APPENDIX E

PROGRESS REPORT: PROGRAMS DIRECTED AT THE DEVELOPMENT OF NEW ARBITRATORS *

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A major part of the work of the Committee on the Development of New Arbitrators for the year 1972-1973 was the conducting of a survey among all Academy members to assess the extent to which available time of persons with a reasonably good degree of acceptability and experience as neutral arbitrators for labor disputes is being utilized.[1] Although the study does not reveal an overall critical shortage of available arbitrator time currently, it does indicate that approximately one half of the Academy's membership would have to be categorized as very busy persons with a high degree of acceptability. The remainder ranges from persons who are fairly busy but with some unused time to those whose utilization is minimal and who have a great deal of available time.

On a regional basis, critical shortages were found to prevail in the New York City and Michigan regions. A tight supply situation was found in Ohio, the Southeast, Illinois, the Southwest, and northern California. Regions with no shortages but with reasonably good utilization of available time were Washington, D. C., western New York, western Pennsylvania, and St. Louis. Finally, a clear surplus of available arbitrator time was found to exist in New England, eastern Pennsylvania, Canada, the Rocky Mountains, and southern California.[2]

The results of the study were consistent with some further data provided by Vice President Joseph Murphy of the American

* Report of the Committee on the Development of New Arbitrators for 1972-1973. Members of the committee are John T. Conlon, Harold W. Davey, John E. Dunsford, Wayne Howard, David Kochery, Seymour Strongin, John C. Shearer, Milton Friedman, and Paul Prasow.

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[1] "Survey on Availability and Utilization of Arbitrators in 1972," Appendix F in this volume at 261.

[2] *Id.*

Arbitration Association. In his analysis of 6,658 cases administered by the AAA in 1971, he found that 3,712 ended with written opinions and awards by 532 arbitrators. Over one third of the awards were by arbitrators who had received only one case from the AAA that year. At the other extreme, 25 arbitrators (4.7 percent of the 532) each had 31 cases or more. Fifty-four, or approximately 10 percent, received more than 10 cases each.[3]

In that study Murphy also found that although 57.7 percent of the 532 arbitrators were 55 years of age or older, they accounted for 63 percent of the total number of decisions. Only 38 arbitrators (7.2 percent) were under 40, and they rendered 148 decisions, or 4 percent of the total. Thus, this matter of age remains an important factor relating to the future supply of arbitrators. However, some more recent statistics with respect to the age of arbitrators who had cases with the AAA in 1972 would indicate that some progress is being achieved in the acceptance of younger persons as arbitrators. In this regard, Murphy reports the following comparative data: [4] In 1967, 65 arbitrators under age 45 served, whereas in 1972, 106 arbitrators under 45 served. In 1967, 27 arbitrators under age 40 served, whereas in 1972, 46 arbitrators under 40 served. In 1967, six arbitrators under age 35 served, whereas in 1972, 20 arbitrators under 35 served.

Thus, the results of the survey, the AAA data, and the increased acceptance of younger persons would appear to indicate some easing of the supply situation. However, it must be recognized that there will always be present the situation where a small group of persons will have such high degrees of acceptability that problems of overcommitments and resulting delays will arise. A possible cure for that situation may be one proposed by committee member John Shearer—that the Academy consider the use of sanctions against members who are habitually tardy with their decisions.[5] Another is that proposed by Harold Davey in a paper presented to the members at the 26th Annual Meeting of the Academy on April 4, 1973.[6] It is his belief that the Code of Ethics, now being revised, should designate as unethical the rendering of decisions more than six months after the close of hear-

[3] 7 *Arb. News* 1 (Oct. 1972).

[4] Letter dated Mar. 8, 1973, from Joseph Murphy, vice president, AAA.

[5] Letter dated Mar. 5, 1973, from committee member John C. Shearer.

[6] See "Situation Ethics and the Arbitrator's Role," this volume at 162 and note 21.

ings or the receipt of briefs, where no genuine extenuating circumstances exist.

At any rate, the work of the Committee on the Development of New Arbitrators must continue because, as a professional organization, the Academy has a continuing responsibility to play a positive role in seeking to provide for the development and acceptance of new arbitrators. Interest in programs designed to develop new arbitrators certainly has not waned during the past year. Programs instituted in the past have continued through 1972, and several new ones have been instituted.

