Chapter 11

ARBITRATION AND THE PUBLIC SECTOR'S ECONOMIC CRISIS—A TALE OF TWO CITIES

Is this the "worst of times" for the public sector and its unions? Our panelists will discuss their first-hand experiences in Boston and San Francisco, and how interest arbitration and mediation was utilized in the face of major budgetary shortfalls.

Moderator: **Roberta Golick,** NAA, Sudbury, MA
Panelists: **Martin Gran,** Employee Relations Director, City and County of San Francisco, CA
Vincent A. Harrington Jr., Weinberg, Roger & Rosenfeld, Alameda, CA
Thomas Kochan, NAA, Professor, MIT Sloan School of Management, Cambridge, MA

MARGIE BROGAN: You must have thought we were brilliant in coming up with this topic and that we somehow foresaw events of this year. I wish they'd not taken place. But, we have a wonderful panel discussing those topics. As our moderator, we have Roberta Golick, from Sudbury, Massachusetts. She is our President-elect.

ROBERTA GOLICK: Good morning, everyone. Welcome to the first plenary session of the conference. It is my great privilege to serve as moderator of today's panel discussion entitled "Arbitration and the Public Sector's Economic Crisis—A Tale of Two Cities." The reference to Charles Dickens is spot on. If there were room in the printed program, more of the opening paragraph of the Dickens novel would have been apt. "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity. …"

As you'll hear from our panelists, two from San Francisco, one from Boston—two from Boston, if you count me—the tale of these two cities provides an excellent backdrop for many of the enormous and difficult problems confronting all cities in North America today.

For more than 50 years, collective bargaining has been a mainstay in the public sector. Beginning, ironically, in 1959 in the state of Wisconsin and spreading across the country in subsequent years, collective bargaining enabled government workers to make up in various ways for the large disparity between their benefits and those of their counterparts in the private sector. In the sixties and seventies, binding arbitration gained a foothold as a reasonable alternative to public employee strikes, most frequently involving essential workers, like police and firefighters. Though there were constitutional challenges to many of the statutes across the country, those that contained safeguards against the peril of arbitrariness tended to be upheld.

In 1976, the Supreme Court in Massachusetts responded to the attacks on the first public safety arbitration decisions by saying, "We are less concerned with the labels placed on arbitrators as public or private, as politically accountable or independent, than we are with the totality of the protections against arbitrariness provided in the statutory scheme." That sentiment—recognizing that dispute resolution governed by established rules, conducted by impartial neutrals applying objective standards—allowed for the further growth of binding arbitration in the public sector over the next decades.

While many of the state and local governments and statutes provide interest arbitration just for police and fire, others, such as the City Charter governing San Francisco, have used binding arbitration in creative ways across a broad swath of labor groups.

Fast-forward to 2011, and the Charles Dickensian lament "It was the worst of times" grabs the country's attention. There is not a person in this room who has not followed with ever-growing concern, to say the least, the proposed rollbacks in collective bargaining rights. There have been bills introduced in more than 40 states to curb or alter collective bargaining for public employees.

Is the accusation valid that governmental unions have caused or contributed to the fiscal crisis? Are the wages, health, and pension benefits that have been gained through the years out of sync with those enjoyed in the private sector? What's a responsible union, a careful employer, a thoughtful arbitrator to do?

I turn the program over to our esteemed panelists to provide us a glimpse into their experiences and to share with us their insights into these and other questions. Our first speaker is Vin Harrington. Vin is a partner in the San Francisco Bay Area law firm Weinberg, Roger & Rosenfeld. As counsel to SEIU, the largest public sector

union in the Bay Area, Vin has been involved in numerous dispute resolution processes, both mediation and arbitration with the City and County of San Francisco. As you'll hear, he and the man to his immediate left spend a lot of time sitting as far apart from each other as they can get.

That man is Martin Gran. Martin is the Employee Relations Director for the City and County of San Francisco. After serving in the city attorney's office for 11 years, Martin took his current job in 2008 just in time for the economic meltdown. When he's not negotiating concessionary labor agreements, Martin can be found leading negotiations over pension and health reform. Martin has generously agreed to go second so as to correct the misstatements that he feels you'll undoubtedly hear in Vin's presentation.

After Martin, our own NAA member Tom Kochan will speak. Tom is the George Maverick Bunker—not to be confused, he urges, with the Archie Bunker—Professor of Management at MIT. Last year, Tom played a critical neutral's role in an interest arbitration dispute that gripped the City of Boston. It involved the Boston Firefighters. Tom will be telling us a bit about that very complicated and deeply political controversy. He also intends to impart some thoughts about how the parties and the arbitrators can be part of the solution to the crisis in the public sector and not part of the problem.

Each panelist will speak for approximately 15 minutes. After that, we'll play it by ear. So, I give you Vin Harrington.

VINCENT HARRINGTON: Good morning. Well, to be introduced by Roberta is a very nice thing, and to be described as "esteemed" is even better. As I look around the room, I see some familiar faces. I'll be talking about some events which are, in fact, very familiar to some of the folks in the room.

I thought it would be useful to give a brief description of the legal situation, the context in which we engage in interest arbitration, in San Francisco. As Roberta mentioned, the typical interest arbitration statutory provision addresses public safety employees. But in California, under the regulations and statutes, local entities are free to develop their own dispute resolution mechanisms as long as they do not conflict with statutory minimums described in the statewide bargaining law. And San Francisco has adopted that alternative in a couple of different ways which are, perhaps, unique in the sense that again in California there are two basic divides in terms of describing local governmental entities.

There are so-called general law cities who obtain their power essentially from the legislature. And then there are charter entities—cities and counties that can create through the adoption of a charter and the amendment of a charter their own rules for local governance. Essentially, the charter becomes the constitution of the entity. In the City and County of San Francisco, we have yet a third sort of unique characteristic in that it is both a city and a county, which is, again, unique. It is the only "city and county" in the state. So, we have a kind of unique setting in which we can look at this analysis and talk about our experience.

Because it is both a city and a county, it has a number of services which would be typically found in California at a county level, such as a county hospital, a county jail system, a county library system, and county social service and social welfare systems. It also has the typical city services: police, fire, the building inspector bureau, and all of the support network that people in a modern, industrial city in the United States expect to receive.

