APPENDIX A

STANDARDS OF CONDUCT FOR LABOR ARBITRATORS

The following report of the Committee on Ethics or Standards of Conduct for Labor Arbitrators was presented to the National Academy of Arbitrators at its Second Annual Meeting in Washington, D. C., on January 14, 1949.

The Report of the Committee on Ethics in Labor Arbitration to the Academy at its first annual meeting in January, 1948, concluded as follows:

"In truth, the arbitration process is capable of infinite variety, and no code of ethics or standards of conduct should be drawn so narrowly as to inhibit the possibility of varying the process to fit the present and future needs and desires of the parties and of the public. Even if we were prepared to propose a code adapted to the prevailing thought of labor and management, we would have great difficulty in obtaining a definite and authoritative statement of that thought. Granting that we have the ultimate responsibility of determining for ourselves our ethical obligations, we cannot and should not legislate in a vacuum, or determine for ourselves what is best for those whose interests we serve, namely, labor, management, and the public.

"In summary, we are agreed on certain basic canons of ethics for arbitrators embodying concepts of decency, integrity and fair play. These could be reduced forthwith to a code of ethics. We do not believe a code should be adopted until our thinking is clear on a number of other problems which may be of ethical content. On some of these problems agreement may be impossible, reflecting a lack of agreement on the part of labor, management, and the public as to the functions of the arbitration process and of arbitrators in labor disputes. On others, further

enlightenment should precede any attempt towards agreement. We are convinced that further study and reflection during the ensuing year is desirable and necessary before consideration of a specific and detailed code of ethics. This approach, we are certain, will strengthen public confidence in the seriousness and sincerity of the purposes of this organization."

The subject of ethics in labor arbitration has continued to receive extensive publicity and considerable thought. Important new developments since the last meeting of the Academy include the institution of informal meetings of arbitrators and other interested persons, notably in the Philadelphia and Boston areas, to discuss arbitration problems of ethical content. While such meetings have not produced agreements on many issues of real importance, they are nevertheless helpful in pointing up the issues and as indicating the fields in which further exploration may be most fruitful.

The Committee believes that the current interest in the arbitration process is a healthy thing, and in the public interest. We hope for continued constructive criticism, and that the membership of the Academy among others, will be stimulated to a thoughtful, positive and comprehensive program rather than stung into a battle of recrimination, or at best a process of white-washing or hole-plugging.

The questions foremost on the agenda of this Committee are easy to state. First, shall we adopt a Code of Ethics? Second, how shall we go about it? Third, what shall be its form, scope and content?

The answers to these questions require exploration of more basic problems. What is the purpose of a Code of Ethics for arbitrators? Stated most simply, it is to protect and improve the arbitration process by promulgating the standards of conduct to which "good" arbitrators should adhere. What is the arbitration process, and in what respects does it need protection or improvement? Here is where confusion reigns and disagreement commences.

Nature and Functions of the Arbitration Process

Historically,[1] labor arbitration was a device to prevent or settle a labor dispute which otherwise would be determined by a test of economic strength, typically through the strike or lockout. Hence the interest of the community as well as of the disputants was directly involved. The typical dispute was regarded as nonjusticiable, or regarded as unsuited for litigation, because of the assumed delays and technicalities of the judicial process. Nevertheless, the characteristics essential to the judicial process, honesty and impartiality, were sought after then as now in the selection or appointment of arbitrators. These qualities were not thought to be limited to lawyers. On the contrary, a minister, priest, rabbi, or professor was frequently selected because of his awareness of the social values involved in a dispute involving human beings and his assumed disinterestedness. Sometimes the choice was a judge or a lawyer, and occasionally a businessman, selected because he enjoyed the respect and confidence of the parties. The "good" arbitrator, whoever he might be, conceived his job to be to settle the dispute, which meant an award, perhaps faulty in logic and based on no "objective standards," but nevertheless one acceptable to both sides. Informal procedure, including ex parte conferences, was the rule rather than the exception. A code of ethics in those days would probably have been confined to these principles:

1. The public interest in a labor dispute is paramount.
2. Time is of the essence.
3. The award must be just.
4. The award must be mutually acceptable to the parties.