Ongoing Programs

The Western New York Program

In 1971, members of the Academy, acting in cooperation with the Federal Mediation and Conciliation Service, the AAA, and the Western New York Chapter of the Industrial Relations Research Association, played an active role in a comprehensive program to develop a group of new arbitrators in that region.[7] The program began with 20 persons, referred to as arbitrator-designates, who, over the course of a year, participated in a total of 10 formal day-long sessions combining lectures and discussion. Academy members and other practitioners served as speakers and seminar leaders. Jean McKelvey and Alice Grant served as coordinators of the educational aspects of the program.

Each of the arbitrator-designates sat in on an average of six hearings with arbitrators working in the area.[8] Academy members who conducted the hearings were very cooperative in accepting and assisting the designates. Each candidate also wrote six mock decisions which were evaluated with the assistance of the cooperating arbitrator.

The formal training aspects of the program are now completed, with a graduation dinner scheduled for May 22, 1973, where the graduates will be presented to a large number of representatives of the parties. Of the 20 persons who began the

[7] See Thomas J. McDermott, "Activities Directed at Advancing the Acceptability of New Arbitrators," report of the committee, in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973) at 340-346 for a detailed description of the make-up of that program.

[8] Report from committee member David R. Kochery dated Feb. 24, 1973.

program, 15 will graduate. One of those who did not complete the program left to take a job with the Pay Board in Washington, and another had to leave because the pressure of his law practice did not allow him the time necessary for the program.[9]

Currently, evaluations are being made for determination of admission of the candidates to the rosters of the AAA and the FMCS. After admission to its roster, the FMCS is planning to advise its regional offices in Buffalo and adjoining areas of the names of the graduates of the program, so that when inquiries might be made with the Service's commissioners regarding specific individuals, they may be able to identify them as having completed the program. In addition, FMCS commissioners are going to be urged to contact various parties in order to encourage them to select new and less experienced arbitrators for their cases. This drive will be supported by run-outs from the computer, which will designate the companies and unions who are getting panels containing the names of the arbitrator-designates and who are consistently passing them by. Such parties will be contacted to determine if they will consider using the available new talent. Also, efforts are going to be made to broaden the panels going to companies and unions so as to include more new names.

One very successful aspect of this program is that six of the arbitrator-designates in this program already have been selected to serve as arbitrators for the Steel Industry-United Steelworkers of America expedited arbitration program in the western New York area, and by March 1973 they had conducted eight cases.[10] In addition, several have received assignments as mediators and fact-finders in public employment disputes. However, six of the designates had had some of this experience prior to their joining the program. Therefore, on the basis of progress to date, the results of this program are very encouraging. Consideration is being given to the institution of comparable programs in other areas.

American Arbitration Association Activities

The American Arbitration Association continues to be active in areas of interest to this committee. In December 1972, Academy

[9] Murphy letter, *supra* note 4.
[10] Kochery report, *supra* note 8. This program is described below.

member William E. Simkin was named to occupy the J. Noble Braden Chair of Labor Arbitration for 1973. He succeeds Eric T. Schmertz, who was the first recipient of that assignment. Bill Simkin's main interest is in serving as chairman of a special committee established by the Academy, the AAA, and the FMCS to revise the "Code of Ethics and Procedural Standards for Labor-Management Arbitration." [11]

The Association has also made a determined drive to institute procedures for the establishment of expedited arbitration procedures in several cities. The New York City regional office has been operating one for approximately nine months. To date, other panels for this program have been established in Chicago, San Francisco, Detroit, Cleveland, and Dallas. In Chicago, an eight-member panel was established, and in San Francisco nine persons were appointed to the panel.[12] One member of the Academy was named to the latter panel. In Detroit a panel of 18 persons was selected, of whom five are Academy members.[13] In November 1972 in Cleveland, a panel of 15 persons in two general categories was established: (1) those with training and limited experience in either labor or commercial cases, and (2) experienced arbitrators among whom are seven members of the Academy.[14]

Under the expedited procedure, parties who elect to use the process notify the AAA's regional office, and an arbitrator from the panel is designated to hold the hearing. The hearings are to be scheduled quickly, they are not to last longer than a half day, and awards are to be issued within 15 days. A savings of 50 percent in costs is estimated.[15] The AAA reports that use of this service has not been as great as was anticipated. Some parties have objected to the use of inexperienced persons as arbitrators. However, the program has helped to give exposure to some new arbitrators, and it has achieved more success with "under-used" arbitrators.[16] The report from Cleveland is that the parties have

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[11] 9 *Arb. News* 1 (Dec. 1972).

[12] 8 *Arb. News* 1 (Nov. 1972).

[13] 9 *Arb. News* 2 (Dec. 1972).

[14] Letter dated Apr. 13, 1973, from Academy member Edwin R. Teple, who served as chairman of the screening committee for the selection of the panel.

