employer? I don't think you need notice. That's major misconduct, if you go that way.

Hertkin: Peter Hertkin, Orange County. The National Labor Relations Board (NLRB) has wrestled with the issue of how to treat and how to analogize electronic publications. What the Board is wrestling with is that they are not going to treat it like watercooler conversations. This is a publication and subject to the law on libel and slander. On the question of whether you treat this simply as watercooler conversation or talking to her girlfriends at the coffee shop, that would be a mistake.

I take Chet Brisco's side on the issue that there are some things that you shouldn't have to tell employees that they shouldn't do—like publishing deleterious information about major advertisers in the magazine. I represented a lot of municipalities before I went into government service. In the police department, for example, there was no rule against negligently waving your gun while you're off duty, even if it is unloaded. But seeing an officer do that was a dischargeable offense, notwithstanding the fact that the officer didn't understand and said, "Well, no one ever told me I wasn't supposed to do that."

Harris: With that, I am afraid we have exhausted our time. I want to thank all of you once again on behalf of the Academy for your contributions to a useful session.

VII. RAILROADS

Moderator: Joan Parker, NAA Member, Haverford, Pennsylvania

Panelists: Charlie McGraw, Vice President, Brotherhood of Railroad Signalmen, Chicago, Illinois

Lisa A. Mancini, Vice President, Labor Relations, CSX Transportation, Inc., Jacksonville, Florida

Richard K. Radek, Vice President and Director of Arbitration, Brotherhood of Locomotive Engineers and Trainmen, Cleveland, Ohio

Charles E. Woodcock, Director, Labor Relations, National Railroad Passenger Corporation (Amtrak), Washington, DC

Parker: This is our breakout session on discipline in the railroad industry. I am really fortunate because I am flanked by very experienced people who will be responding to the Mittenthal/

Vaughn paper. I don't want to spend too much time on introductions, but I have to let you know, if you don't already know, what wonderful people we have in the room.

On my far right is Lisa Mancini, Vice President, Labor Relations at CSX. We like each other because we're both New York girls. We have the same accent. Lisa and I both got our starts in New York City; I, in labor relations, and Lisa, in budget, planning, and operations for various New York City agencies. She wound up going out to San Francisco, but ultimately came back East and is now Vice President at CSX.

Charlie Woodcock is Director of Labor Relations with Amtrak, and he has held a variety of positions with the National Railroad Passenger Corporation. I run into him all the time because he's involved in administration, contract negotiations, and arbitration.

At my far left is Rick Radek, Vice President and Director of Arbitration for the Brotherhood of Locomotive Engineers and Trainmen, and he also serves as Chairman of the National Railroad Adjustment Board (NRAB). He's an Illinois boy, got his education at Northern Illinois University with a Bachelors in music, if you can believe it. Ultimately, he got a Masters of Science in education. He lives in Chicago.

And, my good buddy over here is doing us all a big favor. You can see by the program, we were to have John Babler of the United Transportation Union (UTU). I received a phone call from Mrs. Babler indicating that John was in the hospital and that he would be unable to join us on the panel. We hope that he will be back on his feet soon. He sends his regrets. This happened within the last 48 hours, and no sooner did I see Charlie McGraw then I pressed him into service. And Charlie, as you all know, is Vice President of the Brotherhood of Railroad Signalmen.

When I first enticed everybody to do this, I said, "You don't have to kill yourselves preparing; we're going to have a free-wheeling discussion based upon the paper that we will have heard in the plenary session. I will also pose some questions. But, if you're absolutely panting to make an original contribution, that's okay, too." And, don't you know, Rick Radek took me up on that. He said, "I have some things I want to say." So, I'm going to start by turning the floor over to Rick, and then we'll see where we go from there.

Radek: Thanks, Joan. It's a pleasure to be here today. I see a lot of colleagues, arbitrators, carrier people, and union people I've known for a long time. I almost think I'm speaking to the choir

here today, so I'm probably not going to break new ground. But, there are some things that I would like to talk about from my particular—or peculiar, if you will—perspective about the "just cause" paper that was delivered.

We, on the panel—except probably for Charlie—got the paper in advance so that we could digest it and form some thoughts. I did have a little time to think about it. Really, I thought that the question of "just cause," and the way that the authors treated it in this paper, really broke down into two separate topics. You know, we all understand "just cause," and most of the agreements that we deal with in the railroad industry require "just cause" for discipline. If we're the carrier, we know what we have to do to show that there was "just cause," and for the unions, we know what they have to do to prove that the burden was not met. And, then an arbitrator ends up refereeing the fight at some point down the line.

Then there's the question of fashioning the remedy. Did the discipline fit the crime? The authors went into more detail on this issue. John Sands made a comment near the end of the session that actually hit on some of the things that I had thought about, and that I was going to say. He made the remark that what the parties are looking for is consistency. The arbitrators reach that, over time, and that probably helps them along because the parties know somewhat what they're dealing with. The parties develop a greater comfort level when there's some predictability. Well, so do we on the labor side.

