CHAPTER IX

THE DEVELOPMENT OF QUALIFIED NEW ARBITRATORS

[EDITOR'S NOTE: A workshop session at the Fifteenth Annual Meeting was devoted to the problems related to providing suitable training and gaining acceptability for new arbitrators of labor-management disputes. One examination of this problem that furnished a backdrop for the discussion was a recent Report of the Committee on Labor Arbitration of the Labor Relations Law Section of the American Bar Association, which is reprinted in this volume as *Appendix B*. This chapter presents the comments of the four speakers whose remarks preceded the general discussion: Frederick R. Livingston, a Co-Chairman of the ABA's Labor Relations Law Section, Committee on Labor Arbitration; William E. Simkin, Director of the Federal Mediation and Conciliation Service; Paul M. Herzog, President, American Arbitration Association; and Ralph T. Seward, the first president (1947-1949) of the National Academy of Arbitrators.]

Discussion——

FREDERICK R. LIVINGSTON *

You have before you living proof of an untrained arbitrator. I decided I would like to become an arbitrator and I became one. Was I qualified? I am not sure. I think objectively I would have to concede that better training would have made me a better arbitrator. On the other hand, I don't believe in false modesty. I had exposure in the field and experience in the field, although not through the War Labor Board; but there are other places, fortunately, for people to learn some of the aspects of industrial relations.

I think it is fortunate that Bobby Kennedy isn't on the mailing list of the Academy, because he might interpret this session as one in restraint of trade by virtue of the fact that it is closed to

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non-members of the Academy. There may even be some people in the room who hope that no steps will be taken to enlarge the fold and thereby enlarge the competition. I happen to be opposed to that point of view.

Some of you would be interested in knowing the genesis of the American Bar Association Labor Relations Report.[1] When I was appointed Co-Chairman of the Committee, I met with the two other Co-Chairmen, Bernie Dunau and Bob Meiners, and suggested that, instead of spreading ourselves all over the lot, we concentrate on one subject on which we could make a constructive contribution to the field of arbitration and hope to get a sense of unanimity among the attorneys practicing in the field.

The three Co-Chairmen agreed, and those of you who know how committees operate know that if the Co-Chairmen agree, the rest of the committee will go along with the suggestions of the Chairmen, who do the work.

All of you have received a copy of the report, and I assume that some of you have read it. Where I depart from the report, the departure does not reflect the thinking of the Labor Law Section of the American Bar Association but rather represents my own point of view.

I shall try to discuss the highlights of the report, so that it can provide the framework for the discussions here.

We had a very good meeting with 18 or 20 members of the Committee from various parts of the country. There were people representing management and people representing labor unions at that meeting. The consensus was that the good, recognized arbitrators are so busy that it is difficult to get them without waiting one or two months. The whole concept of arbitration is therefore not nearly as effective as it sounds from the cliches that are uttered all the time: that arbitration is a good process because it provides a quick resolution of disputes.

There was a unanimous feeling that there must be some method or some criterion established for developing new arbitrators and providing a means whereby practitioners in the field can determine those qualifications.

In my own judgment, this is one of the few groups I know of that holds itself out as a profession, yet has no standards for

[1] See Appendix B.

determining what makes one eligible to be part of this profession. I think the Academy and the people actively engaged in arbitration have to face up to the fact that some standards must be established and that this is as good a time as any to start.

As I watch the old Western movies on television, I note that some of the first doctors were barbers. Later some of them went to school. Still later, after graduating from a medical school, they would go through a period of internship in a hospital. Similarly, early training for the law left much to be desired: A person would read law in a law office, hang out his shingle, and thus became a lawyer. There were no adequate standards for these professions. Need I elaborate any further as to the inadequacy of standards for the profession of arbitrator?

I know that in our practice today, the stakes involved in arbitration frequently exceed the stakes involved in litigation in the courts. It therefore becomes essential that standards be established for the practice of arbitration. This should no longer be something that a person decides to just do. It is a very high ambition. But it is one that a person is not entitled to aspire to unless he has had the educational background, the experience in industrial relation problems, and exposure to the various types of experiences that are essential.

The report of the American Bar Association Labor Relations Committee quite frankly does not attempt to provide all the answers, nor is it a panacea. Like all reports, it was obviously an attempt to get unanimity.

However, it was agreed that there is a need for some kind of training and a need for the establishment of some kind of standards.

In justice to the Committee, they felt that there were three basic problems:

One, that it was extremely difficult to acquire this experience; two, that there is no adequate machinery for establishing standards; and thirdly, the problem of acceptability. Acceptability really involves a combination of the first two. There is reluctance on the part of counsel on both sides of the fence to entrust these matters of great moment to unknown persons. It is conceded that some of them may be fully competent, but there is no way of finding out. They are not willing to be the guinea

pigs and entrust their clients' matters to the inexperienced and unknown.