[15] Murphy letter, *supra* note 4.

[16] *Id.*

displayed interest in the availability of the expedited procedure, but up to April 1973 no cases had been received.[17]

In Boston, a six-month demonstration program for public employment was instituted under a contract with the Massachusetts Bureau of Personnel. Arbitrators were selected from a special panel which included many new individuals as well as a few persons with some limited experience. The program is being funded under the Intergovernmental Personnel Act through the U. S. Civil Service Commission and the Commonwealth of Massachusetts. The report from committee member John T. Conlon indicates that the program in Boston cannot as yet be deemed successful, as only two or three cases have been presented to it.[18]

Among the expedited arbitration programs conducted by the AAA is an experimental one involving the General Electric Co. and the International Union of Electrical, Radio, and Machine Workers. The issues are limited to certain types of discharge and discipline cases. Under this program, 14 AAA panelists agreed to hear cases within 60 days and hand down awards without opinions. The average case was held in 41 days, with awards following 25 days later.[19] These figures do not indicate any high degree of expedition. GE and IUE have agreed to continue the program, but with modifications. Foremost is the requirement that the arbitrators are now to file summary opinions of not more than two pages each, whereas before only awards were issued.

The National Center for Dispute Settlement of the AAA received a demonstration grant from the U. S. Department of Labor's Bureau of Public Employee Labor Relations for a series of Seminars for Neutrals in Impasse Resolution in New England.[20] Six day-long sessions, designed as an orientation for beginning neutrals in the public sector, were scheduled and conducted in each of the New England states. The selection process for those who attended was subjective. Invitations were sent to recent appointees to the AAA and FMCS panels. Following completion of the seminars, a regional conference was scheduled for May 1973 for the participants from the separate state programs as

[17] Teple letter, *supra* note 14.
[18] Report from committee member John T. Conlon dated Feb. 13, 1973.
[19] 9 *Arb. News* 2 (Dec. 1972).
[20] Conlon report, *supra* note 18, and *Newsletter from National Center for Dispute Settlement* (Mar. 1973).

well as for experienced neutrals in the New England area. Approximately 100 persons will attend these one-day training sessions. The program is relatively general in character and is directed specifically at public employment procedures.

The Cleveland Program

In Cleveland, the training program that was initiated in 1971 under the direction of Academy member Edwin R. Teple has continued, with the cooperation of Academy members, and it is now in its final phases.[21] Twelve candidates are continuing to accompany Academy members to hearings, as time and the necessary arrangements permit. Two of these people had a substantial number of labor cases when they entered the program, and they are gradually increasing their arbitration work. About half of the others have handled commercial cases to get hearing experience, and one is scheduled to hear his first labor case. All that remains is adequate exposure through arbitrator lists furnished by the appointing agencies. Six of the group have been appointed to the AAA's Cleveland expedited arbitration panel, and should that program develop, it is expected that others will be selected.[22]

Department of Labor Activities

In addition to the New England seminars for training neutrals, the Department of Labor sponsored two programs in California for the training and development of third-party neutrals for the public sector. One is being sponsored by the Institute of Industrial Relations, University of California, Los Angeles. Through committee member Paul Prasow and Academy members Howard Block and Edward Peters, the Academy is serving as a cooperating agency in the presentation of the program. Howard Block is the project director.

Criteria for the selection of candidates for the program were those used for the Western New York program.[23] Approximately 70 applications were received and screened by a tripartite advisory council of 15 members; 22 persons were selected from among the applicants. The candidates selected may be classified as follows: *Age*—25-35, 7; 36-46, 8; 47+, 7. *Sex*—female, 5; male, 17.

[21] Details relating to this program were reported in the 1971-1972 report, McDermott, *supra* note 7, at 337-338.
[22] Teple letter, *supra* note 14.
[23] For those criteria, see McDermott, *supra* note 7, at 342.