The arbitration process has retained its public aspects, but its function has changed in important respects with the development of the collective bargaining process. In a very real

[1] See "The Future of Labor Arbitration—A Challenge," an address by Edwin E. Witte at the First Annual Meeting of the Academy, Chicago, Ill., January 16, 1948 (Chapter I).

sense arbitration today is an adjunct to that process. Thus, it is practically standard practice for the parties, in negotiating a collective bargaining agreement, to provide that questions of interpretation or application of the terms of the agreement, unless settled through the grievance procedure, be submitted to an arbitrator, umpire, referee, impartial chairman, or the like for "final and binding" decision. Again, there is increasing acceptance of arbitration as the terminal point in the making of an agreement when negotiations have reached an impasse, particularly in industries serving the public directly.

Arbitration of Questions of Interpretation

The construction or interpretation of contracts generally is part of the day-to-day business of most courts. In a sense, therefore, parties who have agreed to arbitrate disputes concerning the interpretation or application of a labor agreement have made provision for a private judge. But there are many differences. One is implicit in the range of titles conferred on the so-called "judge,"—"Mr. Commissioner," "Mr. Examiner," "Your Honor," "Doctor," "Professor," "Mister," or "Hey you!"

For another, the parties either name the "judge" in the contract or provide a method for his later selection through agreement or, failing agreement, by appointment through an outside agency. The "judge's" fees and expenses are usually to be shared by the parties rather than paid by the losing party. He may serve only *ad hoc*, that is, for a particular case, or he may be hired for a specified or indefinite term. The parties usually define his jurisdiction, sometimes limiting it to specified issues, or expanding it to cover "any dispute" arising under or during the term of the agreement. He is furnished no rules of procedure, and his decisions are not subject to court review, except on very limited grounds.

Aside from such variations, how different is the function of this "private judge" from the arbitrator of yesteryear? He is still the custodian of the public interest in industrial peace. In

fact, the agreement to arbitrate is frequently coupled with a "no strike, no lockout" agreement covering all matters subject to arbitration. The historical function of the arbitrator is thus retained in essence. But he is now functioning under a charter of rights and duties, namely, the labor contract. What sort of a code of ethics will fit his new duties?

Must the arbitrator under a labor agreement be a lawyer? In some states, even a court judge does not have to be a lawyer. More important, some of the outstanding arbitrators, umpires, etc., today are not lawyers, although in many instances lawyers participate in arbitration cases before them. If not a lawyer, should he nevertheless "behave like a judge"? What does the phrase mean? A judge is expected to be fundamentally honest and impartial, but these have always been qualities expected of any arbitrator. A judge is expected to adhere to the Canons of Judicial Ethics adopted by the American Bar Association.[2] These canons constitute an admirable statement of principles, which are summarized[3] as follows:

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer *justice according to law,* and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity." (Emphasis added.)

No arbitrator would hesitate to accept this statement, with one exception, without reservation. The phrase "justice according to law," however, points up a significant difference, at least an arguable one, between the arbitration and judicial proc-

[2] Canons of Professional and Judicial Ethics, adopted by the American Bar Association (Sept. 1947) published by the American Bar Association, 1140 N. Dearborn St., Chicago 10, Ill.

[3] Canon 34. A Summary of Judicial Obligation.

esses. The problem becomes more apparent in considering another section of the Canons,[4] which provides:

"A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary or arbitrary power, but a judge under the sanction of law."

This quotation opens up a number of difficult questions, including the whole subject of the use of precedents in arbitration awards, as to which opinions, as you all know, differ sharply.[5]

Has the canon quoted above any application to an arbitrator called upon to construe a particular document and whose very jurisdiction is derived from that document? Does he not owe some obligation to ascertain and minister to the particular needs and desires of the parties who have employed him? If that is what the parties want, is he remiss in his duties if he should "do what he may personally consider substantial justice in a particular case"? Suppose the parties tell the arbitrator in advance that he is to act as a catalytic agent, not a judge; in other words, that their idea of "justice" in the case is a decision that both parties can "live under"?

In brief, though the arbitrator interpreting a labor agreement must act judicially, is he in all respects a judge? In its 1947 report this Committee stated its view that "the arbitration process is capable of infinite variety." For example, Gen-

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[4] Canon 20. Influence of Decisions Upon the Development of the Law.