So our client, who is engaged in this process, is an SEIU local that has about 11,000 members who work in the city and county, which is about half of the total employee complement in the city. It includes everyone from janitors to professional social workers; from clerical employees to district attorney investigators. So it is a very wide-ranging, very widely based unit which has, potentially, extremely disparate interests in bargaining. We have people making $40,000 a year as well as people making $120,000 a year in the same unit.

The city charter has provided for interest arbitration for miscellaneous employees, which includes everyone who is not a police officer or a firefighter, since approximately 1990. Our client elected not to adopt the interest arbitration procedures for some time because, frankly, we did very well in the other procedure, which was basically a salary survey sort of a procedure. Very little "collective bargaining" in a formal sense, but quite a bit of collective bargaining in the informal sense.

You will hear often that San Francisco is a "labor town." And, it both is and isn't, as is typically true of such a statement. It's too broad. But, it's also accurate in the sense that labor is a significant political factor in the life of the City and County of San Francisco. Public officials seek labor support. They abhor labor opposition, if possible, in electoral campaigns. So unions have traditionally been able to do just fine in the traditional setting.

But in 1992–93, we opted into collective bargaining for the very first time. And collective bargaining, as it's used in the city charter, leads ultimately to final and binding interest arbitration if there is not an agreement.

In the early days, the first time we opted in, it was pure baseball with ultimate last best offers offered at the end of the process if there was not a mediated agreement reached. And there was not a mediated agreement the first time we opted in. One of your members, who's in the room here, who shall otherwise remain nameless—but his initials are "J.K."—was intimately involved in that process, which resulted in, from our perspective, a stunning award, which established a core contract with which we are still operating today, with some very substantial and fundamental increases in wages and benefits.

Because this is a political process as well as a labor-management process, the city and county's immediate reaction was to change the rules. They then went to the ballot and they changed the rules to go from baseball-style arbitration to issue-by-issue, last best offer arbitration—obviously to lower the risk of making, as they had in the past, a fatal miscalculation of what is or is not, both the last best offer and what's a good last best offer. So, issue-by-issue arbitration became the method of doing business.

Although we opted in in '92–'93, as was true in many locations and certainly very true in the Bay Area, the mid- to late 1990s was a "let the good times roll" time. We had a tremendous increase in the dot-com industry, a tremendous increase in revenues coming into the city and county, and a tremendous interest in spending those revenues, as it turns out. We were certainly a co-conspirator in that spending. I think it would be fair to say that, looking back on that time, there was no real sense on the part of either of the parties in this process that these good times were going to end any time soon. But in 2000, as we know, they certainly did.

From our respective bargaining and arbitrating in the Bay Area, we've been in bad times before. We've taken wage freezes as part of bargaining strategy. In the period after the dot-com bust and the stock market crash in 2000, we faced a very negative budgetary picture. At that time, we were still engaged in interest arbitration, ultimately. We did, in fact, use the process, I think, to great success in the period 2000 to 2003, and 2003 to 2006, using the provision of our particular law that permits there to be not only collective bargaining, not only mediation, but as well med-arb. So we elected

to use the mediation-arbitration process, and I think to great advantage. Because what that permits you to do, really, is under the cover of the mediation privilege, to engage in a very honest fact-finding. It's a very honest identification of interests which are mutual and, as should be the case in labor-management, interests which are disparate.

But having identified those interests and having looked at the facts, the fact of the economics, we then went to work. From my perspective, our clients—a very diverse group, a bargaining team of 65 people representing the people in over 65 departments in this very wide-ranging group—worked hard and worked their way through some difficult issues. They achieved, in my judgment, some public policy gains for the citizens that the management of the city and county were themselves unwilling to engage in. For example, programs were saved from elimination by the decision of the SEIU members to give up wage increases and to freeze various benefits.

Through this process, I think we realized and took advantage of the med-arb aspect, the ability of a mediator to threaten to be an arbitrator at any given time, but nonetheless who also engaged in the dialogue with the parties. It let the parties understand something that was quoted in *Firefighters Union v. City of Vallejo* in California, which is the California Supreme Court case involving the evaluation of an interest arbitration provision involving firefighters. In that case, they quoted with approval a portion of an article that Joe Grodin had written about, "The Nature of Interest Arbitration." I think it's useful to briefly summarize what it should be, and what it can be, I think, at its best, which is "a dynamic process, in which the positions of the parties and their interactions with the arbitrator are in a state of constant flux. Proposals get modified and non-negotiable positions become negotiable as the parties sort out their priorities, develop an understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered."

I think that that's really what occurred in these days, 2000 to 2006, as we made a variety of adjustments. For example, just by way of the sort of creative solutions that the parties at that time were able to come up with, the union had a benefit called pay equity. It was willing to freeze that benefit and throw a million dollars on the table. We also had various step movements affecting this very large unit, which in any given year is worth a tremendous amount of money. We froze those. We made that money available. Union

members agreed, for the first time in this unit, to pick up the mandatory employee share of the retirement compensation. As you know, there are three legs to that pension stool: investments, the city's contribution, and employee contribution. For the first time, our members agreed to pay that and relieve the city of the obligation to pay not only its share but also employees' share. And then we found some other money.

What did we do with it? Well, the union members bought two years' worth of maintenance of what's called the Mental Health Rehabilitation Facility, a facility the city wanted to close. Our members didn't want it to close. They felt it provided a tremendous value to the population and also provided a base for very significant middle-class jobs. So, the union paid for that program.

The union saved a laundry facility, which the city was prepared to put out of business because it contained a number of low-wage workers. That was their job. That was their future. And without that facility, they had very little opportunity, particularly in that economic environment.

Alongside the city, we strengthened our contracting out language in return for giving some of that money back. We created a joint committee to look for the jobs within the city. I think that was a very creative and effective way to solve the problems. And it resulted from this ongoing dialogue and fact-based discussion, but also from the implementation of policy choices that the members wanted in the bargaining process.

Since then, I think, in my own experience in the city and county, there's much less of a willingness to engage in creative thinking. And there's been an emphasis on the "power of no." "No" is an easy thing to say. "No" is a thing which can result in either a stalemate or an impasse, but it is not a solution for going forward. It damages the relationship of the parties. In my experience, the more recent administration in the city and county thought that no was the answer, and they had the answer. They didn't really need to hear from us about the answer. But that's in the long run not a positive approach, obviously, and damages the relationship.