There was one heartwarming thing at this meeting from our standpoint, and this was an understanding on the part of counsel, representing both groups, that there is a common interest on the part of both labor and management in having arbitrators endowed with honesty and experience and good common sense, and that, fortunately, there is a growing tendency to discard the class-conscious approach to arbitration.

I, for one, have never subscribed to the strictly labor or management approach to arbitration. This is a process in which everyone has high stakes and its integrity is essential to the effectuation of good, sound, labor relations for all concerned.

In my judgment, and this is not something that the Committee comments on at all, there are people who have represented management or labor who, by virtue of their long experience in the field, would make excellent arbitrators. After all, no one can pass judgment in an area unless he has experience in the field—just having good will and being conscientious is not a sufficient requisite for being a good arbitrator. There are international representatives and officers of unions whose objectivity would commend itself to me in such a way that I would not hesitate to recommend them as arbitrators if the dispute did not involve their own unions.

There are any number of people in this room who have represented management and continue to represent management who have complete acceptability as arbitrators.

I was very pleased to note when we were exchanging names with the UAW for an impartial umpire under the Mack Truck agreement, that Lew Gill was on both lists and has been selected by agreement of the parties as Arbitrator under the Mack agreement. UAW is fully conscious of the fact that Lew is a great magnate on the industry side, that he represents the Department Stores Association, but they don't question his objectivity in handling the disputes in Mack.

These are factors that cannot be weighted by virtue of representation on either side. There are many, many people representing unions that I would never accept as an arbitrator. On the other hand, as I said earlier, I could name a half dozen very easily that I think would not only be objective, but would pierce

the argument presented by a union international representative a lot more effectively than the so-called impartial arbitrator or the management representative. They would be more aware of this kind of argument and would pierce the bubble much more effectively.

The Committee of the Bar Association wrestled at great length with how you get experience. I will frankly say that the suggestions made here provide no panacea. They only provide a suggested method. I have talked with the Co-Chairmen of the Committee for this coming year, and they believe that this subject should be pursued further.

One of the Co-Chairmen specifically invited written recommendations from this Academy, and those recommendations should provide the basis for coordinated discussion with the Committee of the Bar Association.

I might interject here that, while they are all attorneys, obviously, it was agreed that a good arbitrator need not necessarily be an attorney.

I have yet to hear any of them say that legal training hurt, but they concede that there are some people who are not lawyers who could be good arbitrators, at least pretty good arbitrators.

Now, one of the methods of training that appealed to the Committee—perhaps it is because it worked so well in the case of Ralph Seward's work with Rolf Valtin—was the apprentice concept. As a matter of fact, we invited John Morse, Counsel for Bethlehem Steel, to sit in with the Committee to tell us how that operated.

I see Dick Mittenthal in the audience—another product of that process in the automobile industry. Bill Simkin was an earlier product of that process under George Taylor. I am sure there are others in the room who had similar training, working under the aegis of a recognized and competent arbitrator.

One of the problems that concerned the Committee which this group should consider at greater length is: how this can be accomplished outside of an umpire structure, under ad hoc arbitrators. Possibly, procedures could be established in some of the major cities for a man to serve under a group of ad hoc arbitrators, so that he would get varied experience. Even among the best of arbitrators, each operates differently, depending upon their respective backgrounds and personalities, and each person within

a chosen profession must adapt his method to his own personality so that he can operate most effectively.

How do you develop standards? I don't know, for sure, but I have some thoughts on it.

In the judgment of the Bar Association Committee it was felt advisable that they collaborate with the Academy, with the Federal Mediation and Conciliation Service, and with the American Arbitration Association to determine certain minimal standards for the selection of arbitrators and to go back to determine certain basic standards for the selection of apprentices to work under experienced arbitrators.

If a man is assigned to one arbitrator, obviously, the arbitrator should have a voice in the selection of that person, because it is a very close personal relationship. If they don't happen to have the kind of chemistry that matches, the project cannot succeed.

It was suggested when we were talking at lunch that possibly the Academy should become a clearinghouse for those people who desire to be arbitrators, for a select committee to interview such people, determine their past background and experience and see whether or not they qualify; then to provide a method for determining which arbitrators are prepared to undertake this process.

This is a very serious thing for the arbitrator who does it. He is assuming great obligations. It is parallel, to a degree, although not completely the same, to the large law firms who are taking young men in every year, training them, putting them into clients' matters and, in turn, assuming responsibility for the work performed by these people. The arbitrator who has an apprentice working for him assumes to a degree a responsibility for the work performed by that person.