Where it comes to determining "just cause," my experience is that this is a very personal issue for people. In other words, what may constitute "just cause" to one arbitrator, may not to another arbitrator. There's no better example of that than in two recent cases. I'm not going to name the arbitrator, or the carriers, or anybody because it's not my purpose to try to embarrass anybody or to make remarks that could be construed as criticism. But just as an example, let's say we have the following situation. Grievant A was charged with two counts of sexual abuse in the second degree. He entered a guilty plea in a plea bargain arrangement to one charge of sexual abuse in the third degree. He served five weekends in jail and was on probation for one year. Sometime after the sentence had been handed down, the carrier received an anonymous call that the individual had been convicted of a charge of sexual abuse. That led to the carrier bringing charges against the employee. An investigation was held, and the employee was dismissed. The charge was conduct unbecoming an employee. We

have a business nexus case here, and we all know what that is. On the record of this case, there was found to be no connection between the conduct and the carrier's business. There were no employees that refused to work with the individual. There was never any connection in the printed press between the conduct of the employee and the carrier. In other words, it was about as clean a break as there could possibly be in a case of this type. The arbitrator ruled that there was no nexus between the person's behavior and the person's job and sustained the claim in its entirety.

In Case B, the employee was charged with a felony count for impersonating a police officer. He also entered a guilty plea and was given a suspended sentence with an 18-month probationary period. The carrier learned of this incident because it made the paper and somebody who worked in the carrier's police department recognized the individual as an employee. The paper, however, did not identify the individual as an employee. Again, as in with Case A, the claimant was charged with conduct unbecoming, and an investigation was held. Again, there was no nexus shown between the conduct and the carrier's business mission. But, this time the arbitrator denied the claim. The arbitrator reasoned that because there had been three previous cases of a similar nature on this property, that stare decisis should control the outcome of this case. I don't understand the logic. After reading the award 12 or 13 times, I still don't quite understand how you would apply stare decisis to a discipline case. And even if you could, the three previous awards all involved different predecessor carriers and different collective bargaining agreements.

At any rate, what was puzzling to me and why I wanted to talk about these cases is because the same arbitrator decided both cases. The same arbitrator ruled in a contradictory fashion in cases that were cut from the same cloth. I think that "just cause" is very subjective. It does call for a careful assessment and judgment by an arbitrator. If we were going to hire an arbitrator now, it almost certainly won't be this arbitrator if we have a business nexus case on that docket. I think John Sands hit the nail right on the head in stressing the importance of consistency. When we are counseling our clients, we look to how arbitrators rule on this particular subject matter. It might enter into a consideration of whether we actually take the case forward or not, or whether we try to settle it short of arbitration. There are myriad reasons why I think it's important that there be this consistency. I would hope that when arbitrators are ruling on cases, that we do this with a view toward being consistent. Thank you.

Parker: Rick, I want to follow up on that. Aside from the fact that this particular arbitrator appeared to be inconsistent in his or her application of the nexus doctrine with respect to off-duty misconduct, would you say, in general, that the arbitration process as it applies in the railroad industry does not lead to predictable results in disciplinary matters?

Radek: I would want to say, possibly, you're correct. I don't think that it's too much worse lately than it's been for 25 years. There has not always been great consistency or unanimity among arbitrators deciding similar issues.

But discipline cases are pretty much fact driven. No matter how much that you're cast into the advocacy role, you still make an empirical assessment of the record yourself. My experience, generally, is that it is not that bad; but I think that there have been a few notable exceptions lately, like the examples I have given today. But, I wouldn't say that it's of such a general problem that we need a presidential commission to study it yet.

Parker: What do the other panelists say about predictability and consistency?

Charlie Woodcock: I think that that is something that both parties want to see. One of the issues that I think is not necessarily reflected in the paper, because it's aimed primarily at the rest of the world, is that in this industry, that the parties really do drive the process with public law boards and other on-property boards. There is a longstanding relationship with many people in this room with properties where there are a larger number of cases that are handled compared with other companies throughout America. That tends to promote greater consistency, both in the interpretation of agreements and in the interpretation of discipline. There is a body of law that develops over certain issues, such as with regard to a passenger railroad and employee misconduct with passengers. Every so often, as Rick is pointing out, there is a deviation from that. I think both the carriers and labor want predictability. We search for that. It's a tribute to some of the people in the room that have been in this industry for a long time—that you've got public law boards that are issuing hundreds and thousands of decisions with the same arbitrator. I think it's one thing that's hard in the context of the overall Mittenthal/Vaughn paper to understand where you might not see an arbitrator at a particular worksite or business but once every couple of years. That gets to be more of a crapshoot.

Charlie McGraw: I think we have some control over consistency. As Charlie Woodcock pointed out, we establish public law boards

and discipline boards and usually pick out the arbitrator. And it goes down to the old theory, you know, screw me once, shame on you! So, if that arbitrator has cooked his goose, he's not going to be used any more. The only control we have over the process is going through the list and picking an arbitrator who is somewhat consistent. The way we do that is set up public law boards and try to pick out the best person possible. And, when we get tired of him, we let him go.

Parker: I agree that we look for consistency. But, we also look for the opportunity to tighten some standards of performance. Some of these sexual abuse cases, for example, may not have resulted in discharge in the past and are more likely to result in discharge now because we have a different standard of performance. We're also taking a different standard of performance toward safety violations. If you have a completely consistent-over-time process, how do you change standards of performance within a company?

