Article VI

Membership

SECTION 1. Application for membership shall be filed on an approved form with the Chairman of the Membership Committee.

SECTION 2. At least thirty days prior to the approval or disapproval of an application by the Membership Committee, the Committee shall send to each member a statement of the qualifications of the applicant. (As amended January 29, 1960)

SECTION 3. Upon completion of the review of an application and following a majority vote of those present at a meeting called for the consideration of such application, the Membership Committee shall submit its recommendations to the Board of Governors.

SECTION 4. The Board of Governors shall act on the recommendations of the Membership Committee at each semi-annual meeting, or at any special meeting called for that purpose, and applicants shall be admitted to membership by a two-thirds vote of those present.

Article VII

(Added by amendment January 24, 1962)

Nominating Committee

SECTION 1. On or before the 15th day of September preceding the Annual Meeting, the President shall designate a Nominating Committee consisting of three members. The names of the Nominating Committee shall be announced promptly to the membership. The Nominating Committee shall select one or more candidates for each vacancy, and shall report its selections to the President on or before the 15th day of November preceding the Annual Meeting. After receipt of the report of the Nominating Committee, the President shall announce promptly to the membership of the Academy the names of the candidates selected by the Nominating Committee.

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APPENDIX B

REPORT OF THE COMMITTEE ON LABOR ARBITRATION TO THE SECTION OF LABOR RELATIONS LAW OF THE AMERICAN BAR ASSOCIATION *

The Committee met for round-table discussion at the offices of Kaye, Scholer, Fierman, Hays & Handler, 425 Park Ave., New York 22, N. Y., on Tuesday afternoon, May 23, 1961. Eleven members of

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the Committee, including the three Co-Chairmen, participated in the discussion. The Committee had the benefit of the experience of John H. Morse, Vice Chairman of the Section, who participated in our discussion. In addition, the Committee considered several letters of comment on the proposed agenda previously mailed to the Co-Chairmen of the Committee.

It was the consensus of the Committee that it could fulfill its responsibilities most fruitfully by limiting its deliberations to a single, vital problem. Therefore, the Committee concentrated its attention upon possible programs for the training and development of qualified new arbitrators experienced in an industrial environment and acceptable to the parties. The discussion was enthusiastic, lively and thoughtful. The judgments derived from that discussion were embodied in a report drawn by the Co-Chairmen and circulated among the members of the Committee. The Committee now respectfully submits this report to the attention of the Section.

THE DEVELOPMENT OF QUALIFIED, EXPERIENCED AND ACCEPTABLE NEW ARBITRATORS

1. THE PROBLEM. In the judgment of the Committee, the problem is three-fold:

A. *Experience.* It is often extremely difficult for talented and objective young men to acquire the experience necessary both to qualify and to be accepted as arbitrators. Today, there is no institution comparable to the War Labor Board, which served as the training ground for many respected members of the present generation of arbitrators, and both management and labor are understandably reluctant to permit unknown men to experiment with their affairs.

B. *Standards.* There is no adequate machinery for passing judgment upon the qualifications of arbitrators and communicating that judgment to the parties. The appointing agencies have failed to develop any standards of background or performance for arbitrators and have not imposed any meaningful restrictions on the admission of arbitrators to their panels. Consequently, when an unknown name appears upon a panel submitted to the parties, there is no basis for assuming that appearance denotes adequacy as an arbitrator, and ordinarily there is no feasible means otherwise available to the parties to check the fitness of the person. Selection therefore tends to be confined to the familiar arbitrators who have acquired repute. Widespread dissatisfaction with many of the panels submitted to the parties is thus symptomatic of the basic need of devising a means to develop suitable new arbitrators and gaining acceptability for them.

In the absence of any standards or adequate rating system,[1] the parties frequently attempt to evaluate an arbitrator in the light of

[1] Experiments by private groups in the rating of arbitrators have proved to be hopelessly inadequate.

his published opinions. However rational this approach may be, it is often unrewarding. An opinion will not be published at all unless the parties, the arbitrator, and the publisher determine that it should be. Even if published, the opinion may not disclose the bases of decision in full, some of which though unrevealed may nonetheless legitimately inhere in the particular industrial framework in which the decision was rendered. This factor is explicitly avowed in the unpublished opinion of one knowledgeable arbitrator. He notes that "there are some reactions which are better left unsaid—even by a neutral. One can't take the parochial view that because the issue is narrow anything at all can be expressed which has a bearing on the issue. . . . If the arbitrator doesn't acknowledge some aspects of the case it is not because they were ignored in reaching his decision. Rather, it is because he is mindful that regardless of the verdict, . . . (the parties) must continue to work together in harmony . . . at the local and national level. Brutal frankness might strengthen the Opinion; but, more important, it might hurt good men." Moreover, it is not difficult to write a logical opinion that hides a poor judgment. Finally, opinion analysis may not proceed from a rational expectancy of impartiality and industrial wisdom on the part of an arbitrator but from less reliable assumptions as to the political behavior of arbitrators economically dependent upon their acceptability to the parties. Such calculations may be expected frequently to miscarry.