Ethnic—black, 8; white, 14. *Background*—management, 9; labor, 5; attorneys, 5; others, 3.[24]

The program is divided into four phases. The first covered a period of three months and consisted of seminars, readings, and conferences. Academy members assisting in this phase of the program as instructors were Irving Bernstein, Howard Block, William Eaton, Edgar Jones, Edward Peters, Paul Prasow, and Thomas Roberts.[25]

The second phase began in March 1973 and involved the assignment of each trainee to two public or private sector hearings. Twelve active neutrals, most of them members of the Academy, are participating in this part of the program. The trainees are to attend the hearings, take notes, and prepare their decisions which are then subject to discussion and evaluation. All trainees must attend at least two hearings and write two decisions, but they may attend up to five.[26] The third phase of the program involves role-playing by the candidates in simulated negotiations, mediation, fact-finding, and arbitration.[27]

The final phase of the program will be directed at achieving acceptance of the successful trainees. In the Los Angeles area there are two neutral public sector employee relations agencies, one administered by the city and the other by Los Angeles county. Both maintain panels of neutrals for assignment to public sector cases, and both have agreed to place some of the trainees on their lists. In addition, the trainees are to be considered by the AAA, the FMCS, and the California State Conciliation Service for admission to their panels of public sector neutrals.

The UCLA program directors have commitments from members of the selection committee who represent parties using neutrals in the Los Angeles area. In addition, there is a labor-management steering committee of prominent representatives of labor and management in the area, and it anticipated that its members will exercise considerable influence in assisting the candidates who complete the program to achieve acceptability.

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[24] Howard Block, *Training and Development of Third Party Neutrals for the Public Sector*, A Six-Month Report Submitted to the U.S. Department of Labor, Feb. 28, 1973, at 4.

[25] *Id.*, Attachment 2.

[26] *Id.* at 6.

[27] *Id.* at 11.

The second program sponsored by the Department of Labor is being conducted at the University of California at Berkeley, under the direction of Academy member Adolph Koven. It has been designed as a full-year program, also directed at training neutrals for the public sector. The first four months are to be devoted to classroom training, and the next five months will consist of field training, where candidates will serve as observers or unpaid assistants in various community dispute forums. During the final three months, an attempt will be made to develop machinery for the referral of graduates of the program.[28] This committee has received no further information on the make-up of this program.

The FMCS sees some problems with regard to Department of Labor sponsorship of programs for the training of new arbitrators. One is that the Department is entering the business of training new arbitrators, when that function in the Federal Government is a responsibility of the FMCS. Another is that the programs are provided at no cost to the candidates and, where necessary, some pay or travel expenses may be provided as well. In contrast, candidates attending programs sponsored by the FMCS-AAA must provide for their own expenses and must purchase the necessary materials. Finally, no provisions were made with the FMCS as to qualifications for selection for the Department-sponsored programs or for standards to be met if the candidates are to be admitted to FMCS rosters.

The Canadian Experience

During 1972 a new area of activity in the training of new arbitrators appeared in Canada. Under the government's Public Service Staff Relations, provision is made for a staff of grievance arbitrators. Only one, the Chief Adjudicator, serves full time; eight others serve on a part-time basis. Initially, experienced arbitrators were used for the part-time assignments. After a time, when the supply of experienced arbitrators was deemed insufficient, the Public Service Staff Relations Board instituted an apprenticeship program which has proved to be successful in providing the Board with needed arbitrators.

Academy member Jacob Finkelman is chairman of this Board,

[28] *Training Neutrals for the Public Sector* (Berkeley: Institute of Industrial Relations, University of California, June 23, 1972), Adolph Koven, director.

and he reports that funds were made available for an apprentice program for the training of new arbitrators to serve in both the private and the public sectors.[29] The objective was to enlist young people in their twenties and early thirties to work with experienced arbitrators on Public Service Staff Relations Board cases. The apprentices are to be compensated for their time, but at a lesser rate than that paid to experienced arbitrators. They also are to be sent to arbitration seminars as they may be scheduled.

Textile Workers Union Program

The Textile Workers Union of America is in the process of establishing an expedited program for the western New York area.[30] To get the program under way, the union is going to select a panel of arbitrators who reside within a 150-mile radius of the City of Buffalo. The arbitrator, when requested to serve, must decide within a four-hour period whether he will be available on certain suggested dates given to him. He must also be available to arbitrate within 10 days of the initial request to serve.

Arbitration hearings may be scheduled for the day or evening. If the hearing is scheduled during the day, the arbitrator may be called upon to hear two cases. In the event two cases are heard in one day and involve one or two employers, the fee will be in the area of $175 plus expenses for bench decisions. In the event that one arbitration case is heard, the arbitrator will be paid $100 plus expenses. Should the parties request a written decision, an additional $50 will be paid, and the decision must be submitted in writing within one or two workdays.

Evening arbitrations will begin at approximately 7 or 8 p.m. and will not extend beyond midnight, unless the parties agree otherwise. Only one case will be heard, and the fee will be $75 plus expenses. Should a written opinion be requested, it also must be prepared in one or two workdays, for which the additional $50 fee will be paid. If a second evening session is necessary, the fee paid will be the same.