Here, again, you get into the question of acceptability. It is our feeling that the greater emphasis given to the common objective of labor and management in getting labor arbitrators of competence and integrity, the greater the chance of acceptability of newer people. It has been suggested that there be tripartite committees in major communities to screen arbitrators. I know a cry will go up about blacklists, but good arbitrators are not effectively blacklisted any more than good lawyers or doctors are; no matter what we do in our chosen profession, we will be

criticized; but if we cannot stand up to it, I am not sure we belong in it.

The tripartite committee, made up of people who are sufficiently objective to know that the mere loss of a case doesn't mean that the arbitrator is incompetent or lacks objectivity, can go a long way toward developing a greater acceptability, particularly to the uninitiated. If the appointing agencies were in a position to say, "These people have been screened by a labor-management advisory committee,"—call it whatever you will—those people who are not well versed in the field would feel much more confident about taking the names of previously unknown arbitrators.

One suggestion that was made, and frankly I am not sure that it was a good one, was that the appointing agencies might classify their panels in a way to indicate the degree of experience. They might indicate, with respect to everybody in this room, that they have great experience in all kinds of cases, contract interpretation, production standards, job evaluation, or anything you want. There is a great fund of experience here.

On the other hand, they may indicate that other individuals less blessed have more limited experience, but they have reason to believe that these people are acceptable, or they can say that others are just getting started, but that the appointing agency, on the basis of information gleaned from discussion with respresentatives of labor and management, is convinced that these people are competent and have the qualities of integrity to which the parties are entitled.

In brief summary, it was the consensus of the Committee that there is a growing need for more arbitrators; management and labor are looking to this process more and more. Both of the major appointing agencies I know have a much greater case load than they have ever had before, and I venture to say that they would both think that the parties, as they come to know the process better, are making their own selections more and more, so that agency statistics will only reflect in part the growing use of arbitration.

The stakes are high for the parties. There is plenty of room, without impinging upon the ability of the recognized and established arbitrators, to make some room down below.

As I look around the room, as I see my friends here, most of

them came out of the War Labor Board and they are all of the same generation, give or take five years. We are all getting older. We had better get somebody to move in, not necessarily to have young blood, but to have some blood.

Discussion——

WILLIAM E. SIMKIN *

After all the years since 1947, I feel a little strange appearing here at an Academy meeting in the function of the head of an appointing agency rather than as one of the practitioners. Perhaps this new vantage point has changed my mind about a few things —but not about too many.

I would like to start out by indicating fairly briefly the steps we have taken in the last several months within the Service which have, I think, some bearing on the subject matter of this afternoon's session.

When Herbert Schmertz[1] and I took a look at the biographies being sent out along with our panels, we found what might be expected. The biographies, for the most part, had been written up on whatever Joe Doakes or Joe Blow might have submitted to us as a basis for his experience. It is not, I am sure, any surprise to you—it was no surprise to us—to find that some people are modest and some people are not. Consequently, we felt that the biographies that were being sent out did not portray to the parties a fully accurate indication of the experience and qualifications of the men on our panels. Soon after that, we sent out a rather pointed questionnaire that most of you fellows in this room had to answer and about which I am sure some of you raised eyebrows.

As a result of that questionnaire distributed among all the people who are on our roster, we have prepared new biographies which we think present a more uniform type of disclosure as to experience, educational qualifications, and various other items of background. For one thing, we felt we had an obligation, as an appointing agency, to make rather full disclosure where the individual involved was devoting the bulk of his time to repre-

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[1] General Counsel, Federal Mediation and Conciliation Service.

senting either companies or unions, and the new biographies do make that disclosure.

This is not to say that we are not sending out those names. We are sending them out, because I happen to be one of those who believe, along with Fred Livingston, that acceptability as an arbitrator is not necessarily synonymous with assuming a completely neutral role in every area of work. We are continuing to send out names of individuals the bulk of whose time is devoted either to management work or to labor work, but we do make a whole disclosure of that fact in the biography.

The second thing that we attempt to portray in this biography is the extent of experience. That, I think, is somewhat more objectively stated now, in view of the answers that we received to the questionnaires.

We do have a fairly sizable number of persons on our roster who have had very limited arbitration experience, but who, according to the best information and guidance we can get, are good potential arbitrators. At least some of them, in the years to come, should become more active in the field. We have tried in those instances to do two things:

First, we have tried to show in the biography enough of the background of the individual to indicate that he does have experience in the labor-management field and, therefore, has the potential qualifications.

Second, we have also been careful to point out, in terms of actual number of cases heard and decided, that the individual has extremely limited experience.

In short, we feel that the parties who are selecting arbitrators are entitled to know what they are getting insofar as it is possible for us to show it. It is still too soon, I think, for us to determine what the reaction will be.

With respect to persons who have extremely limited arbitration experience but who do have real potential, I think it will take more time before we can get any satisfactory answer to that question, but I think we do know—I think Fred mentioned this and it is certainly indicated in the Report—that there is a great reluctance on the part of most companies and most unions to accept men with very limited experience, no matter how good their background is as potential arbitrators.