You know, as I look at this process and when it works well, it is an incredibly valuable process. When it can lead to impasse, it creates tremendous frustration. Because the trade-off has been that the union gives up its right to strike in order to get a final and binding resolution. But to the extent the employer, for example in San Francisco, retains the ability to change the rules, to modify the dynamic, which they've done several times since these early days,

and to impose or threaten to impose draconian takeaways because they can, in the end, that really undermines collective bargaining. I think that this is a dangerous tendency, although, as Martin will report on, there have been some more favorable, recent developments in that regard. But, there's been a dangerous tendency even in a "labor-friendly town" to act in a fashion which I think is death to the interests of the union. I think that our union has demonstrated, historically, an ability to be flexible, an ability to want to do the right thing, and has used this process to force a dialogue in a situation in which, in the quiet of their own study, management would not have come to some of these more creative solutions. So I think it's an example of how collective bargaining working within a context of someone else imposing a deal on you that you may or may not wish can be really a successful way for not only addressing legitimate problems concerning your budget, but also preserving a relationship between the parties.

Because we're not going away, and, the collective bargaining system, certainly, where we come from, is not going away, either, unlike, perhaps, its fate in some other areas, that we may hear about in Tom's part of the program.

ROBERTA GOLICK: Thank you.

MARTIN GRAN: Good morning. I'm Martin Gran, and I'm very glad to be here. So, Vin, I think that you doth protest too much.

VINCENT HARRINGTON: That's my job, Martin.

MARTIN GRAN: In my 14 years with the city and county, neither Mr. Harrington nor his client has ever hinted that they want out of the interest arbitration. San Francisco remains the only jurisdiction in California that has binding interest arbitration for miscellaneous employees. I've been on a number of panels in which I've been happy to report that interest arbitration has largely worked in the City and County of San Francisco, at least. So, Vin, if you're serious about bailing out of interest arbitration, let us know. In this environment, it's certainly possible.

Vin is largely correct about his statement of the facts. Going back to the early 1990s, the police officers and firefighters were the first to get approval from the voters for interest arbitration for wages. In 1991, SEIU—Vin's client—and one or two of the other large unions in San Francisco worked with then-Mayor Art Agnos and the board of supervisors to get interest arbitration for miscellaneous employees, which we use today. In the San Francisco

Chart of Factors[1] you will see what the arbitration panel has to consider, and a number of arbitrators in this room have become very familiar with those factors.

Contrary to what I think Vin is implying, those factors have remained almost constant since 1991. Included in the list are, of course, the traditional factors including the city's ability to pay, looking in the workforce to see what other employees within the city and county area are making, and what employees in other jurisdictions are making. There has been very little tinkering with the factors. I think we added one factor, which was a specific look at a budget document prepared by the mayor's office, the controller's office, and the board of supervisors' budget analyst, which, because it involves all three of those agencies, has become a very good bellwether of what is coming up in the next fiscal year.

So contrary to what Vin is implying, those factors have not, by and large, been changed much at all since 1991. I should add that there was one big change that occurred following the Kagel award. This was going to "issue-by-issue" baseball arbitration. In that case, this was the city and the union's first outing into interest arbitration, and we ended up with an award that went to the union. Under the baseball-style provisions in the charter, the arbitration panel granted 125 pages of award that included issues the

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SAN FRANCISCO'S CHARTER FACTORS FOR INTEREST ARBITRATION (CITYWIDE EXCEPT FOR MTA)

Changes in the average consumer price index for goods and services
The wages, hours, benefits and terms and conditions of employment of other employees performing similar services
The wages, hours, benefits and terms and conditions of employment of other employees in the City and County of San Francisco
Health and safety of employees
The financial resources of the City and County of San Francisco, including a joint report to be issued annually on the City's financial condition for the next three years from the Controller, the Mayor's budget analyst and the budget analyst for the Board of Supervisors
Other demands on the City and County's resources including limitations on the amount and use of revenue and expenditures
Revenue projections
The power to levy taxes and raise revenue by enhancement or other means
Budgetary reserves
The City's ability to meet the costs of the decision of the arbitration board

union submitted, many of which were never bargained. As Vin said, a stunning award. Yes, we were stunned.

So following that experience, we moved to an issue-by-issue approach which labor did not oppose, at least not publicly.

It's very interesting; since that award in 1993, the city and Vin's client have never gone to arbitration. We've gone to med-arb and enjoyed the mediation skills of Arbitrator Winograd a number of times over the years. But, we've never once gone on the record since the first award.

Another important part of our charter-driven bargaining process is our deadlines. Under the charter, we have to wrap up this process by June 30th. That creates an enormous amount of pressure on us because, as you can imagine, nobody wants to sign a deal until they find out what Vin's client gets. They don't want to agree to one percent and find out that Vin's client got two percent. We go round and round and round, and then about 72 hours before the deadline, all the deals come in at once, and it's pandemonium. The attorneys pull their hair out. The clerk of the board pulls her hair out. It's quite an operation. But on the other hand, when you do it this way, you don't bargain year round, which, of course, has its appeal. As I said, I got here in 2008 in time to enjoy the economic meltdown. "Lehman Brothers Day" was September 15th, 2008. Under our MOUs, we had 3.75 percent raises due to be paid the following March. Mayor Gavin Newsom talked to my boss, Micki Callahan, and me and said, "Go to the unions and ask them, please, don't take that raise. We know we're in the middle of something big. The last thing we need to do is to give out 3.75 percent raises."

So we went out and started the negotiation process. The overwhelming response we got back from the unions was that they needed to take that raise, but they'll figure out ways to give us the equivalent back through other parts of the contract.

Now, by the way, I think it's worth noting that the unions were in closed contracts and could have simply said, "No, thanks, we'll talk to you later. See you when the contract's open." Almost to a union, they have been willing to have the discussion, and that's often led to concession agreements. Well, why is that?

In San Francisco, labor has stepped up many times in the 14 years I've been here. In part, they are saving jobs of the bargaining unit members. Plus, they also know that politically they don't want to risk the public's ire by doing nothing. Frankly, I think a lot of union members and union leadership basically want to do the

right thing. They know that times are tough. They have friends and family that are unemployed, losing jobs, losing houses. At some level, even the most ardent members of the bargaining teams understand that they've had it pretty good, and now it's time to give back.