Panel Member: When we are talking about consistency, we shouldn't be looking at just the arbitrators, but at the railroads, too. They also have different ways that they handle cases. We recently had a case that did not go to arbitration. This individual, who lived in a small town out West, was charged with sexual abuse of a young girl. Well, this young girl happens to be the daughter of his brother who also worked for the railroad in the same small town. He was charged, and he pled guilty. He served a little bit of time on weekends, and the judge ordered that he had to stay more than 500 feet away from his brother and his family. But, they were in the same little town. And, the railroad brought him back to work. It's, like, what? I haven't the foggiest idea what their rationale was.

Audience Member: Arbitrators don't do de novo hearings in this industry. So, what's consistent for an arbitrator is based upon the record you give us. If one person is trying a case and introduces all kinds of facts concerning off-duty misconduct, and nexus, or whatever, then that's the record we're dealing with. If we get a record with similar potential facts, that doesn't have any of that evidence in it, then we're stuck with it. And so, when you're judging consistency, you have to look at the consistency of the process as well. Make sure the people who are doing the advocacy at the hearings are bringing in the right information to give the arbitrator.

Audience Member: In my experience, and I've done a bunch of cases, there is consistency among the railroad arbitrators. I

think this is a very unique business, and we generally select those arbitrators who are experienced in the railroad industry. I think there is more consistency in the railroad industry than there is in the private sector, because there's a process to gain acceptability in the railroad industry. I think the parties do an excellent job of bringing the cases before us, I mean, to the point of nausea at times about Rule G violations or time and attendance violations. I think if you're going to take that position as an arbitrator, then you have to be consistent. Let's say that the union argues that there's no nexus in an off-duty misconduct case, that it's not a situation that was publicized. If, as arbitrator, you don't believe that that's the case, then the carrier should have the right to remove that employee from the property. Now, there may be grounds for a different position if we were looking at a freight railway as opposed to a commuter railway; that might be a different ballgame. I mean, you may treat off-duty misconduct different on a freight railway than you would on a commuter railway.

Parker: To follow up on that, if you are an arbitrator who is issuing a decision that appears to be taking a position that is inconsistent with an earlier decision, you ought at least to include a few paragraphs explaining why that case is distinguishable. That way, you don't look like you are demented, and more importantly, you give the parties some way to explain it back in the shop to managers and rank-and-file members, alike; because otherwise, the parties are left with a situation that is not only incomprehensible, but inexplicable as well.

Audience Member: I want to ask couple of questions. Were these decisions on two different properties? When you said that the arbitrator upheld the discharge stating that he was relying on stare decisis, was he saying that three or four other people had been discharged at that property for this same type of offense?

Radek: I've got it marked what he did say. He said that there appears to be little, if any, connection between claimant's off-duty misconduct and his work life that, standing alone, might give the board pause over the carrier's dismissal action. But, he went on to say that nothing in the organization's analytic arsenal is brought to bear on the fact that three arbitration awards on this property with this organization have sustained a dismissal in analogous circumstances. The arbitrator then cites the three awards.

Audience Member: So, it seems like perhaps the arbitrator was just trying to be consistent with that property, but, you know, it appears to be a foolish consistency in the context.

Parker: I want to shift gear for a minute and talk to you about something else. We heard today about a standard of reasonableness, which the authors suggest has evolved in most unionized industries with respect to the arbitration of disciplinary matters. And, then they drop a footnote number four, which says that the railroad industry generally applies both a substantial evidence test to determine whether "just cause" has been met and an arbitrary, capricious, or abusive standard in the evaluation of penalties. So we are sui generis, as they say; and we don't follow the rest of the crowd.

Do you think there is a substantial difference in the justice that is meted out in this industry for worker misconduct as a result of the fact that the standards are a little bit different, and, further, that we have an appellate process here rather than a de novo hearing approach? Panel, any thoughts?

Panel Member: Well, I believe that the abuse of discretion standard is fairly well accepted. I think that the difference in this industry is that we have a context for all of these standards. I don't think there's any question on the railroad—Rule C, Rule G, whatever it was on the property, you understood and there was a context. You rarely, shall we say, turned that aside. I won't even address procedural issues. But in terms of the quantum, there was never any doubt. The issue of sexual offenses, I would submit, is a new area that maybe 20 years ago wasn't really addressed. Today, I think there isn't an arbitrator out there who would not understand the seriousness of this issue. In a public law board setting and the way arbitration works, there is, I think, a lot more consensus possibilities.

Steve Parker: I would be very interested in hearing you, Joan, answer your own questions as most of the advocates here all work in rail and are familiar with our industry. I'd like to hear from someone like yourself who works extensively in other industries as well.

Parker: Generally, I think a substantial evidence rule or quantum of proof standard would make it a little bit easier for an employer to meet its burden of proof. In other words, in other settings, arbitrators sometimes apply a clear and convincing evidence standard. They sometimes apply the standard of proof beyond a reasonable doubt, which is certainly the most demanding standard for an employer to meet. Substantial evidence may mean something a little less in terms of the hurdle that the employer has to overcome in order to sustain its burden. As far as the arbitrary,

capricious, or abusive standard with respect to the evaluation of penalties, in all honesty, I think that what we do in railroads is pretty much the same as I do in other settings.