[5] See, for example, a brochure entitled "Arbitration," published in 1948 by Ernest L. Klein.

eral Motors and the UAW may expect and demand something quite different from their "Umpire" than U. S. Steel and the United Steelworkers of America from their tri-partite Board of Conciliation and Arbitration. Something entirely different from either may be expected and demanded by a local union and the X Company, employing 68 employees in a town of 2,000, coming in contact with an arbitration for the first time, with lawyers excluded by agreement, and no holds barred. And what of those industries in which arbitration has perhaps the longest history and in some of which by tradition the arbitrator is expected to discuss his proposed award with the parties, often *ex parte,* before issuing a final award? Can we say with any assurance that the founding fathers of arbitration were "wrong"?

If the analogy of the judicial process be applicable, what of the lawyers who, in their ordinary practice, are most appropriately described as "an arm of the court." Consider the first three Canons of Professional Ethics adopted by the American Bar Association, which read in part as follows:

> 1. *The Duty of the Lawyer to the Courts.* It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. * * *
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> 2. *The Selection of Judges.* It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarass their free and fair consideration of questions before them for decision. * * *

> 3. *Attempts to Exert Personal Influence on the Court.* Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. * * *

Are these and other canons followed by lawyers participating in the arbitration process, as strictly *vis a vis* an arbitrator as towards a judge? Is it true, to take an extreme example, that some lawyers think nothing of asking a prospective arbitrator in advance how he would decide a particular case if appointed? Do lawyers, or don't they, regard arbitrators as judges? Can the members of the Academy, any more than the American Bar Association, fail to promulgate canons of ethics or standards of conduct for those who practice before them, whether they be lawyers or not?

Tripartite Arbitration

If arbitration is a judicial process, the use of tripartite boards of arbitration to determine questions of contract interpretation may involve a problem of ethical content. While the use of experts to assist a court is not unknown, as, for example, in admiralty proceedings, participation by a litigant or his representative in the *decision* of a case is foreign to Anglo-American judicial tradition. In arbitration proceedings, however, it is not uncommon to have a question of interpretation presented to a board composed of an equal number of "neutral" members and members designated by management and the union, with equality of voting rights. It is common knowledge that the members designated by the parties almost invariably view the case as partisans, though purporting to sit as impartial judges and in some states (like New Jersey) actually taking an oath as such.

Is this an "ethical" arrangement? Whether it is or not, if the decision is to be made by majority vote, it often puts the neutral arbitrator in an impossible position if his function is to decide the case "judicially." Yet the parties may have entered into such an arrangement in perfect good faith. They may have sound practical reasons for preferring such an arrangement, uppermost of which is the fear of having an arbitrator unfamiliar with the mores of the particular company-union relationship go off "half-cocked." When it is realized that an award in a labor dispute is not merely the decision of a legal issue but may materially affect the day-to-day relationship of an employer and his employees for an indefinite period in the future, the concern of the parties is understandable. Yet serious questions exist as to the propriety of tripartite arbitration in the interpretation of labor contracts—if the arbitration and the judicial processes are indistinguishable.

Arbitration of the Terms of the Contract

The Committee has up to now attempted to orient the problem of ethics in arbitration with respect to *questions of interpretation or application of a contract,* insofar as the analogy of the judicial process may be urged as applicable. We have sought to raise a few questions to indicate that the analogy may not be as close as commonly supposed and have pointed out that the parties themselves and their attorneys, consciously or otherwise, attach secondary characteristics to the arbitration process which have little relation to the judicial process as such. One basic question in this area is whether and to what extent the Academy believes that the arbitration process should mould the needs, the desires, and the behavior of the parties or be moulded thereby.

Problems of a different nature are involved in arbitration concerning the making or renewal of a contract, as contrasted with the interpretation of a contract once made. The Committee has limited its consideration to voluntary arbitration without government intervention, except in the designation of arbi-

trators on joint request. While "compulsory arbitration" is thus excluded, it may be noted that many agreements to arbitrate result from governmental intervention in one form or another as, for example, under the Railway Labor Act.

The essential difference in the two forms of arbitration—interpreting versus making a contract—is that, if nomenclature be important, one is primarily judicial and the other primarily legislative. In negotiating a contract, the parties make "the law" under which they are to live for a stated period.