So it creates an interesting dynamic. They have no legal obligation to sit down with us, yet they do. And what we've seen have been very complex and creative discussions about how to find money in the contracts. Let's shave two hours off the night shift. Let's cash out an education fund that has been dormant for two years. We did our best and, indeed, met the goal of finding a 3.75 percent concession largely through furlough days. That's been the model in San Francisco for the last three years. And as I'll describe in a minute, we're moving into an area of more structural reform.

Before turning to that issue, I'd like to give you a little more flavor of the bargaining that took place in 2008–09. After we reopened the contracts—this is right after the 2008 meltdown—we did reach our first tentative agreement with Vin's client. Soon thereafter, I got a call from the union's chief negotiator saying, "Martin, we just figured out that in this very complex deal, our members are going to be out-of-pocket by about ten dollars a month. We have to renegotiate." You can imagine our response: "No, we don't have to renegotiate. You have to vote the tentative agreement." They said, "No, we can't do that."

We refused to renegotiate the tentative agreement, and Vin's client picketed our office to demand (with the picket signs and all that) that Martin come out and negotiate with us. We responded by buying them jelly donuts, which I think softened their militancy, but, nevertheless, the message percolated up to the mayor's office, and we were soon back at the table.

We negotiated a new tentative agreement, and then a third tentative agreement before we got to a vote. The third TA was defeated soundly by the membership. And then we got to the fourth TA, the magic bullet, and SEIU International sent scores of organizers out to run the campaign. It was a powerhouse. They got an 84 percent ratification vote and about 50 percent turnout rate. That was a big victory for all of us. It was the trigger for many other unions to get on board. Then the next year, which was the last year, we agreed to a two-year deal agreement with 12 furlough days each year; 30 unions got on board with that. So we've really tried to encourage labor to move forward with one big step, so that the person that goes first doesn't end up looking like a schmuck.

The San Francisco Labor Council played a strong leadership role in this and future concession agreements. Last year's concession deal saved the city $230 million over two years. It's still one-time money, and they're still based on furloughs.

So in this last year, we started to turn the corner and look for more structural reforms. Last year, our public defender, Jeff Adachi, filed a ballot measure dealing with the public employee pensions. Mr. Adachi is decidedly in the progressive wing within the city and county. What we're starting to see is a split between traditional, more centrist labor-supported politicians, board members, and more of an ultra-left group, more associated with the Green Party, that has sometimes been at loggerheads with labor. They like labor, they want labor's support, but if it comes down to issues like affordable housing and a number of other issues, they move to the left of most of our labor unions. Mr. Adachi has made the case that we are so generous to our unions that we are robbing the nonprofits and the departments that provide social services.

So he put together a very draconian charter measure which dealt with not only pensions but also with health care and which sharply increased pension contributions by active employees and limited dependant health care subsidies, etc. Labor carried out an intense campaign against that measure, spending millions of dollars opposing it, and it was defeated soundly. As that campaign progressed, one of Mr. Adachi's supports, financier Warren Hellman, switched sides. Mr. Hellman is a San Francisco fixture who seems to own half the buildings downtown and a popular ski resort. He throws a huge free music event in October every year in Golden Gate Park; it costs millions and is free to everyone.

At any rate, Mr. Hellman was supporting Mr. Adachi. A group of firefighters contacted him and said, "Mr. Hellman, what are you doing? You know, you're killing us here." Mr. Hellman switched sides and said, "I'll withdraw my support from Mr. Adachi's plan if labor promises that it will sit down, roll up its sleeves, and reach a consensus agreement with the city that accomplishes the same goal." Labor said yes. Mr. Hellman switched his vote, and the day after the election we started working on the next phase, which is what you see in front of you.

At the same time that we had all of the drama around the four TAs, there was certainly a lot of disarray within labor, as the SEIU had recently pulled out of the AFL-CIO, along with big mergers of locals within SEIU. In the meantime, some of the union leadership took to the streets to stop layoffs. Meanwhile, our mayor was

running for governor. It was a perfect storm for mischief and civil disobedience and singing "We Shall Not Be Moved" in the halls of city hall and in the streets in front of our offices.

Mr. Newsom did get elected to lieutenant governor. The interim successor unanimously appointed by the board of supervisors was our city administrator, Ed Lee. Ed Lee is a marvelous, personable man, a nonpolitician who is able to find consensus and get things done. He asked us to go in with labor and Mr. Hellman and literally start with a whiteboard, a blank slate, and start listing ideas, start brainstorming, start costing, and start putting packages together.

Mr. Hellman lent us an actuarial firm, which was very helpful because our city's outside firms move glacially, methodically, no doubt due to liability issues. They don't like to scratch out numbers on the back of napkins. So the pension reform charter measure represents the consensus of a broad group of stakeholders, including labor, the mayor, members of the board of supervisors, and business. It started literally with a blank whiteboard and took shape from there. It is the product of—I wouldn't necessarily say grassroots—but we built this proposition from the bottom up. What you see is a comprehensive charter proposal including cost sharing for active employees. We did this by way of a very complicated chart. But, you'll see in the middle of it there's a place where there's the status quo. When the city's cost increases, the employee starts to pick up a share of the employer's costs. When times get good, the employee will receive some relief in the amount that the employee would otherwise owe. We know that there are considerable vested rights issues. We tried to craft a proposal which responds to the economic realities, responds to the structural problems we're seeing as we dig out of our economic hole. I'm sure like every jurisdiction you deal with, the investments have collapsed, and we're digging our way out. But, until we do, there will be some 15, 17, 22, 28 percent employee contributions in the years to come.

So we think we have a balanced approach, and one which we hope will withstand legal challenges. But, we've also been able to be more surgical and deal with retiree health care costs. We also have new retirement tiers. There are a number of provisions involved.

But the point I want to make is I think we are over the time of the intense acrimony and the organizing and the civil disobedience. Hopefully, we're at a point where we can show to the world,

at least to the country, that there is a model for labor and public employers working together to respond to and resolve tough issues in tough economic times.

So, thank you.

THOMAS KOCHAN: Well, good morning, everyone. It's delightful to be here today. Someone remarked to me this morning when I saw him that I look a little more relaxed this year than last year. Maybe the hypothesis was that was when the firefighters' dispute was going on and half of my time was on the phone back in Boston. But I think the real reason I'm more relaxed is the Red Sox are now above 500. This is the baseball that we all expected of them and even this other miscellaneous team in our division is on the run. So, that's the reason for feeling good this morning.