We get this sort of reaction from almost everybody with whom we talk. There is a general recognition that more people need to be used in the arbitration field and that somebody has the obligation to break in some new arbitrators. At the same time, the same people who are quite frank and open about that kind of comment say, "Let somebody else do it; let somebody else break them in; and after that process is over we will be glad to take a look at them."

I think the primary purpose of any program that may be developed—and I certainly don't know all the answers to it—is to find some ways and means by which men who do have the potential can become acceptable.

I think people who are personally interested in arbitration generally fall into three groups:

There are those who already have either as much work as they want or more than they want.

There are those arbitrators or persons who think they are arbitrators who have varying degrees of experience but who hunger for more cases.

There is a third group of would-be arbitrators, men who have had no actual experience in the arbitration field but who do have a potential.

I think we need to direct our attention to the second and third groups.

Let us take a look at what the need for arbitration is, the demand side of the equation. I don't suppose anybody has any accurate statistics on what the growth has been, in terms of the number of arbitration cases decided in this country every year, but I think we can make a stab at it.

All of us know that the permanent umpire arrangement is gradually growing. More and more companies are turning to the permanent umpire setup. In most of those instances where a permanent umpire system is used, the total volume of cases is probably not declining drastically; with some it is increasing. In any event, more and more cases are being handled by the permanent umpire route.

Secondly, and I have no figures on this—I don't suppose anybody does—I am convinced that more and more companies and unions are selecting ad hoc arbitrators without reference to any appointive agency of any kind. I think there is a growth—how big

it is, I don't know—in that practice. We do have some statistics as far as our agency is concerned. These are very rough figures, but for the last four or five years the Federal Mediation Service volume has been growing at the rate of about 15 percent every year. This is a geometric increase. I understand that the American Arbitration Association has had a somewhat similar experience. I don't think it would be a bad guess to say that the total volume of grievance arbitrations, as practiced in this country in the last four or five years, is on the upgrade quantitatively to the extent of, certainly, a minimum of 10 percent a year and probably more. I would guess it is closer to 15 percent.

Now, in terms of the supply of arbitrators, I don't need to repeat the "War Labor Board Alumni Association" nature of the National Academy or, as Fred says, the homogeneous age group that we represent. But let us look ahead at a National Academy meeting ten years from now. There will be a lot of changes. I, for one, will be 65 years old, if I am still around at that time, and I am not the oldest member of this group by any means. So if we look ahead ten years, and that is the way we need to look, it is pretty obvious that unless something fairly drastic is done on this problem, and is done quickly, there is going to be a real scarcity of qualified men.

Now, we have drafted, just as a suggestion, a specific proposal to make in this area. We are suggesting—the mechanics of this are obviously somewhat nebulous at this point—that a program be developed under the joint auspices of what seems to me to be the principal organizations involved here, the National Academy, the American Arbitration Association, the American Bar Association, and the Federal Mediation Service. Under the aegis of those organizations, we could establish regional committees for the screening of what I have labeled the second two groups of persons who are interested in arbitration: those who are available already and who have a minimum of experience, but who are just a little bit hungry; and, secondly, the would-be arbitrators, the people who have potential but no experience. Some sort of regional committee could be set up, not too large a number of members, but with adequate representation from labor and from industry, so that the names of these various individuals could be gone over as thoroughly as possible by this committee and

screened on the basis of what labor and industry people in that community feel is their potential for this work.

The mechanics for setting up that organization, I admit, present some difficulties. All of us know, however, that in a city like New York or Chicago or Detroit or other areas we might mention, you could get a half dozen industry people who have a great deal to say about selection of arbitrators—a composite group of a few attorneys who represent management, plus non-attorneys on management's side. Similarly, on labor's side, a few of the labor attorneys and a few of the labor leaders in that community have a strong voice in selection. In most of these communities, you could get a group of roughly six on each side, and you could get two or three, perhaps more, of the leading arbitrators in that same community, men who are not looking for business. A committee of that sort could be established to go over on a careful basis and screen the lists of available people and, if you will, identify those individuals who seem to have special merit as possibilities for build-up in their arbitration work. If that committee could, in effect, put a stamp of approval on those individuals, this, I think, might serve as a useful device to help sell those individuals for actual cases in their own area.

Incidentally, as far as our Service is concerned, such a committee could perform a very useful service for us in helping us clean up our roster, because we have on our Roster of Arbitrators individuals who are not presently being accepted, some of whom should be, and some of whom, perhaps, should not be.

Speaking for the Service, I would welcome the advice of such a committee to help us maintain our roster, and in that manner try to build up a group of newer men, some of them younger, although it is not necessarily limited to the young men.

In addition to a screening job, such a committee could be useful in connection with the thing that Fred was talking about—the development of mechanics for the training of younger men through apprenticeship or what-not.