When negotiations have reached an impasse and the parties agree to arbitration, they are in effect asking third parties to make the law for them. As in the case of legislation, the result is frequently a compromise. Hence, much more clearly than in the interpretive process, a tripartite arrangement may be rationalized. The "neutral" arbitrator is nevertheless in a difficult position if his colleagues, granting they have been appointed as advocates, are unaware of or unsympathetic to his problems of securing a fair award which will receive at least majority approval. Under such circumstances the neutral arbitrator's judgment tends to be influenced by tactical considerations necessary to bring the case to a conclusion.

While many of the ethical problems of the arbitrator are the same in both types of arbitration, the problem unique to the arbitrator who is setting the wage rate or establishing some other term of the contract is the absence of generally accepted objective standards for decision.[6] It is on this point that arbitrators are most frequently criticized, and, in the judgment of the Committee, most unfairly. Why should the parties, having failed to agree in negotiations on objective standards or criteria, much less on their application to given facts and figures, criticize an arbitrator for the standard he selects or for his failure to select or specify any standard? If arbitration, as many scholars maintain, is primarily an extension of the collective bargaining

[6] See "Fixed Criteria in Wage Rate Arbitration," by David L. Cole, *The Arbitration Journal,* Vol. 3 (new Series) Number 3 (1948) pp. 169-175.

process, then why doesn't the theory of "the best contract under all the circumstances" apply to the arbitrator as well?

The fact is that criticism of awards in this area of arbitration depends very often on whose ox is being gored. Unions tend to favor cost of living as a criterion in a period of rising prices, at least as one factor, while opposing it on the down swing. Employers tend to favor ability to pay as a criterion when their prices or rates are regulated or when they are not in the best financial shape, while opposing it in good years. The Committee ventures the prediction, at no great risk, that, if labor and industry agree on objective standards for arbitration, there will be fewer complaints against arbitrators on ethical or other grounds—and fewer arbitrations.

In summary, the Committee believes, first, that most if not all of the criticisms of arbitrators in this area have no ethical implications; second, that much of the criticism of arbitrators should be directed to the failure of labor and management thus far to develop and agree upon objective standards or criteria for the guidance of the arbitrator. There is work to be done, in which the experience of members of the Academy can be of great assistance and should be offered to that end.

RECOMMENDATIONS

The Committee's approach to the subject of ethics or standards of conduct in arbitration is based on the assumption that the objective of the National Academy of Arbitrators is to help achieve the maximum use of the process of arbitration as an instrumentality to protect and further the public interest in the avoidance and just settlement of labor disputes, to supplement the process of voluntary collective bargaining, and to satisfy the needs and desires of the parties in particular cases.

1. To the extent that the arbitration process is directed towards the settlement of disputes by decision of a disinterested third party, the basic standards of ethics applicable to any judge, foremost of which are the qualities of honesty and impartiality, should be applied to the code of labor arbitrators.

2. The problem of ethics or standards of conduct in labor arbitration relate as well to the conduct of those who participate in proceedings before the arbitrator. The formulation of canons of ethics or standards of conduct for persons who appear before arbitrators is extremely difficult because there are no requirements for practice before arbitrators as before courts, no sanctions paralleling contempt of court or disbarment, and no commonly accepted standards for the presentation of arbitration cases. The Canons of Professional Ethics promulgated by the American Bar Association are not followed strictly even by lawyers in arbitration proceedings. It may nevertheless be possible to formulate basic standards of conduct for the guidance of those presenting arbitration cases which would receive general acceptance. The primary objective, however, should be education rather than compulsion. The Committee recommends that representatives of labor and management be consulted with reference to the possibility of formulating such standards.

3. No appraisal of arbitration or arbitrators is valid which fails to distinguish among the varied functions of the arbitration process, particularly the function of making a contract as contrasted with interpreting or applying a contract already made. The Committee calls special attention to the need for analysis of the differences and similarities of different types of arbitration as a preliminary step in the formulation of a Code of Ethics or standards of conduct.

4. In view of the history of labor arbitration, as well as the variety of its present and potential uses in terms of the needs and desires of particular parties under particular circumstances, the Committee recommends that, within the framework of basic ethical standards, the arbitration process be kept flexible, that in our efforts towards improving the process by the adoption of a Code of Ethics or standards of conduct, extreme care be taken to avoid putting it in a straight jacket, procedurally or otherwise. It would be a tragic blunder to begin to formalize the arbitration process at the very moment when judges and lawyers are concerned with simplifying and humanizing the

judicial process to make it more responsive to the needs of the people.