The best of times, the worst of times; I would say it's a changed time. There's one point I want to make here this morning: I want to argue that arbitration is never going to be the same as it was over the long history that was just recited, that Roberta started us off with, and that we heard from Vin and Martin as it's played out here in San Francisco. I think we are in a different era. It's a much more transparent era. You saw and you heard some of the stories about the pension discussion. I'm going to build on that because it's very similar to some of the things going on not only in Boston with the firefighters, but in Massachusetts with health care and around the country with the public sector.

So what I'd like to do is talk about the firefighters' case. But I want to try to put it in the context of where we've come from in public sector collective bargaining and arbitration. Then, I want to challenge us all to be part of the solution, not part of the problem. And, I think we can do that.

So, very briefly, where have we come from? You heard some of the history recited. Roberta asked the question: Are public employee wages really the source of the fiscal crisis that cities and towns and states are experiencing? Are wages out of line? Are benefits out of line? Well, the answer to that is, I think, absolutely not. They are part of a complex problem, particularly around pensions and health care.

But when all of the turmoil began in the public sector, a number of us in the academic community started to look at the long history of collective bargaining arbitration and wage determination in the public sector. If you compare public sector workers of equivalent education levels with private sector workers, basically you find that on average public sector workers wages are some-

where between 5 and 10 percent lower than their private sector counterparts. When you factor in fringe benefits and look more closely at almost total compensation, then those numbers start to get more comparable.

But the argument that we've got a bunch of overpaid and underworked and lazy public employees that are causing the fiscal crisis simply doesn't hold up. Now, there are problems with many of the design features, and certainly the funding arrangements with pension and health care provisions in the public sector make them more expensive than their private sector counterparts. As you heard in the case of San Francisco, those need to be addressed, and I think in many cases are being addressed.

Has arbitration somehow contributed to this problem? Well, a number of us looked at what's the long-haul effect of arbitration, and people in this room know it very well. Arbitrators emphasize comparability. So what do we get in arbitration? We get, essentially, settlements that are equivalent to what would have been negotiated in collective bargaining, because you use comparability. You look at other settlements. You try to match those. And by and large, that's the story of arbitration.

So over the long haul, arbitration and our dispute resolution processes have worked quite well in the public sector. We get 80 to 90 percent settlement rates, short of going through the formal arbitration decision-making process. And that's, I think, a credit to collective bargaining.

Now unlike San Francisco, there are serious, serious problems in arbitration with delays. If you look at Massachusetts, the majority of the arbitrations come down after the contract which is being arbitrated has already expired. In New York state, the average number of days between contract expiration and an arbitration award is 700 days. That's a long time. So you're constantly settling a case or resolving a case where the economic conditions may have already changed. And you're right back in bargaining. So that's clearly an issue that is problematic.

And, I would argue there's another piece to this. Arbitrators, as everyone in this room knows, for good reasons tend to be conservative. I don't mean that necessarily in the political sense. You tend to say if there's something fundamentally new that you want to get into your agreements, then negotiate it. It's our job as arbitrators not to impose a lot of new things on the parties that you haven't been able to negotiate. So you tend to be relatively conservative. There are exceptions, and I'm going to come to one in

a moment. But, that norm works well in an environment where you have relative stability, and stability is a workable solution to the problems that we find.

In a world where things are changing, arbitration is challenged to change with the changing context and the changing problems. And, I think that is going to be a major challenge for us. So, that's just sort of the larger context.

What is this case that created so much controversy in Boston with the firefighters? Well, to describe it in brief, there are two pieces to this case. One is kind of a standard, wage arbitration. Unfortunately, this arbitration was for a four-year contract 2006 to 2010. Again, the arbitration award was going to come down about the time that the contract was due to expire. It had gone on for a long period of time. The firefighters were the only contract in the City of Boston that hadn't been settled at that time. The police had settled. All the other contracts had settled. So there was already a pattern that was established. But, firefighter negotiations were not able to reach an agreement during that period of time.

The other part that was most controversial reflected a very unfortunate situation. There was no drug and alcohol testing provision in the existing agreement. In 2008, there was a tragic fire in a restaurant in Boston. Two young firefighters died in the line of service. One tested positive for drugs and the other tested over the limit for alcohol. So you add tragedy to tragedy. You can just imagine what kind of pressure that then put on the parties to say it's time that we have a drug and alcohol testing program in the firefighters' agreement.

A tripartite, conventional arbitration process, not a final offer, essentially awarded the police pattern. And, unlike the notion that arbitrators don't like to bring new things into their agreements, they did award a very comprehensive, mandatory drug and alcohol testing program, one of the most comprehensive ones that you'll find anywhere in the country. Then, what created the real controversy is that the arbitration award also added two and one half percent on the base salary on the last day of the contract as a quid pro quo for the drug and alcohol testing.

Now, that may sound relatively standard in labor relations' parlance for people in this room. Quid pro quo—you sometimes do that—you buy out old provisions or you compensate someone for something new. Well, it just didn't fly in Boston. The public exploded. Now, part of it was media that was built up by the mayor's office and so on. But, the public just didn't buy it. They

basically said, you mean we have to pay somebody, firefighters, to come to work clean and sober? Isn't it in their own interest and their family's interest to have the person next to him on the line being clean and sober? This just exploded. It became the biggest political labor relations dispute in all the years that I've been in Boston. I've never seen the front page of the *Boston Globe* and the *Herald*, for about a week, taking on this issue.

Now the arbitration award or statute for police and firefighters says that the award's binding on the mayor but the city council has to vote to fund it. If the city council doesn't vote to fund it, then all bets are off. You're back in bargaining. So what happened is the city council president, for better or for worse, said we'd like to have an independent person look at this arbitration award and tell us what's in it. So, they asked me to do that, and I agreed to do that with some trepidation, because you can imagine not so much the politics, but the ethics. I actually did a little bit of questioning about the ethics and about the protocol. Why should I question another independent arbitrator who has done his job in the way that one would expect? But, this was such a big problem for the city, for the firefighters. I was afraid that if we didn't find a solution to this, this was going to be the end of arbitration as we know it in the state of Massachusetts, because there was such a backlash.