To be perfectly honest about all of this, I think there's a lot of hair-splitting going on with respect to these standards. I once heard a lecture by a very prominent arbitrator who said that those scholars and practitioners who pontificate on the difference between preponderance of the evidence, substantiality of the evidence, clear and convincing evidence, evidence sufficient to convince a reasonable mind of guilt, and evidence beyond reasonable doubt are really faking it. In the privacy of their studies at two in the morning when arbitrators are agonizing about what to do, what they're really saying is, did I believe this person? Was there enough good evidence? Is it reliable? Is it authentic? And, can I go with it? They're not really sitting there doing those mental gymnastics to poll themselves as to what standard of proof or what quantum of proof they're applying. In the end, what does it boil down to? Reasonableness. What is reasonable based upon our experience, our knowledge, the laws of the shop, and the idiosyncrasies of the parties. For instance, in the gambling industry and casinos, one of the worst things you can do if you are an employee is to insult a gambling patron. In the refinery business, you do something related to smoking or bringing a flammable chemical on to the property, you're a goner. Every industry has its idiosyncrasies and its traditions. I invite my colleagues to also answer the question, but in the end, I think we're looking at what's reasonable and what's persuasive.

Audience Member: I would concur with that. I don't think that there's any difference in the railroad industry than in the private sector. We look at a case in the private sector, and we apply the test of reasonableness all the time. Was management reasonable in the amount of discipline they meted out? Was management reasonable in the investigation? Was management reasonable in allowing the employee to deal with the union? The difference in the private sector and the railroad industry is that you have a tremendous record in the railroad industry. You have all of this going on in the property. You have hundreds of cases, and you have all of this history. But, I think we do the same thing. We apply the test of reasonableness.

Parker: Well, of course the absence of live testimony is something that impacts the process. We can't get away from that. But I think that at least when we have the tripartite-ism that comes with

the board approach, we get a lot of insight that we otherwise may miss for the lack of a live testimonial proceeding. I don't know how you feel about that, but I think that the tripartite aspect is one of the beautiful things about the board, and it helps my decision-making. The parties that have worked with me on my boards know that we do a lot of thrashing around, and we often come out with consensus.

I want to be provocative and throw something out to the group. There is a very colorful labor attorney in Philadelphia by the name of Bernie Katz. About 20 years ago, Bernie wrote a piece entitled, "Arbitration and the Rachmones Factor."[1] That word means compassion or mercy or sympathy. I want to read you an excerpt from Bernie's piece and see what our group thinks:

> There was a time, years ago, when the feel, the set, and the backdrop of any discharge case was the arbitrator's recognition that compassion, forgiveness, and understanding must enter into all disciplinary cases. Especially, the discharge scenario. In an effort to bridge the chasm between the offense and a just solution, yesterday's arbitrator first evaluated the extent of the problem besetting the employer. Was thievery rampant? Or were there relatively few and isolated cases? Was fighting a daily occurrence? Or was the fighting in the case under consideration an unusual incident? After having evaluated the extent of the employer problem and having the enterprise's functioning not be undermined, the classic arbitrator turned attention to an evaluation of the grievant. How many years of service are there? What was the prior record? What was the extent of the grievant's responsibilities to dependents, such as children and a spouse? What is the social impact of sustaining a discharge in a particular case? Does the grievant's background compel a conclusion that a rehabilitative approach has a real possibility of success? All of these questions and others of similar value were put into a pot with the employer's needs of an untroubled workplace, mixed together, and the final product assembled with a cohesion made up of the Rachmones Factor, a sense of compassion, sympathy, or recognition of the frailties of human nature.
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> The responsibility-abdicating arbitrator of today erects a protective set of rationalizations under which responsibility for the quantum of discipline is shifted from his or her domain to some perceived formula of the parties behind which our modern arbitrator is all too happy to retreat. Instead of being drawn from backgrounds reflective of the original arbitration concepts of justice and sensitivity, today's "impartial" labor adjudicators are better suited to count beans or total arithmetic columns. No great expertise is really required to determine if an employee is guilty of an act of misconduct. The real work of an arbitrator is in deciding whether and how the employer's needs may be served

[1]On file with speaker.

> without sacrificing the employee's future. The modern bean-counting arbitrator often expresses remorse over the decision and blames it on structures imposed by the parties. It's time to end such moral abdication.[2]

This is perhaps an overstatement, but maybe it contains a grain of truth. Are we too formulaic? Are we too legalistic? For instance, we said it before, you have a Rule G violation, and the standard in the industry is that you get one chance and one chance only. You don't stop and think about seniority, the wife, the kids, the bills, and the other issues when you have a repeat offender with a drug offense. Is Bernie Katz right?

Elizabeth Wesman: I think one of the beauties of the tripartite board is that you have input on those factors. You do find out, for example, that this person who had a Rule G violation now has gone through a tragic event where a wife died, his mother's in a nursing home, whatever else is going on in this person's life, and the carrier is saying, "Look, I know what the Rule G is, I don't want you to go and say, 'Well, Rule G isn't what I meant, we're going to have to feel sorry for this guy.'" Instead, among the three of you, the board manages to craft something that doesn't damage the process, but still is of benefit to the grievant organization, the management, and the railroad.

M**ancini:** Although, I think that there are cases where the arbitrators do show leniency, I think, in general, what we advise our operations people is that if there's a case for leniency, management should be the one that brings the employee back. And, we do. We have processes, particularly, in our train crew discipline where we sit down with the union leadership every month and go through the discharge cases and bring people back where it is appropriate to do so.