That, in substance, is the proposal, in very rough terms, that I would like to throw out for consideration at this meeting.

Discussion——

PAUL M. HERZOG *

Members of the Academy, I am immensely grateful to be allowed to speak here today. Not being a member of the Academy, never having been a member of the Academy, and having no prospect of ever becoming one, I am not in the delicate position of every other person on the platform. I am simply here representing what might be called one of the "disappointing" agencies.

It is tremendously reassuring that the Academy is undertaking a serious study of this program. I doubt, however, whether I can make any concrete contribution to it. I may ask questions on some points raised by Fred Livingston and Bill Simkin, all of which I think are very creative. Those questions will not be intended to be captious but merely to sharpen everyone's thinking for discussion.

You are doing something that takes a certain amount of courage as well as imagination. You are building up your competition. That is particularly true of the younger men in the group. This is a professional obligation and you are performing it professionally.

You are really acting like the old Follies girls teaching some of the younger ones what to do in order to break into that particular profession. I don't think you will be offended if I say that the analogy may be more apt than you would like to have it considered.

When we criticize, let us remember, we are not seeking perfection. If we seek it, although our standards should be high, we are going to be so critical of suggestions made by others that we will achieve nothing. As Secretary Herter said recently in a speech about something else, we have got to find a solution somewhere between inertia and Utopia.

These programs that were suggested by the representative of the Bar Association Committee and of the Mediation Service are intensely interesting. I suppose what they are doing is to develop an apprenticeship program to break out of that vicious circle which is troubling everyone—how do you get a man accepted, in the first place?

Nobody wants to be the patient of a young doctor. Everybody

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says in a case like this, not, "Let George do it," but, "Let these new Arbitrators do it to George."

Or to phrase it differently, picking up one of Bill Simkin's remarks, "How do we teach men who have the potential to become potent?"

It seems to me that the Academy's suggestion—as it will be presented, perhaps, in a few minutes by Ralph Seward—is an attempt to set some standards. We will run into a few risks in doing this. This is not being said critically. If you have what looks like an imprimatur system, a system by which people will be "screened," they will be approved under a different method than under the American Bar Association program.

I am a little concerned about a blacklist. I am also concerned about another problem. Once you put people in on a screening basis—give them a certificate to practice arbitration, if you like—what do you do to remove them? What do you do if somebody doesn't meet those standards any longer?

Certainly, at the very least, whether it is legally necessary or not, as a matter of fairness you have to give notice and hearing, and you run into all kinds of problems. I don't think you can have a disbarment proceeding so to speak, without having had a barment proceeding. Think about it. This is not fatal, but it is something you have to think about.

Let us look at another question: If we have the appointing agencies following the recommendations of a committee, such as the one suggested by the American Bar Association, or a regional committee as suggested by Mr. Simkin, are we going to lose something if one system or the other prevails? Will we lose something of the advantage that exists from having varying standards as between different appointing agencies if we are both bound by those recommendations? Is that desirable? I do not say these questions cannot be answered in such a way as to give a good result. Perhaps one or the other or a mixture of the two might work.

Where do the State agencies fit into this picture? What is the system for the use of associate arbitrators, as suggested in the American Bar Association program which most of you have read, going to be? Would the associate arbitrator be the person who would actually write the decision, or would he only be advising the senior arbitrator who would be his teacher? I wasn't quite

clear, from the Report, whether it is supposed to be the associate arbitrator's own decision or award that the parties are to receive and accept.

Another possibility, that I will come back to in a moment, is to have the associate arbitrator sit with the senior arbitrator and draw a draft decision which the senior arbitrator might use himself, but which would not be seen by the parties at all.

To change the subject a little: We have thought of the possibility of going much further with our own arrangements for training, which I believe are a little too casual today, a little too informal, a little too uncertain.

At the American Arbitration Association—we would appreciate the help of the Mediation Service in this if they are interested—we have thought of setting up a more formal course which people would take under our auspices. Our staff, and I would trust that members of the National Academy could volunteer their services occasionally, might serve as the professors. After all, many professors are Academy members. Why can't Academy members be professors for a change, and give some lectures, some instruction, some basic reading material, or allow the young arbitrators—young in experience, if not always in years—to serve as was suggested a moment ago, with different ad hoc arbitrators? Thus they would not get the single line of training that a man gets even with the best of Impartial Umpires, but would be able to sit for a while, draft model decisions, work with different arbitrators, and then conceivably be tested in some way, either by an Academy group serving for the American Arbitration Association, or by the American Arbitration Association's own educational staff.

Now, whether after such training they should be certified, graduated, and get a degree, I don't know.