So I agreed to analyze the agreement and write a report that said here's what's in it. Basically, the report said the arbitrator matched the police settlement. So for those four years, there is no question but that should stand. But the question is then, what do you do about this two and one half percent as a quid pro quo? The council wanted to know if should they vote it up or vote it down. Basically, I said, don't do either. You've got all the parties in this room and a big public hearing session in city hall, and they're all here. The city was concerned about setting a precedent for the next round of bargaining and the quid pro quo. You have options on how to separate out the 2½ percent on the base: You could extend out the agreement. You could put it into a wellness program. But, you should encourage the parties, or force the parties, to go back to the bargaining table.

To make a long story short, they reached an agreement with the help of tremendous leadership on the part of the state AFL-CIO president in Massachusetts. He recognized there were big issues involved, and he encouraged the parties to work together to modify the award. To the firefighters' union president's credit and to the mayor's office credit and particularly the city council presi-

dent's credit, the parties got in a room, series of rooms, series of long nights and reached a compromise agreement. They spread the 2.5 percent out over time, and they separated it from the drug and alcohol program. And, it was acceptable to the public and to the city council and all the parties.

To me, here are the lessons that I took away from this. One is, this is not labor relations in a back room or in closed process. This is now an era of transparency. If it doesn't carry the water with the public, if there's something that may make sense to us as labor relations professionals but I can't sell it to my wife at home, then I know we've got a problem. She's a nurse, and she was the one who said, "You mean we've got to pay people to come to work clean and sober?" And that was the way the community reacted. We have to be transparent and we have to meet community standards in ways that I think are much, much more profound today than in the past.

The second thing that I think this says is that the process has to be flexible enough to address problems as they come along. We've talked about med-arb or arb-med, as Arnold Zack likes to talk about it; well, this was a process. I don't know what this process was. But we had to invent something to get us out, to save arbitration for the future, and to make it more adaptable to the process. So, we created something that was probably a one-off approach, but it helped the parties to find a way to adapt an arbitration agreement that they already had completed.

So, what does this tell us about where we are? Well, I think we're seeing more of this. We're seeing more transparency in collective bargaining. We're now seeing this crisis all around the country, as Roberta recited the numbers. And, we're seeing attacks on collective bargaining and arbitration as an institution. If we can't adapt this process to meet the real crisis that cities and county governments and state governments are facing, then we are going to see arbitration decline in importance. It's probably going to get voted out in some states, or it's going to be minimized around the country.

I'm delighted with what you did in San Francisco in responding to this public sector crisis. I and many others have called for the parties to form coalitions, to come together to deal with the real fiscal problems with the pensions. It sounds like that's what you've done very creatively in San Francisco. That should be a model for how we approach these processes in the future. It's also an illustration of the same point that we experienced in Boston.

Here it was the public and the finance people saying we've got to address this issue. It wasn't the unions and the politicians saying it or the collective bargaining system itself driving this change at the beginning. It's the failed referendum, and it's the mechanism that came from the second finance leader and community leader saying, "I'm going to provide support and help get this done."

We're going to see more and more of that. We're seeing it in Massachusetts right now. We're in the midst of trying to bring cities and towns and all of the unions into the state health plan, because the state plan is more efficient than the local health plans that are negotiated bargaining unit by bargaining unit. The governor and the legislature gave the unions two years to try to negotiate this bargaining unit by bargaining unit, and they couldn't get it done. So, the legislature, the house, the one body of the legislature finally just said, "we're going to impose it, and we're going to bring everybody in, and it's going to be legislated."

Now, the governor, the labor movement, and the senate are in negotiations to say maybe we can fashion a more flexible way to get the same saving, to get it done, and to use a three-party panel if the parties can't agree. But, do it within 30 days or 45 days. Pick a very tight time frame. This, again, is an invented, new dispute resolution system. They probably won't call it arbitration, but it's going to be a three-party panel. If this part of the bill goes forward, it's going to be a neutral picked by the governor's office. And there are going to be very clear, statutory criteria that say you've got to meet the same monetary savings that the other default option would achieve.

So, this is the kind of environment we're in. I think arbitration can step up to this process. We can design solutions. This three-party panel is a solution that a number of people came up with as a way to provide assurance that there would be a resolution in the end, in a tight time frame. And, it still would allow the parties to be creative in trying to find a negotiated solution to this problem that allows them to move forward in a more joint fashion, maybe more deeply committed to the solution.

So, where does this leave us? Well, I think as members of the Academy, it says it's our job to go back to what many of the people in this room and people in an earlier generation did when collective bargaining came on the scene. In states like Wisconsin, Michigan, New York, Massachusetts, and California, there were study commissions that brought neutrals and experts together to identify how we bring collective bargaining into the public sector

and make it work in a foreign kind of context to what we had beforehand.

Well, we're now in the next generation. We're going to have to invent the dispute resolution processes and the much more flexible approaches to problem solving for dealing with the pension, dealing with health care, dealing with whatever issues happen to be most critical in the public sector, and find ways to adapt the traditional arbitration, to adapt the mediation, to use interest-based processes, to facilitate change, and to become the change agents of the future. If we do that, then we're going to be part of the solution.

If we stay with our traditional norms, and if we take as long as traditional arbitration has taken, and if we are not able to respond to the changing environment, then arbitration as we know it is going to fade away in the public sector, at least in many contexts. And, it's going to continue to get some of the bad publicity that it's getting in Massachusetts, that it's getting in New York, that it's getting around the country, not necessarily legitimately deserved. But, we have to step up and not just be defensive. We've got to create the next set of solutions. I think we can do it. I think Massachusetts can be an alternative to Wisconsin. California can be an alternative to Wisconsin. I think Hawaii—Joyce Najita and her colleagues—are well on their way to working on making Hawaii find solutions to collective bargaining in constructive ways. We need lots of states to demonstrate that we can do better than just take a sledgehammer approach to unions and collective bargaining. But, it's going to require a lot of creativity on our part.

Thank you.

ROBERTA GOLICK: Thank you. Thank you very much for three terrific presentations. Before we start with any questions from the floor, let me invite the panelists to comment, if they wish, on each other's presentations.

VINCENT HARRINGTON: Yes, I'd like to take a few minutes in rebuttal in self-defense here. I'll make it brief.

I think there are a number of important lessons that I would draw from even the harsh remarks from Martin. I would say, generally, it's worth remembering that the 2008 issues, the 2008 dispute, took place in the context of a closed contract. So basically, the membership was saying to the member leaders on the team, why should we?

There's a tremendous education process, and it was commented on that labor unions, the labor unions we represent, are

very democratic. Democracy is expensive. It's time-consuming. And, people have to be given the information upon which they can make an informed judgment. So I think it's worth thinking and remembering that.

