under your retained jurisdiction, however it's worded, do you believe that you have the jurisdiction to issue supplemental remedies as well as clarifying or confirming your previous award? Are there any obstacles and any reasons why you would see that you shouldn't or can't do that?

Nicolau: I think there are some obstacles, although you could probably make a case that the additional remedies such as interest or attorneys' fees are something that the arbitrator ought to do. These are remedies that arise from the post-award conduct of the losing party. I've never been faced with that question but it would be an interesting thing to tackle because I think you might have the ability to do that.

Picher: In Canada we've had a principle whereby interest will be paid as part of compensation. And there was an arbitrator who retained jurisdiction and indeed did exactly that with respect to interest. I suspect we'd be conservative on the other stuff. That said, there's a whole other subject we could get into that is arbitration boards in Canada now exercising jurisdiction to issue punitive damages as a result of a Supreme Court of Canada decision that seems to give us tort jurisdiction in outrageous cases and defama-

tion and things of that kind. That's a whole other topic. By and large I don't think arbitrators want to do that.

From the Floor: I'm with the Association of Flight Attendants. We've had an issue that we call the rename it, reclaim it game. We get an award, for example, that's favorable to the union and then the policy is altered. Now, instead of having to file a new grievance, we have routinely asked that the arbitrator retain jurisdiction. However, on several of the recent awards our request has not been addressed. We were wondering what is the appropriate response as a union advocate as to the absence of addressing that issue?

Nicolau: I think all you can do next time you see her is say, "Hey, listen to us."

Picher: Or maybe you don't see her again.

Sutter: So you think it is completely appropriate to go back to the arbitrator and say, "We requested this, you haven't addressed it, and we did not receive a response in the award?"

Nicolau: Even if just to say you're not going to at least deal with it. If I didn't respond to it I would expect somehow or other that the union or management is going to let me know about that.

From the Floor: Janet Gaunt and I had a little debate on this on the Internet. Janet took the position that routinely, at the start of every hearing, she says, "Oh, by the way, if I decide in favor of the grievant, is it OK if I retain jurisdiction?" The parties, she said, never object. I won't do that because I think that raises a question in the management's mind—that my mind is made up. I was just wondering whether that's a practice of anyone on the panel.

Nicolau: I don't ask the parties, I don't mention it during the proceeding. Once in a while some party may ask me to retain jurisdiction, and I'll say yes.

Picher: That's exactly the experience I've had. Earlier in my practice, 30 years ago, it seemed like the formal request for retaining jurisdiction is routine and now we almost never hear it and it's understood that we do.

From the Floor: I don't routinely retain jurisdiction but I do frequently when I think that it's necessary. From hearing the story from the Airline Flight Attendants, maybe I don't always when I should. I have had several problems with this, including being sued, and I wonder if any of you have run into this problem?

Cossack: Being sued specifically because you retained jurisdiction?

From the Floor: Yes. Under most circumstances, the objection I have received when I retain jurisdiction is on a remedy where, for

example, the company wants to come back and show that the guy had earnings or didn't seek work and the union says that they should have put that on in the first hearing. And I've had it in reverse. This was a case where there was a question about where new teachers should have been hired. I issued an award that set forth principles but the union did not put on a good case and I had no information to determine where to place each grievant. I said that I was issuing an award, instructing the parties to try to do it themselves and if they couldn't, they should come back to me. I always set 30 to 60 days in order to encourage them to move but the union called me a year and a half later and said that the school district will not do anything about this and asked me to proceed. I said that I did not have enough information to proceed, so we're going to have to have another hearing, and I scheduled the hearing. The school board protested and said that I didn't have the jurisdiction to hold another hearing. If I wanted to go ahead and issue an award I could, but they didn't have to appear. I scheduled the hearing and 7:30 the next morning I was served with a Court Order to show cause about why I should hold the hearing. That all got settled but it was just they were determined that I didn't have the authority to order them to produce more evidence and they were going to stop me any way they could. It's disconcerting and it made me think twice about my authority to order parties back to produce evidence they failed to produce at the case.

Picher: I don't know that you're ordering anybody to produce evidence. It seems to me that you're continuing the same hearing, you're saying the parties have not agreed on certain things, you will each have the opportunity to produce evidence and I will decide on such evidence as they choose to present. If they choose not to come and present any, that's their problem.

From the Floor: I just want to make two points. Bill Murphy, when he gave his presidential address, summarized the Trilogy better than anyone I've ever known, when he said that the purpose of the Trilogy is to keep the law out. I think retaining remedial jurisdiction keeps the law out. Secondly, with respect to what I do at every hearing, I tell people that I know less about the case than anybody in the room other than the court reporter, but it's my practice to ask whether they want me to retain jurisdiction

From the Floor: I wonder if you would comment on the adequacy of saying in the award that you are retaining jurisdiction as to the remedy period. What we have heard so far today, and even the question posed by the chair, was do you retain jurisdiction or

not. It seems to me that saying that you retain jurisdiction as to remedy covers the ground? Or must it be broader?

Nicolau: I usually extend it to any dispute over the meaning, application, or interpretation of the award, which includes the remedy because the remedy was in the prior paragraph and there may be something in there that the parties need to have some guidance.

Picher: I'd do the same thing as boilerplate.

From the Floor: With due respect, my question was what do you think of the adequacy if one takes the course of retaining jurisdiction solely as to remedy and thus avoid the question of going back on other matters.

Nicolau: You can do that if you like. My view is it ought to be broader.

Picher: It seems to me you open a question of who gets the remedy—what's the class of employees—if somebody's going to object that's not an issue of remedy, that's an issue of identifying facts. You've done your fact finding, that's over. I think there's a bit of danger there.