Some of us feel that if there were something of that kind, the certification would go further than the certifications of appointing agencies go. I think it is worth the risk. If, therefore, we did issue certificates, or at least people knew that they had taken this course without any such formal imprimatur or certification, this might increase acceptability, which is what we are looking for, provided always that the man is trained so as to be acceptable.

The other possibility comes a little closer to Bill Simkin's idea.

This is to have our educational program conducted on the basis of regional institutes, where we would allow new people to go to conferences, participate in hearings, get a certain amount of training by the ad hoc arbitrators, not at a central point but rather region by region. Both in terms of economics and in terms of people understanding local problems, and perhaps most of all, because they would participate in those programs locally, this should increase the likelihood of acceptability. The local people would come to know them.

I, for one, would be very anxious, if any such course were set up on any basis, to have management and labor people and, perhaps even more important, labor-management attorneys, participate in the giving of these courses, whether nationally or locally. They would know who the good students were, who the well-balanced people and prospective acceptable arbitrators were. Because, after all, teachers sometimes learn something from students. It isn't always the other way around.

I want to give you, finally, a word or two as to what standards AAA requires now, plus a few statistics.

As I said before, we probably should tighten up a bit. We have a number of minimal standards. Except in a few instances, we won't put anyone on the panel under the age of 35.

Secondly, we ask for five years' experience in labor-management relations, or appropriate academic or field experience. A good reputation is usually considered important! As one indication of that, but I don't think it always proves it, we want four references from management and labor. The trouble with references is that they are usually the names that the applicant puts on the application blank himself; the objection is that you don't often get a wholly objective report from such people.

As to training, we do hand out written material; we do, wherever possible if the parties do not object, let potential arbitrators sit in our cases with skilled ad hoc arbitrators. We ask them to attend conferences which we hold in various communities, hoping that by attending these conferences and the occasional Institutes we hold in certain parts of the country, these men will gain exposure, believing that people who might be willing to take them as arbitrators might thus get to know something about them.

Recently we have asked men who have intellectual prowess,

but are not well enough known, whether they would be interested in submitting an article for the Arbitration Journal. We have had a number of those articles submitted now by very skillful people, some you would know. Some of those articles will be published. Those, then, at least in the legal community, will be recognized from the point of view of their intellectual powers. Whether they will be accepted, I don't know; but familiarity with the subject and capacity to think clearly will, at least, be revealed.

The problem of acceptability remains. Let me give you a few figures.

Turning to applications for entry on the AAA panel during the year just past, we had approximately 206 formal applications —some originated as voluntary applications, but most of them were nominations. Of that number only 56 were accepted by us —about 27 percent. A few are pending, but approximately 150 of those 206 were not accepted at all.

I might say that the 206 figure is not a stuffed figure; it does not include casual inquiries. It does not include people who drop in and ask how to become an arbitrator and are discouraged at hearing what the difficulties are.

Rejections? What were they? A great many were rejected because of age; lack of experience; unsatisfactory and insufficient recommendations. In a good many other instances, there is loss of interest because the applicant becomes discouraged when he hears about the difficulties, not only of becoming a member of the panel, but by learning that even when he touches first base and becomes a member of the panel the going is still very slow and uncertain.

What about the parties' use of the additions to the panel? These figures are necessarily loose. They come in a series of years, and they inevitably overlap. Perhaps you will get something from what I am going to say.

During 1959, 1960, and 1961, taken as a triad of years, we added approximately 200 new arbitrators to our labor panel rolls. Of these, only 36, or less than twenty percent, have now actually served. Of that twenty percent who have actually served, several have served several times, not just once.

The figures look a little better from the point of view of the new arbitrator trying to break in if you omit the 1961 figure

because, naturally, one cannot expect too much quick reaction on acceptability.

If we take the people added in 1959 and 1960 only, about 25 percent or more will have served, some of them more than once. In addition, about 88 persons added to the panel shortly before 1959 have served one or more times since 1959.

This is not the sort of figure that would impress a statistician, I am quite aware, but it gives a general impression of what is going on. The important figure, of course, is that only twenty percent of those put on the panel in three years have actually been called upon to serve.

Mr. Murphy's guess is that of the total of 124 who have gone on the panel and have been used at all in the last few years—88 before 1959 and 36 since 1959—about half will probably be used to a considerable extent and perhaps 25 or 30 of these to a very great extent, in the sense that they will really be breaking in as much as a new person can expect to break in. Perhaps another 25 will be used to a sufficient extent so that they will feel that they are finding their way.

So much for figures. Indeed, so much for everything, as I have talked too long. We have a problem here which everyone knows is difficult to solve. But that is no reason for not trying to solve it.

I think that every single factor: Obligation to the parties, obligation to ourselves, and obligation to the country requires that we pull together on this. Every one of us should be ready to surrender a pet idea if necessary. This includes me.