I think there is actually, looking back on it, an error in not asking for mediation or arbitration or finding some other person, some entity to help the dialogue at a colloquy. Because there is a substantial lack of trust, which relates to a question that Martin mentioned but did not discuss in detail, which was many of our members believed that this was political theater. The mayor at the time was running for a higher-level office. He was campaigning against his own workers. His first proposal was to cut everybody's hours. Lay everybody off and hire them back at 37½ hours. Now, although an interesting idea, it was perceived as a threat. It was perceived as you're getting into my pocket. You're threatening me. What's this really all about? So, there was a tremendous lack of trust. There needed to be a long dialogue about that, which really wasn't available in the context of one bargaining team sitting in one room, another bargaining team sitting in another room, and the newspapers running headlines every day about what was this all about?

Finally, I would say that the lack of trust in some sense, from our perspective, was realized because part of the deal was supposed to be, we'll take the hit on furloughs. We will agree to these other takeaways. You have to go look for some reasonable, alternative funding. Look for some new revenues. Go to the business community and ask them to put their money on the table. That never happened. That promise was never realized, which creates the dynamic today with this new discussion about the pension, where there was, initially, an issue about is this real? Is this imagined? And if you know anything at all about the pension debate today, you know the myth-making that is taking place about the funded nature of these plans, whether they really have the ability to produce the benefits, etc. None of the facts about these issues are really being presented adequately, in my view, to the public. It's all 30-second sound bites and hysterical headlines.

So, although I commend the parties in San Francisco for making changes, the problem I potentially see with the changes is the changes in the charter are permanent. Changes in the charter are not the product of a collective bargaining arrangement or agreement which could be changed three years from now or five years from now. It's a permanent legislative change, which can only be

modified by another vote of the same public who was asked to vote for these changes before. So you build in this two-tier system, which has long-term effects. I'm not sure it's in the best interest of labor or, indeed, employers to have John Smith and Sally Jones sitting side by side earning totally different and very separate benefits, health care coverages, etc., if they're doing the same work. I leave that open. But, I think, as arbitrators in these cases in the future, that's going to be a fundamental question of whether this is something which finds support in bargaining units, or, in fact, it has some inherently destructive aspects to it.

MARTIN GRAN: The San Francisco Charter has shaped both of our careers. Both sides have had occasion to take things to the voters and create rules independent from state law interference, to some degree. Certainly, we wrap up a lot of our benefits in charter provisions, which direct some of it to resolution through arbitration, some of it only to the voters.

In fact, the retirement levels that we have in San Francisco are actually quite moderate. We're probably in the bottom third in terms of benefits. We did not go 3 percent at 50 for our safety unions. We're still at 3 at 55. We are just above the 2 percent at 60 level, which is 2.2 at 63. So we're not wildly out of whack. And the voters have been, I think, judicious. After the 1976 strike, guess what? The voters reduced retirement benefits. They took overtime out of the retirement calculation. They punished the folks, including public safety, who walked off their jobs.

But I do want to also respond to something that you said earlier, Vin, in the idea of the "power of no" and the mayor running for governor. You really can't say that there was a lack of creativity involved. We spent countless hours, not only with SEIU, but with the Labor Council representing in 2008, 2009, 20 unions and, then, in the second round, 30 unions. What came out of that was an agreement with the Labor Council which is 12 pages long. It involves a number of complex issues including extremely complicated rules around layoff protection, the number of furlough days dropping if the economy improves, changing the new notice rules to labor around in the event the city seeks to contract out, and protection for employees who retire to make sure that the economic concessions do not permanently reduce their pensions and that income lost through furlough days does not hurt their retirement.

While the mayor and SEIU got into some heated exchanges at a time when they were dogging his campaign at every stop, those of

us doing labor relations in the city maintained as cooperative an approach as could be maintained in that setting and came up with good agreements. In the world of concession bargaining when you can have everyone at the table shake each other's hands and say that they appreciate the steps that were taken to get here, I think that says a lot. And, it's more than just the "power of no." The employers know they need to get there; the politicians know that we need to get there; and our failure to get there means loss of jobs, loss of services, and nobody was willing to walk away from the table given those stakes.

ROBERTA GOLICK: Any questions from the floor? Please take the microphone. Any comments from the floor?

THOMAS KOCHAN: Ah, my good friend.

ROBERTA GOLICK: Please identify yourself for people.

HOYT WHEELER: Hoyt Wheeler from South Carolina, where we don't have these things going on. What you described to me sounds like a real situation where final offer selection makes no sense at all. I've never liked it very much and I have written about it in the past. But, it seems to me that if you don't get a settlement, which is what final offer is geared to produce, then you're bound to have a bad solution—one that's extreme and hard to justify to the public. I just wondered if perhaps issue by issue you can work certainly a total package final offer. It seems to me to be a complete disaster in this situation. I'd like to ask if the panel has any comments on that?

MARTIN GRAN: You've heard my opinion on that. I would defer to Vin.

VINCENT HARRINGTON: Well, I think for the winning party, obviously, it works terrifically. I agree. In the public sector, the stakes are extremely high and perhaps too high for last best offer as being the only methodology. But, ironically, it's also the case that to the extent interest arbitration is a political process, and I think it is—it's substantially a political as well as a labor relations process—you can truly say that giving to a panel the ability to actually make the contract, issue by issue, point by point, is actually a greater surrender of political authority or autonomy than making your own last best offer your last best offer, based on your evaluation of the total package your party needs in the agreement. And, thus I think that's an interesting question about whether—even if—it produces a better result. It actually involves a greater surrender of public accountability by a politician or group of politicians.

THOMAS KOCHAN: There's unanimity of agreement here on this. Final offer was introduced to try to get settlements. That was the idea behind it. That was the theory behind it when it was first proposed. That's not our problem in the public sector today. Our problem is getting solutions to problems. And it's too rigid. It's too limited. It doesn't allow for the kind of tripartite back and forth. I mean you can do that. But, you've got to have a much more flexible process, especially when there are multiple issues. In baseball, you're going to give Peter Shortstop $14 million or $20 million or $15 million. Okay. Figure it out. That's not so complicated—it's one issue and you can do it, but not in this kind of context, and particularly not in this political environment. Because if it comes up with an agreement that the public won't accept, you're going to get the Boston reaction, and this will destroy the credibility of arbitration.