McGraw: I just want to make a comment with regard to that. I do outside arbitration, also. But, in the railroad industry, Betsy's absolutely correct, there's more of an avenue to resolve the problems. I don't go in there and argue cases. I go in there with the intent that we're problem solvers. In outside arbitration, you go up there and you argue the case, and then you close your books and go home. That's it. There's no executive session; there's no kibitzing back and forth and visiting with each other and talking about the case off the record or anything. But, in the railroad industry, we have that opportunity. And, I believe that there is room for

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[2] *Id.*

compassion. It's something that we have to weigh because we're all human. But, it takes us as a board—the carrier, and the arbitrator, and myself as an advocate—to winnow out the ones where we can show compassion. I have been doing this for 20 some years, but there's probably been at least a dozen times where, when we're in executive session, that I have begged and I have pleaded for this individual to have one more chance. And I'm usually the first guy that goes back and tells him, "If I ever see your name again, guess what?" And, the message gets through. Out of all these times, I've had only one case where I got burnt.

Audience Member: Depending on the relationship the parties have and their willingness to compromise, they have the ability to settle many cases. Sometimes you can agree on most every aspect of a case, but not certain ones. Then, you tell the arbitrator, "Well, we really don't have a problem about this, but we do have a problem about that," and in that way we can narrow our arguments to just what is actually in dispute.

Joan, when you read that piece, I was reminded of what they used to call the Shulman Principle. Do you know when that was written?

Parker: In 1996.

Audience Member: So, relatively recently. I think that probably 40 years ago there was more of a tendency that if the discipline was not arbitrary or capricious, then the arbitrator wouldn't set it aside. But, I think that's as archaic today as is the Shulman Principle. Mac Shulman was an arbitrator who I think was from New York City. He said that if an arbitrator is faced with conflicting testimony between a management official and an employee, the credibility issue should be decided in favor of the management official because he had no motivation to lie. I always thought that approach was silly. I think today I'm going to bring every fact I can bring to bear to mitigate against an offense. And, I think that there are things that you, as an arbitrator, have to consider. You have to take a larger view, I think, today than you did before. It may be true that there are certain types of offenses that we now consider to be less tolerable, but on the other side of the scale, I think you do have to take into consideration the personal part of the equation.

Audience Member: On our railroad side it's always been innate that we have a blending process that's somewhat de novo. We sit down with the union on a regular basis, and we settle them like candy salesmen. When an arbitrator comes in, he doesn't get to

look people in the eye, listen to what they have to say, observe cross-examination. And, that's what the problem is when you're working from just a record.

Woodcock: I have two comments. First, I would ask that the arbitrators tread lightly in this area. Obviously, they hold a lot of power on the tripartite board. It's not unusual that they will spur discussions between the parties. But, speaking for the employer, there are a couple of things we miss. We talked a little bit about the shop floor. Joan, you mentioned that key term, shop floor. Whether it's the tracks, whether it's the dispatching office, what are the dynamics? But the difference, I think, is that we miss being on the property.

Second, by the time we get a discharge case, I am comfortable that employees need to leave. Now, that's a discretion issue, and one of my functions at the final level is to make sure that is the right decision. We don't always hit the fast ball, but we do, I think, most of the time. Trust me, employers have no interest in jettisoning employees. It is difficult and expensive to hire. There are drug testing costs. There are recruitment costs. There are pockets around the country today where there are shortages of workers. Now, again, that's not to say we walk on water. That's not my point. But, it is not in our interest to jettison employees. We'd rather turn them around. And, on my property, I think we do a good job of that, in balancing and in being careful to make the right decision.

Audience Member: I think Amtrak might be an anomaly because there are a lot of railroads out there that don't have that philosophy. I heard somebody mention in one of the discussions during our conferences today about the politics within the unions. Sometimes that is the reason why a case has progressed all the way up. But, I'm here to tell you, there's politics in the railroad management, also. A supervisor does something and all the way up the line they try to protect the bad guy because they don't want to look bad. So, there's politics all the way around. In terms of dismissing employees, I credit Amtrak; they do a pretty good job. But, there are railroads out there that dismiss people for the stupidest things in the world. We had a case where a guy got stung by a bee and they dismissed him for being accident prone! It's like, how stupid can you get? But, that's the mentality of some people out there.

Steve Powers: I disagree somewhat with Charlie about local supervisors, not that they're not good people, but they're often trained in building railroads or running trains and may not be the

best at employee relations and managing people. And so often, we see cases coming up all the way to the arbitration process, and it's the labor relations person who is fixing the problem in the arbitration setting. Second, what Pat said about video conferencing is troubling me. And I'm asking everyone in this room to be very thoughtful about this step. I haven't decided if I'm for it, or against it, or maybe a little of both. But, what worries me very much is that the process that Betsy described suddenly is being videotaped or it's being done over the wires. The mental processes that are happening between the three arbitrators now become very public. And, that changes the process fundamentally. I think we ought to be very careful about this video conferencing business. Whether it helps or hurts us, I don't know. But I think we need to be very thoughtful about it.

Parker: We really have to stand united on that issue because if we resist it as neutrals and as advocates alike, we stand the greatest chance that it will disappear. I agree with you 100 percent.

I want to ask you something else. We were talking about the fact that so many times when a case comes to the level of discharge and it's in arbitration, the issue is not so much whether the employee did something wrong but whether he deserves to lose his job over it or whether we should be reducing the discharge penalty in favor of some form of corrective discipline. When we arbitrators make that choice and opt for corrective discipline, in the majority of cases we don't find out what happened later. I'm asking you, does progressive, corrective discipline work? I know a lot of times when I get a discharge record, I'm looking at somebody who has screwed up not once, not twice, but many times and finally the employer's patience is exhausted, and it fires him.