Discussion——

RALPH T. SEWARD *

I am not sure that I can really present the Academy point of view because, outside of interest in the problem, I am not sure yet that the Academy has a point of view on this particular question.

Letters were invited on this subject, and I received 13 from Academy members. Most of them indicate rather generally expressed approval, with offers of help in any way the writer can be

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of service—in helping to train arbitrators, studying the problem, anything of that sort. Some discussed details and, although the details are interesting, they are too detailed to go into at this stage of the meeting.

One raises the question, and only one out of the 13, as to whether or not a program for the training of arbitrators is necessary; whether there is a need for new arbitrators or whether there is not, rather, a need for fewer blacklists.

One comes out wholeheartedly against the program, in no uncertain terms, so forthright that I think that the letter should be read directly to you:

> "I have read the report [the ABA Report] as rapidly as it can be done. My views will be briefly expressed. With respect to the development of qualified, experienced and acceptable new arbitrators, please record me as saying 'nyet'. My reasons (without limitation and subject to supplementation and elaboration) are:
>
> "One. I distrust young persons. They are unduly ambitious and usually seek success at my expense. They tend to be disrespectful; and when they do not behave in that way, are fawning and hypocritical. Show me a 'new arbitrator' and I will show you a person with his hand in my pocket, claiming my sustenance as his own and robbing my grandchildren of their security.
>
> "Two. Young persons are too inexperienced to exercise good judgment. They are arrogant in their opinions and attitudes. When you tell them what is right they argue and do not believe you.
>
> "Three. Young persons are like camels with noses in our tents. They do not have a decent sense of propriety.
>
> "Look at Rolf Valtin.
>
> Very truly yours,
>
> Peter Seitz."

In spite of that letter, which might probably put an end to the discussion right here, I would like to go on to consider some specifics.

We have been talking largely, I think, in the area of selection. I think that is an important area and, obviously, a very difficult one, one which has all the problems of standards, mechanics of selection and so forth that have been mentioned this afternoon.

I will say one thing about it—aside from saying I don't think it is the key question, but I will launch it—that, in so far as you are working towards standards, there are, as Paul Herzog mentioned, some real dangers as well as some real needs. Once you

set up a system where any group of management and labor people is coming up with something that might be called a certification that this man is a good arbitrator, it is very easy, by indirection at least, to come up with a certification that some other man is a bad arbitrator.

It is very easy, somehow or other, to institutionalize and formalize that which so far has been informal and uninstitutional —though sometimes, I think, more effective than Fred Livingston believes—namely, the blacklist.

I think that the problem is not so much of sitting around, looking at the records of people and selecting them, although that will have to be done at some time. The central problem is that of getting experience at a minimal risk from those who can provide the experience. That is where the Academy members come in.

I don't believe that you can learn to be an arbitrator in a classroom. I think the classroom could help. I think that books could help and reading could help and writing could help; but you don't learn to arbitrate in a classroom. Basically, you learn to arbitrate by arbitrating, and I think everybody here knows that, just as, I suppose, you don't really learn to be a lawyer by going to law school. All you learn is a little law, but you don't get to be a lawyer until you really are out there with your client. Then you begin to learn what being a lawyer is. I don't believe that you learn to be a doctor, either, merely by learning some medicine by going to medical school. I think you learn to be a doctor in a doctor's office, in the hospital, in actual practice; and this is more so, I think, of our profession, in so far as we are becoming a profession, even than of law or medicine, because we are a profession without a school. Although a school might be useful and provide a useful way of solving the certification problem, a certificate that somebody had been to school, had taken certain courses or had had experience with certain arbitrators would be merely a statement of fact, but not a certificate that somebody was a good arbitrator—merely a statement of fact that the parties could take into account in their own judgment.

So, though this might be useful, you still have the problem, I believe, of how in the world are you going to let people arbitrate with minimal dangers to the parties whose cases they are hearing?

That is why I think that what has come to be known as some form of internship is not necessary. It is not necessary by a long shot, because most people who are arbitrators have learned to be arbitrators without any internship, although many have had it; but many have had, at least, some training in dealing with management and labor.

Rarely have you ever found an old-time arbitrator, although they became arbitrators from scratch, who didn't know something about labor relations, who didn't have some form of contact with it. What was it that the War Labor Board experience provided? It didn't teach us grievances, particularly, but it did give us some familiarity with what goes on between management and a union, as well as bringing our names to the attention of management and union people. Some experience of this sort ought to be a part of the training, I think, of any arbitrator.

I have fallen on my face in trying to do this, unfortunately, more often than I have been successful, but I have tried working with awfully good young men who had no direct experience with labor relations. It was tough going, and I think we talk a little bit too easily about "internship."