No prehearing or posthearing briefs are to be submitted, although either side may present a hearing brief. Also, no tran-

[29] Letter dated Aug. 23, 1972.
[30] Report from Academy member Jean McKelvey.

scripts are to be used. In the event of a postponement, the party requesting such after the date is set shall pay a $50 fee to the arbitrator.

It is clear from the time limitations being set and the fees provided, the union has in mind the use of persons new to arbitration, or persons with some experience but very light workloads.

Steelworkers Union-Steel Industry Expedited Arbitration Program

The most extensive program directed at reducing the cost of arbitration, reducing the time for cases to be resolved, and eliminating the growing complexities of arbitration procedures and decisions is the expedited arbitration program instituted by nine steel companies and the United Steelworkers of America.[31] Twelve panels have been established in various steel centers throughout the country, and approximately 200 arbitrators have been appointed to these panels. Most, but not all, are young attorneys, inexperienced in arbitration, and the group includes a significant number of blacks and women.[32]

The panels are administered on a rotating basis. The parties set the date for the hearing, which must be scheduled within 10 days of the appeal. The assignment is then given to the next person on the panel who is available for that date. The decision must be rendered within 48 hours, and the arbitration fee is paid only for the hearing day, during which one or more cases may be heard. American Arbitration Association offices administer the panels in the more heavily concentrated centers of Philadelphia, Cleveland, and Chicago, while the others are administered by the parties' own personnel.[33]

Experience with the new procedure up to March 1973 appears to have been quite successful. Approximately 250 cases were heard, with arbitration costs running from $25 to $75 per case.

[31] For a more detailed explanation of the problems which the program seeks to overcome and the workings of the program, see Ben Fischer, "Arbitration: The Steel Industry Experiment," 95 *Monthly Lab. Rev.* 7 (1972). See also his paper entitled "Updating Arbitration," ch. 3 in this volume. For an evaluation of expedited arbitration programs, see Steven E. Kane, "Current Developments in Expedited Arbitration," 24 *Lab. L.J.* 282 (1973).

[32] Fischer, "Arbitration: The Steel Industry Experiment," at 8, 9.

[33] *Id.* at 9 and note 7.

For the Republic Steel Corporation, the average cost per case was $37.50. Lapsed time from appeal to arbitration to completion has ranged from one to three weeks. In general, no discharge cases are submitted; the largest concentration has been disciplinary cases involving lesser penalties and cases where no precedential matter is involved.

In discussions with lower echelon Steelworkers Union representatives, company personnel, and some of the panel arbitrators, several potential difficulties have been mentioned. Initially, only awards were to be issued, but local plant and union people have found this to be unsatisfactory, as they desired to know the basis for the arbitrator's decision. As a result, short opinions not exceeding two or three pages are being rendered. In some other cases, one or the other party to the arbitration case has insisted on citing prior steel decisions as precedential support for his position. In both of these situations, the young arbitrator is required to expend considerably more effort and time for which no compensation is provided.

Of more significance were the potential hazards voiced by company representatives at the 1973 Academy meetings. One was the fear that the low cost per case will encourage lower echelon union and management representatives to fail to carry out their responsibilities and genuinely seek to negotiate a resolution of the grievance in the early steps of the grievance procedure. Another was the belief that the low cost factor will encourage many grievances, which otherwise would have been withdrawn, to be pushed through the procedure.

Despite these potential difficulties, which can be avoided if responsible persons for both parties carefully police the procedure, the industry's expedited arbitration program is by far the most revolutionary advance in the history of modern arbitration. As the parties believe, it offers a real potential solution to the resolution of the problems of the ever-increasing workload, the shortage of what the parties believe to be qualified arbitrators, and the increasing costs and delays of arbitration. At the same time it represents a solution that the parties themselves can institute for, as has been repeated time and again in prior reports of this committee, the solution to most of the shortcomings in arbitration and to the acceptance of new faces in the profession rests almost exclusively in the hands of the parties. In no other

profession is the control of the destiny of the profession in the hands of users to the extent that it is in private sector labor arbitration. As Ben Fischer has emphasized, "It is labor and management that must provide the ultimate answers and leadership, money, and full participation in these institutions" (labor, management, arbitration, and government).[34] It is they who have the power to overcome shortages, reduce delays, and reduce costs.

The Academy, as a professional organization, will continue to stand ready to cooperate and participate, wherever asked, in all seriously planned and valid programs for improving arbitration, promoting its use, and finding the ways to ensure a flow of qualified persons into the profession.

[34] *Id.* at 9.