Audience Member: Sometimes it works and sometimes it doesn't.

Parker: But, I have a feeling that many of you in the room may have a sense of whether people who do wrong feel chastised by the process and learn from the process and shape up or whether we arbitrators tend to bet on the wrong people by repeatedly reinstating individuals who are only going to get in trouble time and time again. Does anyone have any empirical or intuitive experience with this?

Audience Member: I don't have any empirical or intuitive evidence, but I had the privilege of serving as the mentor on an MBA program for a labor relations person with one of the major railroads and he was seeking a research topic. I suggested he look at

the last five years of records for people who had been discharged by the railroads but then reinstated by an arbitrator to see what happens with them. The results were something that you really could have predicted. Where the discharge was for a singular offense, like having a fight with a supervisor and that's the first time it ever happened, then the employee who is reinstated has a fine record. But, the employee who is discharged for lots of absenteeism, for drug or alcohol offenses, or for repeated poor performance—in other words something that was built into the job—in most of those cases where reinstatement was granted, they were out within a year on another discharge.

Parker: Well, my observation is that the arbitrators are more likely to put the person back for that singular offense. The arbitrators are more likely to put that person back than they are to put the one who has screwed up on a bunch of small things time after time and hasn't been disciplined. And, I think that that is the right decision.

I know, Lisa, that you came with some hypotheticals that you wanted to share with us.

Mancini: Yes. I think it gets to the question of whose standard of reasonableness should control. Here is the hypothetical. A railroad has a fairly lenient policy toward safety violations and also a poor safety record. New management that came from a different railroad with a much stricter policy toward safety violations and a much better safety record wants to change the safety policy. How do the arbitrators treat the management's new standards? If you have the same case from two different railroads and one railroad has a higher standard of performance and less tolerance for errors, does the arbitrator give a different decision to that railroad for the exact same offense? The related question then is can the previously more lenient railroad now change that? Can they announce a new policy and say, "Lenient didn't work, so we're going to be stricter now?" So, those are my questions for the arbitrators.

Audience Member: I think I'll take the last one first. If the rule is reasonable and the concern is reasonable, then, with notice, I don't see any problem with the railroad changing to a more conscientious safety policy. I've seen that in the private sector. I've seen it on some railroad properties. If management comes in and says, "Look, you know, we just got written up for umpteen problems by the government and now we really need to crack down on this." The answer is, yes, go ahead. But, management at least should put everybody on notice. "You used to be able to be sloppy,

but now you can't. If you are sloppy, this is going to happen." You wait until an accident occurs and then say, "Gee, we've changed our policy and now we're going to start prosecuting." That's not going to fly. An arbitrator is going to have a lot of trouble upholding it if you've got a past history of being lenient. But, if you put employees on notice and the rule is reasonable, I don't think an arbitrator is going to give you a lot of trouble on it.

Audience Member: I would agree. There's a plethora of decisions from agencies like the National Labor Relations Board (NLRB), for example, that would say the employer, by its past actions, is condoning that kind of conduct. In addition to what Betsy suggested, you also should educate your workforce as to the new stricter standard, and, at the same time, talk to them about what is going to happen if they don't follow the new standard.

The other thing is that you have to give reasonable notice. So for example, you can't say "We've been fairly lax for the last 15 years in how we follow these safety standards, but tomorrow we're going to change it." That isn't going to work because that's not reasonable notice. What's reasonable? Reasonable, generally, is defined as the amount of notice that an employee would be required to receive, together with training, so that a reasonable person standing on the outside, like us as arbitrators, would say that it is now fair that any employee would have a reasonable expectation of the need to comply with the new policy.

Plus, you're probably not going to get termination on the first group of employees that fall short of the new rules. You're going to have to do some progressive discipline, like warnings and suspensions. Then, if you continue to see these violations, I think the arbitrator is more likely to uphold the termination. But, if you've been allowing it for a period of time, even if you give employees notice but then try to fire a batch of employees, I don't think an arbitrator is going to support that.

Audience Member: I think Dennis hit it right on the head. Speaking on behalf of labor unions, we know there are rules made to protect people. I don't want my guys out there getting hurt. If there's a safety rule, it should be followed. But, they have to provide training for these people. And disciplining them and suspending them is not the way to teach people. You don't sit there and slap your kids. You teach them the proper way to do things. You're right on point, Dennis. Thank you.

Parker: I think that even if you do the education, the retraining, the postings, you may have to anticipate a period of transition. I'm very familiar with a situation where a major defense contractor had a problem with employees stealing time. Employees who would never think of behaving dishonestly in terms of stealing money, were repeatedly coming in late, leaving for lunch early, coming back from lunch late, and overextending coffee breaks. And, this is a defense contractor where every minute of every productive hour has to be accounted for on government contracts. The situation just got out of hand. They announced to the panel of arbitrators—there were three of us—"This is it. We are retraining, we are re-educating, and we are going to teach this workforce that stealing time is stealing money." And, the union was a part of this plan. They are our partners in this because we are going to lose those federal contracts if we don't jointly crack down on this problem. So, there was an effort to re-educate the workforce and redevelop the culture. They did it over time. Even then, in all honesty, it did take a few arbitrations for the message to really take hold. There were a couple of test cases and there were a couple of reinstatements as a result of the discharges. And then, ultimately, I probably had the most heartbreaking case of them all where a very senior employee knowingly cheated and I had to be the wicked witch of the West and say, "Okay, we've had this arbitration, we had that arbitration, and now somebody has to pay the price." But that was after at least 18 months of re-educating this workforce repeatedly. But, you know what? They don't steal time anymore at that plant, or in any of that employer's plants.