What does it involve? What is this internship relationship? It isn't any one thing any more than arbitration is any one thing. There are all sorts of variations and a lot of thinking has to be done, I believe, in individual situations, as to what kind of relationship can be established between this particular arbitrator, that particular potential trainee who may want to go on a full-time basis, but may be on a part-time basis, and so forth, and this particular group of parties. This is because one principle I believe in very strongly is that whenever a training relationship is established, it must be established with the full knowledge and, if possible, cooperation of the parties involved. I believe that ghostwriting, and so forth, without the knowledge of the parties (and I know there are some who disagree with me) raises a potential ethical problem.

What are the possible relationships?

Well, they can vary from having a man go around with you while you hear the case, sit in on the hearing if possible, discuss the case with you later, and you go ahead. Otherwise, aside from watching you work, that is all that happens. That is the first thing that happens often in an internship. It doesn't involve

any necessary impact of that man upon the case. It would involve some explanation to the parties as to who this man is who is sitting over there alongside the wall. If you want him to do more than just that, there has to be more explanation.

The next step is that of ghost-writing, in other words, writing a draft decision. That isn't too good, because he is a ghost that the parties should know about; but he is writing a draft decision some parts of which you might use. At first you will throw away most of it. This can be a very time-consuming process, but it can also be a useful and an essential training process.

You are getting into a problem that has to be dealt with. Are you trying to train a man to be a good arbitrator, or are you trying to train him to be a duplicate of yourself? Because these are two very different things.

And what the ghost-writer provides may be a wonderful draft, but it is not the draft that you would have written. What are the parties going to think? Real problems have to be solved with the parties, I suggest; but they are not real problems if the parties are all in on the process and know what is happening and know why they may get a decision that reads differently than your ordinary decision would read; but all this could be very difficult if it is going on in the dark.

It is at the ghost-writing stage, again, that the question arises of your own responsibility. For in training arbitrators, self-discipline comes in—you have lots of cases and you are getting ready for a whole week of hearings and you would like to get this out to the parties because you are already behind—it is so easy to take the finished draft and touch it up a bit and get it out, rather than really going into the case. It is tough to feel that you have to pull the draft apart. That is where responsibility comes in, and where a party's relationship with you comes in.

Next we have the hearing officer. Up to this point, the arbitrator has been losing money, time, and all the rest of it. Training is a highly expensive process to the arbitrator up to this point.

When the trainee can go out and hear cases, leaving you time to sit back in your office and get out a decision, the financial picture is easier. The production of the joint enterprise, so to speak, goes up, but your responsibility and difficulties also go up. Of course, there is an intermediate stage where you both go out, possibly, and hear the case, but then he writes the decision

and probably signs it, with your approval. If you don't, there is the problem that you have not heard the evidence, you have not seen the witnesses. If the parties are looking to you, not only to protect the agreement, but to protect the individual decision of that case, you may have a very serious problem. You will be influenced a bit by whether or not there is a transcript; if not, how good are your assistant's notes, what can you learn about what went on, how much is this inexperienced man's judgment to be trusted on the aura of the case, the feeling of it? What is in back of it? What are all the imponderables that necessarily must and should be kept in mind if you are going to come out with a realistic decision?

You go on from there, with the man established, writing decisions, with an expectation on his part and yours of general supervision. What is your responsibility there? And to the extent to which you do not sign the decision and your name does not appear, how clear in the minds of the parties is your responsibility?

I have stubbed my toe here several times and it is something that anybody who tries this must keep in mind. When you are reviewing decisions in a situation in which you are not in close contact with a case or with the trainee—or when you are reviewing by mail, which has happened to me once or twice—often it can work well, except about all you know about the case is the draft. If the parties think that you are just responsible for the draft, that is one thing; but, again, if they think your responsibility is for the entire decision, you cannot, and we all know it, get from the draft of a decision the complete knowledge necessary to exercise complete responsibility for the decision. These things have to be clarified or the parties are going to be in the position where they don't know what is going on. Either the assistant will be considered responsible for things for which you are responsible, or you will be held responsible in matters for which you should not be held responsible. These are all areas that have to be brought out into the open if you are going to think about this whole problem realistically.

Finally, there is the area of mere consultation. A lot of people don't want anything but a consultation on important cases. Again, variations arise which need to be thought about and clarified with the parties.

I have been harping on areas of responsibility of the trainee and the arbitrator because we are talking about gaining experience with minimal risks. That involves this question of responsibility and different areas and different ways of doing it. I suggest it is highly important to maintain ingenuity, imagination, and flexibility in this whole area, and that any effort by ourselves as an Academy—or, I respectfully suggest, by the American Arbitration Association or the Federal Mediation and Conciliation Service—to over-institutionalize this process and clutter it up with rules and regulations may freeze and render unworkable something which, if it is kept flexible in the manner of direct relationship between individual arbitrators and individual parties or groups of parties or committees of labor union men and employers, can be worked out in many different ways, each of which may be satisfactory to particular parties.