5. The problems of ethics in arbitration relate not only to the conduct of arbitrators but also to the conduct of representatives of labor and management, lawyers or otherwise. The solution of such problems therefore requires some degree of soul searching and the maximum of cooperation among all groups concerned. The Committee recommends that labor and management be invited to designate representatives on a national and regional basis to act as a liaison between the Academy and employers, unions, and the general public, for the following purposes:

(a) To make suggestions from time to time, on their own motion or otherwise, for the improvement of the arbitration process, so far as the conduct of arbitrators may be concerned.

(b) To transmit to employers, unions and the general public, suggestions by the Committee on Ethics for the purpose of the improvement of the arbitration process, so far as they concern the conduct of those who appear before labor arbitrators, concerning any practices on the part of parties participating in arbitration proceedings which appear to the Committee to present questions of ethical content.

6. In planning its further course of action, the Academy should not overlook the opportunity to enlist the aid of various colleges and universities through their research facilities and personnel, which have proved increasingly useful in studies on various important aspects of industrial relations.

7. It may safely be predicted that a calm and careful study will reveal that some of the problems causing most heated debate are not "ethical" problems at all but more or less a misunderstanding or differences of opinion as to the nature and function of the arbitration process itself. We need first of all to learn the facts. How do arbitrators act? Are the practices complained of the exception or the rule? If the practice is general, how do the arbitrators and the parties involved explain it? What are the results of different arbitration practices and procedures, in terms of good industrial relations as between

plants in which conditions otherwise are comparable? The Committee recommends that the Academy, in cooperation with all interested groups undertake a series of studies on the arbitration process in general, and in particular on those phases which are commonly assumed, rightly or wrongly, to involve problems of ethical content.

8. There is always time enough to make rules. We should first concern ourselves with seeking a better understanding of the arbitration process. The problem is not only one of self-education for arbitrators but of education of the parties and the general public. The Committee recommends that arrangements be made for the appearance of members of the Academy before employer, union and public groups, to exchange ideas on the problem of labor arbitration.

9. The Committee recommends that the Board of Governors be authorized to take such steps as may be necessary to put the foregoing recommendations into effect.

A list of commonly discussed problems may be cited, for purposes of illustration only:

(a) How does one get to be "an arbitrator" in the first place? How does he become known as such? How is he selected for a particular case? Does he solicit business? Is he solicited by one party or another? Is he asked to make commitments in advance? Is he re-engaged by the same parties? Why? Why not? Does he "compete" with other arbitrators for business?

(b) The "professional arbitrator" versus the arbitrator with a steady job other than arbitration. Is one more or less inclined to be "ethical" than the other?

(c) Can a person "ethically" be an arbitrator although he represents or consults with the same or other unions or employers in other matters?

(d) Problems involved in ex parte communications.

(e) Fraternizing, entertainment, and the like.

(f) The conduct of hearings. Is there a "right" and a "wrong" way, in terms of ethical content? Is it "unethical" to attempt to mediate? To help out the weaker side, particularly if it has no attorney and the other side has? To disregard the

"rules of evidence"? To attempt to "reform" the parties? To compromise? To "duck" issues?

(g) The award. Should the arbitrator make the decision which both sides want, even though he thinks it is a "wrong" decision? Should the award be accompanied in every case by an opinion? Should it be published? At all? Or only with the consent of the parties?

(h) When is a fee "too large" or "too small"? Under what circumstances should an arbitrator serve without a fee? Can a fee properly be charged for "waiting time" when the arbitration is called off because the parties have settled and the arbitrator has forfeited some other income-producing assignments?

CONCLUSION

The Committee has made some suggestions, admittedly general, as to the form, scope and content of a Code of Ethics or a set of standards of conduct, and how to go about its formulation. Our report indicates that we do not believe a code can be developed simply through a report on substantive matters to an annual convention. We have stressed the need for further study of particular problems or groups of problems, in cooperation with all interested groups. Continuing education of all concerned is a prerequisite for informed legislation on the subject of ethics or standards of conduct, as in all other phases of the process of labor arbitration.

Respectfully submitted,

COMMITTEE ON ETHICS

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January 14, 1949.