Audience Member: Could I just go back to the issue of reasonableness and consistency? I probably have written 50 cases on an employer's right to expect reasonable and regular attendance from their employees. Along comes the employee with a good work record, but whose wife gets cancer. All of a sudden, he's got a horrendous work record. How do we, as arbitrators, deal with that kind of question? There's no question that the employer has a right to expect reasonable, regular attendance regardless of medical problems or other circumstances. But here's a case with a unique set of facts. And, that's what I think Betsy was trying to point out. And, then it gets to the other argument, consistency. "Gee, Tom Rinaldo, he always upholds management's right to discipline for time and attendance. Why didn't he do it in this case?" And, I think that we do apply the standard of reasonable-

ness when we see the right case that comes before us regardless of what happened on the property.

Audience Member: I also think that because of the kind of relationship labor and management have and their relationship with us, that we are also very conscious of not causing damage when we do something like that. So, there will be language in the award referring to the peculiar circumstances of this case. And in some cases, it will also say that it is without precedent for future cases. This is a relationship that is very particularly amenable to that kind of a decision.

Parker: Absolutely correct. Let me ask another question. In the paper we heard today, the authors say that employers sometimes underscore the importance of a rule by creating this aura of the zero-tolerance principle. The authors then go on to say that any unilateral rule, however strongly stated, cannot substitute for proof of just cause and cannot diminish the arbitrator's role in determining whether discharge is the reasonable penalty. Question: Is there a special imprimatur when an employer promulgates a rule and says, "This is a zero-tolerance rule?" Does it have a connotation of greater importance? Do arbitrators pay more attention to it? Should arbitrators pay more attention to it if you say, "We have a zero-tolerance rule about fighting." Or does the fact that you put that kind of terminology on the infraction not really have any special meaning at all?

Audience Member: You know the zero-tolerance policy issue is interesting because, first of all, you have to look at the type of rule to which the policy is being applied. If they're going to make zero tolerance of spitting on the sidewalk, I mean, they're going to get laughed at. On the other hand, when it gets to a context where zero tolerance is being applied to drugs and alcohol in the workplace, now you're looking at the history of the parties and, particularly in the railroad industry, you're looking at what they tell you that they do. Industries establish the rules or policy; that's longstanding. And generally, with respect to a larger employer that has a zero-tolerance policy, you can see from the history of what the parties have done in grievance procedures whether they have allowed the employer to take the lead or whether there's been a long history of fighting over this. So, I'm not quite sure that statement in the paper was accurate.

Audience Member: With things like drug and alcohol, I think the parties understand that a zero-tolerance policy means what it says. We had fights in the beginning when we first implemented

it and had a lot of arguments over it. Now, everyone just understands it. If it's a positive test, that's it, the employee's done. More recently, it's a zero tolerance on violence in the workplace.

Parker: Right.

Audience Member: How do you define what violence is? I mean, is it a pushing match? Or, is it somebody coming in with a gun? That's where it can become like spitting on the sidewalk.

Woodcock: For the most part, we are seeing zero-tolerance policies with respect to harassment issues and drug and alcohol issues. I see 5 percent of the workforce, and I forget the fact that there's 95 percent of the workforce out there that basically does the right thing. So, when we take actions at a board, and I would ask the arbitrators, in particular, as the third leg of that stool, to make sure we think of that 95 percent who will be receiving somebody back, whether it's a pernicious case of absenteeism or it is somebody that is a bully or a harasser. Quite frankly, the average employee wants those folks out of there, too, just as much as management. And, I do believe that we owe it to the survivors who are there running the place and doing the right kind of thing.

Audience Member: Did Amtrak's policy change on violence in the workplace after you had those incidents?

Woodcock: Oh, well, it was certainly a very crystallizing effect, the shootings in the Wilmington shop, very much like Chase, Maryland. These things, unfortunately, happen. If it's not regulatory, it's a lawsuit or class action suit, and there is nothing as energizing as those actions.

Audience Member: On some of the harassment and discrimination cases, our feeling is we're not going to put this employee back to work. If you, as arbitrators, put them back to work, that may be what you think is the right thing to do; but we're not going to put the employee back to work. And, a lot of it is for the other employees. We want the other employees to know we don't tolerate it. And we may not have the evidence in this case, but we're not going to tolerate it.

Audience Member: I would caution arbitrators to not be overwhelmed by the zero-tolerance policy rules. We put too much emphasis on that to the extent they don't look at the record and what took place because the employee who is being disciplined still has a right to due process. And all too many times, I believe, there's too much emphasis on the policy.