C. *Acceptability.* In addition to the natural reluctance of the parties to entrust their fortunes to the inexperienced, many clients lack confidence in more youthful arbitrators regardless of their exposure to industrial life and many are fearful of the predilections of arbitrators enlisted from the opposite side of the industrial relations profession. Not all of the parties to industrial arbitrations have an adequate understanding of the common interest of labor and management in arbitrators endowed with honesty, experience and common sense.

2. RECOMMENDATIONS.

A. *Experience.* In the judgment of the Committee it is desirable that the American Bar Association take the initiative in organizing the efforts of labor, management and the arbitrators to establish a pilot program for the training of new arbitrators under the guidance and supervision of experienced and respected arbitrators. One model for such an experiment is the successful development of associate arbitrators in the steel industry under the close and immediate supervision of the permanent arbitrator under the contract between Bethlehem Steel Company and United Steelworkers of America, Ralph Seward. However, the Committee is of the opinion that experience gained within the framework of a particular industry is not necessarily transferable, so that emphasis should be placed on the possibility of placing associates with ad hoc arbitrators who practice in several industries.

The theory of this experiment is that the parties can be induced to accept the role of associates selected and supervised by noted arbitrators in whom they have confidence just as these same clients rely upon the work of legal associates selected and supervised by lawyers in whom they repose confidence. Therefore:

(1) This pilot program should be limited to a few well known and widely respected arbitrators whose judgment is likely to be persuasive. It is expected that these same individuals would have such great demands on their time and such self confidence that they would not be reluctant to turn their cases over to associates.

(2) It is imperative that each arbitrator who commits himself to the program have great latitude in the selection of his associates. In no event should he be required to accept any individual unsatisfactory to him. The logical approach to the selection of candidates would seem to be to constitute a special committee, on which management and labor would be represented equally, to screen and approve applications and to arrange interviews for the candidates with the arbitrators. Then, the arbitrators would make all final selections for themselves.

(3) The nature of the supervision and control to be exercised by the arbitrators over the work of their associates should be articulated clearly and in detail. It should be understood that no decision would be rendered without the approval of the arbitrator, and that the associate would compile some form of record for review by the arbitrator. In the steel industry a complete stenographic transcript of the hearing is made, but this procedure may be too expensive for many of the cases in which associate arbitrators would sit. At the very least, however, the associate should record all the lines of argument directed to the application of the contract to the facts and all procedural objections and his rulings thereon.

(4) Associate arbitrators would assume responsibility gradually as their experience and personal judgment develop. This progression should be left to the discretion of the senior arbitrator, but he should be required to submit periodic reports to the special committee commenting on the progress of his associates and describing the kinds of cases to which they are being assigned currently.

(5) The associate arbitrators will be compensated for their services, but it is to be understood that participation in the program is to be considered a part-time job only. The Committee recognizes that this limitation on salary will tend to limit the program to persons with some other source of income and that some more experienced persons may be offended by the whole concept of training, but some progress seems better than none at all. Moreover, it is essential that a pilot program on a limited basis be initiated to determine the practicality of a more ambitious undertaking.

To the extent feasible, it would be wise to finance secretarial assistance to the associates in order to facilitate the proper compilation of a record for review by the arbitrator.

(6) In order to assure the acceptability of decisions participated in by associates, the candidates must be required to meet certain minimal standards of experience with industrial relations and possibly age.

The Committee has given considerable attention to the possible means of financing this project, and the most hopeful prospect would seem to be to induce an appropriate Foundation to contribute the necessary funds. In the event that this hope does not materialize, it may be possible to persuade some companies and unions to share the expense. Such an endeavor would be most likely to succeed in industries with permanent arbitration systems. However, some companies and unions may be persuaded to help subsidize associates to ad hoc arbitrators from whom they may not derive any immediate benefit because of the general importance of arbitration and the increasing amounts at stake in arbitration cases.