BILL McKEE: Bill McKee. I'm an arbitrator and recovering economist. I don't know the answer to this question because I haven't looked at the data recently. So I ask Tom, you compared public and private salaries or wages by educational credentials. What's the difference if you look by other classifications—say, occupation and other sectors? How does that come out?

THOMAS KOCHAN: Yes. It's very difficult to do that because you have such different occupations—teachers, police, firefighters and so on—in the public and private sector.

BILL McKEE: Right.

THOMAS KOCHAN: What I can say is when you look at blue-collar service employees, the differential is more positive toward the public sector than the private. As you go up to more highly educated, college graduates, teachers and so on, and state employees, and local employees with higher degrees, the differential in favor of the private sector gets greater. So at lower levels, we haven't seen the public sector do what the private sector has done which is to contract out a lot of those low wage jobs and just eviscerate the wage structure at the bottom. So, you tend to have a little bit more of a small gap, and sometimes a positive premium for low wage public sector workers relative to their private sector counterparts.

BILL McKEE: That's pretty consistent, right.

THOMAS KOCHAN: And Boston's the other way.

BILL McKEE: It has been for some time. Thank you.

NORM BRAND: Norm Brand, arbitrator. Tom, I'd like to hear your opinion on what sorts of things can be done to bring more transparency to the process. The old bargaining in the sunshine

never worked out. What would you suggest in the area of interest arbitration to make things more transparent, especially in light of the fact that many statutes require the arbitrator to take into account either the interest and welfare of the public or the employer's ability to pay, or both.

THOMAS KOCHAN: I think that's a good question. But, I think the first responsibility for transparency falls on the negotiating parties. The arbitrator and the mediator can only be as transparent and as visible, if you will, as the parties are willing to allow.

Let me go back to the Boston case. The question that I raised when I agreed to do this is, what am I doing here? I'm writing a report for the city council. Is this going to be public? Do you want this to be public? The answer was it's got to be public. Therefore, I wrote it for the public. I wrote it for the council, but I wrote it with an eye that this is going to be read by people in Boston. It's going to be in the *Boston Globe*. So you think about how will this play out. Let's have some ground rules over how we're going to be transparent. What we're going to communicate.

So I think there are ways we can do this. As an arbitrator, though, or as a mediator, we have to think about how is this going to be received by the people who are paying the bills and, therefore, we've got to write it in a way that will be understood and can help educate the parties.

I think, also, as third parties who sometimes get called into these disputes, we have to do a little bit better job of educating the public than we traditionally would have done. We usually don't talk to the public. But with permission of the parties, sometimes you need to educate the public. So I think we take some small steps along those lines and use all the media opportunities that are there now.

NORM BRAND: My question was actually structural, what one could do in terms of the legislation? Remember, we had a highly unsuccessful notion of fact finding that came from Taylor, who thought that the public was going to get engaged when the fact finders' report was released.

THOMAS KOCHAN: Yes.

NORM BRAND: What I was curious about is the structural issue: What legislative changes are needed?

THOMAS KOCHAN: Let me use the health care bill in Massachusetts. There, you have a structural solution. The criteria that are going to be built into that law, if they go for this option of having a panel, is not going to be the traditional arbitration criteria.

It's going to be that you've got to demonstrate that an alternative negotiated solution reaches the same cost savings as would have been the default plan to go in the state plan. So it's got to be as good or better. And, that's going to be the standard. So you can rewrite the standards to fit the problem. And if I heard the story of the San Francisco pension agreement, it's partly that kind of process by being clear on what the problem is, laying out what the real problem in the funding and in the spiking of benefits is, and so on in the last years. If we can be clear on the problem, then you can fashion a structural solution that reaches it.

But, we've got to communicate what the problem is and be clear about it, and then set standards that address the real heart of the issue.

ROBERTA GOLICK: Thank you. We have time for just two quick questions that remain.

ARNOLD ZACK: Arnold Zack from Boston. Tom made a passing reference to my espousal of arb-med. And I've spoken here about it before, which would postpone mediation until after arbitration. If there's no settlement between the parties during direct negotiations, you go directly into arbitration without mediation. The arbiter writes the award and puts it unannounced into his pocket before mediating for a fixed period of time. The parties then know all the facts. They know all the positions. The arbitrator knows everything. Nothing is being held back for another step as too often happens in mediation prior to arbitration. When I originally talked about this, years ago, the thought was to make impasse resolution more efficient. But listening to Tom now, I think it becomes a more appealing device for capitalizing on and recognizing the benefits of transparency. What you did in Boston, Tom, was in fact, arb-med, I mean, the arbitration was done by someone else. And, you were called in, aside from your analysis; the important part is you got a settlement. The parties knew the arbitrator's award—when you get the decision available, the parties realize the impact of the consequences of that. And, that seems to be the time where the mediation would be far more effective than having it in secret before the parties get into the arbitration step.

So the arbitration becomes open. The parties know what's going on. And then they have an opportunity before that arbitrator, or another mediator, to come in and say, "here's the case. It's going to go into effect unless you're able to resolve it with some alternative by X number of hours." And, I think that may be a device for

switching things around instead of having the mediation first—have it afterwards with public awareness.

THOMAS KOCHAN: Good.

ROBERTA GOLICK: Ed?

ED KRINSKY: Ed Krinsky from Madison, Wisconsin. I'll try to be brief. I spent 45 years in a state that used to have collective bargaining for public sector employees and I've been a part of it.

I'd like to emphasize Tom's point that the arbitration procedures, which have worked very well in Wisconsin, perhaps are not up to the changed economic and political climate that require creative solutions. Contrary to my friend of long standing, Hoyt Wheeler, who's out of the loop in South Carolina, final offer arbitration—baseball style, as you call it—has worked very well for years in Wisconsin. And lots of studies have shown that. The parties narrow the issues. There are usually not more than about three issues. Their differences aren't all that great. And, it ends the problem.

So I wouldn't blame any of this on the style of arbitration. The problem is that the economic and political, especially the political, climate has changed. And, the traditional way of dealing with arbitration may very well not be up to it. So, I agree with you completely, Tom. And don't worry about baseball arbitration if you have a climate in which it can work.

ROBERTA GOLICK: Thank you, Ed. And, once again, thanks to our panel, Vin Harrington, Martin Gran, and Tom Kochan.