Parker: Well, let me ask you this. Reflecting on Bernie Katz and his feeling that people should be saved and not just punished,

and remembering Charlie Woodcock's statement that employers don't look to jettison employees, that we have an investment in our workforce and we want to maintain a productive workforce, should we be doing more with last-chance agreements? We all know that when we do last-chance agreements, we're usually dealing with drugs and alcohol. And, it's kind of ironic, too, because it's the flipside of zero tolerance. We won't tolerate it, but we tend to do last-chance agreements in drug and alcohol cases if we're going to do them at all. But I don't know what your experience is. I don't do many last-chance agreements when I'm not dealing with drugs and alcohol. Should we be using last-chance agreements more to correct and rehabilitate workers who get in trouble? Or, does that turn the workplace into a rehab center, which it's not.

Audience Member: We do them with all progressive discipline. We call them discharge with dignity.

Parker: We're getting rid of you; but you're going with your head held high!

Audience Member: Well, no, it's that they get discharged, and they get a day to think about it and come back to sign a contract where they're saying that, this is it, and if they do anything further, they're gone. We do it mostly on performance or attendance kinds of issues, things that are corrective. You're discharged and then you're reinstated with a last-chance agreement, and they get counseling.

Audience Member: My railroad experience at this point is limited. But in the non-railroad circumstances in which I have been involved, I've found that the last-chance agreements work best when they are directed at something other than drug and alcohol problems. For example, a last-chance agreement imposed on an employee who is not drunk but gets into a fight is the type of agreement that advocates tell me help people to survive and stay clean.

Audience Member: I think it's very important to realize that at this moment we have changed the subject. There are various times when it is valuable to use last-chance agreements or to send someone home for a day to think about what they have done. But, that is within the framework of collective bargaining, and not arbitration. I would not like to leave the impression that it is ever proper for an arbitrator to make a last-chance agreement. I think that an arbitrator is overstepping his or her bounds in imposing a last-chance agreement because he or she is trying to control what

the next arbitrator will do if the last chance is broken. If the last-chance agreement is perfectly clear and the union knew about it when it was made, the arbitrator's job is simply to determine whether this agreement has been broken.

Parker: I have never imposed a last-chance agreement as an award. I have mediated cases where I have assisted parties in writing the terms of a last-chance agreement, but I've never imposed it. And, I hope most arbitrators don't think that they have the authority to do so.

Audience Member: What about an arbitrator ordering a conditional reinstatement? Same commentary?

Audience Member: An arbitrator cannot impose a conditional reinstatement because that arbitrator cannot impose the judgment of what the next arbitrator will do if the offense is repeated. An arbitrator should make up his or her own mind and sustain the action or not.

Audience Member: Most arbitrators who have had relationships with us over a period of time will pull the two representatives aside and say, "You should settle this thing." That's all I need usually. If I think it's going south a little bit, then you want to set the conditions for the employee's return yourself. I don't want the arbitrator setting the conditions.

Parker: Once you express willingness to the union that you will take this person back with conditions, the union is generally happy that the guy is going to go back to work and will partner with you in making sure they don't have to represent him again. So, you can get out of the last-chance agreement far more than an arbitrator typically would give you with reinstatement and no back pay. You get things such as requiring the employee to report to his drug counselor, to go to Alcoholics Anonymous, and to do whatever the Employee Assistance Program tells him to do. Plus, the next time he gets in trouble, he can challenge the facts but not the penalty. You get the whole host of conditions that you would like to have, which will ensure that if this person cannot be rehabilitated and gets in trouble again, he'll be gone.

Audience Member: The problem with last-chance agreements, though, more than anything else, is that they are a political problem for the union. It's because the last-chance agreement has become a regular part of our business now. I mean, I sign five, six of them a week. What happens, as a result, is that the employee who messes up never gets a day in court. Unions aren't as active as they

used to be on the property because we're using that process to resolve things, and there are not as many arbitrations anymore. For the employees, it's like, "What am I paying dues for?"

Parker: Well, my time keeper is telling me that it's about time to wrap things up. Thanks for being such a great audience.

VIII. HEALTH CARE

Moderator: Jay Nadelbach, NAA Member, New York, New York

Panelists: Bill Flannery, Partner, Post & Schell, P.C., Harrisburg, Pennsylvania
Barbara Hoey, Chair, Labor and Employment Practice Group, Kelley Drye & Warren LLP, New York, New York
Hope Pordy, Attorney, Spivak, Lipton, Watanbe Spivak Moss & Orfan LLP, New York, New York
Gwynne Wilcox, Partner, Levy Ratner, P.C., New York, New York

Nadelbach: I will briefly introduce everyone beginning with the person next to me and moving down the line. Gwynne Wilcox is a partner at Levy Ratner and represents unions before the National Labor Relations Board (NLRB) and other administrative agencies as well as in arbitrations and litigation. Barbara Hoey is chair of the labor and employment practice group for Kelley Drye & Warren, a national firm based in New York City that represents management in all types of labor and employment matters. Bill Flannery is based in Harrisburg, Pennsylvania, and represents management in labor and employment practice. Finally, Hope Pordy is associated with the law firm of Spivak Lipton in New York City.

This will be an interactive session and we will begin with the general reaction from each of our panelists to the presentation on arbitral discretion and the discharge penalty as it applies to the health care industry where each of our panelists practice. I invite the panelists to tell us if they have witnessed an evolution of the "just cause" standard and, if so, how?

Wilcox: I have not witnessed an evolution in arbitral discretion with regard to the discharge penalty. The Mittenthal/Vaughn paper did place in perspective the arbitration practice and just cause. Arbitrators make their decisions based upon what they