B. *Standards.* In the judgment of the Committee it is advisable for the Association to collaborate with the National Academy of Arbitrators, the Federal Mediation and Conciliation Service, and the American Arbitration Association in the formulation of certain minimal standards for labor arbitrators. It is recommended that these standards be used to condition admission to the panels of the appointing agencies, but such conditions should be imposed prospectively and should not be applied to arbitrators now admitted to the panels. The logical place to begin the application of standards would be in the evaluation of candidates who had completed the training described above. However, it is not thought advisable to limit any such seal of approval to those few candidates selected by the Association for the program. On the other hand, if any meaningful approval is to be given to other new arbitrators it seems necessary to assure the cooperation of the appointing agencies in the formulation and administration of standards and in the establishment of such standards as conditions to admission to the arbitration panels.

C. *Acceptability.* In the judgment of the Committee approval by an impartial group, in which labor and management are represented equally, is likely to succeed in inducing client acceptance of the new arbitrators so approved. However, the Committee is of the opinion that greater publicity could be given to the common interest of management and labor in the training and development of objective, capable and experienced new arbitrators.

In some quarters undue emphasis is placed in the selection of arbitrators upon the political balance sheet of the arbitrator. The Committee is unable to confirm the extent to which the assumptions underlying such speculation may be true, but it is clear that this approach to the selection of arbitrators over-simplifies the program and is generally unreliable. Political predictions tend to ignore the factual differences in cases and important differences in the industrial frameworks in which the decisions were issued. Moreover, such primi-

tive thinking about the arbitral process tends to retard the development of a truly professional and independent body of arbitrators.

The Committee recognizes that the temptation to political behavior upon the part of an arbitrator derives primarily from his economic insecurity. Unlike the security of an independent judiciary, the arbitrator's livelihood depends to a greater or lesser degree upon his continuing acceptability to the parties and he may therefore be swayed even unconsciously to shade or split his decisions in conformity with his notions of what the score card should look like in order to retain the confidence of both management and labor. A judge's freedom from this sort of diverting influence, however, only serves to define the nature of the problem and does not in itself suggest a solution. Life tenure during good behavior with irreducible compensation cannot be conferred upon the arbitrator. Unlike the judicial process, the American system of labor arbitration is essentially voluntary, and the more or less ready dispensability of a particular arbitrator by the parties even for the wrong reasons is intrinsic to the plan. Doing away with an arbitrator's incentive to political behavior arising from his economic concern must lie instead upon inspiring him with assurance that his selection by the parties will not be based on tabulating or evaluating his results solely in terms of whether he decides more often than not in favor of management or labor. In short, idealistic as it may sound, removal of the political arbitrator is largely a function of removing invidious considerations from the parties' own thinking in exercising their power of selection. A stupid, unfair, or uninformed arbitrator should lose the confidence of both management and labor whether or not his stupidity, unfairness, or lack of knowledge favors one side or the other.

The Committee considered a suggestion that once adequate standards were developed and enforced, arbitrators could be assigned to particular cases by the appointing agencies without leaving the parties any choice. Although such an approach has succeeded in at least one limited experiment engineered by the parties themselves, it is not likely to find widespread acceptance in either management or labor. Moreover, it is doubtful that any standards could be developed or applied so perfectly as to justify the exclusion of the parties from the selection of arbitrators.

On the other hand, it may be feasible for the appointing agencies to classify their panels in a general way in terms of the experience of the arbitrators to be appointed. The less experienced arbitrators could then be appointed to the less complicated and less important cases. The Committee understands that this practice has been adopted informally to some undefined extent. Since this approach may have merit, the Committee recommends that it be made the subject of further study.

One problem that immediately comes to mind is the formulation of a sound procedure for the classification of cases. The importance of a case to the parties may not necessarily appear from the sum of

money at issue or the difficulty of the legal questions presented by the grievance. On reflection, it may become apparent that the parties should be included in this process in some formal manner.

In this connection, the Committee has considered the possibility of inducing the parties to accept a lower rated panel by reducing the arbitration fee in such cases. In the judgment of the Committee this approach is extremely ill-advised, would degrade the arbitration process, and ultimately would impair the acceptability of any such panel.

Conclusion

The importance of the subject of this report may be appreciated in the light of the virtually uniform commitment to arbitration as the method of deciding disputes arising under the terms of a collective bargaining agreement. Continued and improved effectiveness of this private system of jurisprudence depends significantly upon the quality of the arbitrator. The Committee is convinced that the Bar must contribute to the development of a body of arbitrators equal to the responsibility entrusted to them.

Respectfully submitted,

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Bernard Dunau
Robert G. Meiners

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