CHAPTER 6

CERTIFICATION AND TRAINING OF LABOR ARBITRATORS: SHOULD ARBITRATORS BE CERTIFIED?

DEAD HORSE RIDES AGAIN

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I have been asked to speak on the subject of "Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified?" Last year, while discussing the same subject, Ben Aaron said, "I do not think it is necessary to flay this dead horse any longer," but you have dug up the corpse and I am willing to howl over it once again.

What makes a successful arbitrator? Almost 30 years ago, at the first dinner meeting of the Academy in 1948, Edwin E. Witte of the University of Wisconsin spoke to that question:

> "Enduring success in labor arbitration calls for . . . honesty and impartiality . . . a broad knowledge of industrial relations and a good deal of specialized information on the issues arising in labor disputes . . . a disposition not easily ruffled and a keen appreciation of the rights and feelings of others. It calls for an understanding of human nature and a realization that the matters to be dealt with are basically human relations problems. . . . It requires an 'uncanny' ability to grasp the real situation, amid pretenses and arguments, which often are made for purposes ulterior to the arbitration. . . . It calls for imagination and ingenuity for finding acceptable bases of settlement within the framework of reference. . . . Arbitration is an art rather than a body of knowledge. It cannot be learned in college, nor from books and speeches. It is not something that every lawyer can do, nor even learn. Nor is every judge a good arbitrator and, much less, every professor or clergyman . . . . There is much about arbitration that can be learned from books, from experience in industry, from personal contacts with aspects of the problems to be decided, and from the experiences of others. A well-rounded education and quite likely also special training in industrial relations and law are valuable. But the best teacher is probably experience."[1]

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[1] Witte, *The Future of Labor Arbitration—A Challenge,* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1954), at 16-17.

Professor Witte said that the best way to get experience was to work with a busy arbiter. And for years the Academy and the American Arbitration Association have encouraged arbitrators to lend a hand to worthy applicants to the profession. Our Code of Professional Responsibility requires arbitrators to cooperate in the training of new arbitrators. Internship is one approach.

But in addition, recent years have seen many attempts to bring new arbitrators into the field through training programs, through recruiting and exposure efforts, and through the general encouragement of parties to take a chance on new faces. All of these efforts have added up to some increase in the arbitration pool, at least according to AAA statistics. But almost everyone warns that the caseload is growing and that an increased number of competent and acceptable arbitrators will be needed in future years.

Let me say at the outset that I do not favor a formal certification program, in the absence of clear evidence that it would benefit the labor-management community by increasing the general standards of performance and by lowering arbitration costs. I am concerned that a formal certification program might have exactly the opposite effect, excluding many potentially acceptable arbitrators from the practice.

In preparing my remarks, I have been greatly assisted by a thoughtful memorandum prepared by Alfred J. Smith, Jr., a law student from Boston. I have attached his paper to my remarks as an appendix. He recommends that a certification program be established by the American Arbitration Association and that it be financed out of applicant fees.

Mr. Smith's proposal is seductive. The alleged benefits to labor arbitrators and to the sponsoring organization are plausible. The aim of such a program would be to enhance the reputation of labor arbitrators as viewed by the labor-management community; provide a comprehensive education program for labor arbitrators, even after they are listed by appointing agencies; and assure that labor arbitrators take the time, at least periodically, to study changes that occur within our field.

One is reluctant to refuse an opportunity to create a captive market for training programs, particularly when the aim would be to raise standards of performance by mandating continuing education. But I am convinced that a formal certification program for labor arbitrators would not be in the public interest. Too often we see professional groups knitting together intricate, defensive webs, based upon compulsory academic requirements, professional ex-

aminations, credentialing committees, and government licensing programs. In the past the National Academy of Arbitrators has rejected opportunities to create such barriers, leaving the task of listing arbitrators to the appointing agencies.

At your meeting in 1975, the Committee on the Development of New Arbitrators, under Thomas J. McDermott, noted the established policy of the National Academy not to endorse or recommend individual arbitrators and encouraged the Academy "to cooperate with appointing agencies and other recognized organizations or groups concerned with labor arbitration in formulating programs designed to train and develop qualified arbitrators."[2]

The American Arbitration Association requires candidates for its labor panel to demonstrate knowledge and experience in the field, including letters from at least four management and four labor representatives affirming that they know and would be willing to use the candidate as an arbitrator on their own cases. The Federal Mediation and Conciliation Service maintains a similar procedure.

A formal certification program would go further, placing the responsibility for approving a candidate in the hands of a board appointed under the bylaws of a professional organization. If any organization were to establish a full-fledged certification program, it would be costly to its membership in time and in money. Such a program requires the establishment of a professional staff to handle voluminous correspondence and telephone calls. A major commitment in unpaid time from members of the certification board would be required to plan and carry out the program, preparing and administering examinations, interviewing, and determining the acceptability of candidates. The continuing education aspects of such a system could be equally onerous, requiring the faculty to stay abreast of the entire field of labor arbitration.

In any case, the demand for a formal certification program has not been established. The sentiment in favor of a certification program is expressed mainly in the returns to a questionnaire mailed out to members of the Labor Relations Law Section of the American Bar Association.

In the fall of 1976, over 8,000 questionnaires were mailed to the members of the section. As of March 15, 1977, 3,442 of these forms had been completed and returned. More than two-thirds of the re-

[2] McDermott, *Entry into Labor Arbitration and the Effectiveness of Training Programs for Such Entry*, Appendix D in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), at 336.

turns were from management lawyers. The balance were from union lawyers, along with a few hundred labor arbitrators and others. A mailing to a control group of nonlawyers resulted in 131 returns; 1,262 of the ABA respondents strongly agreed and 1,454 felt that it would be desirable to require labor arbitrators to pass "a certification examination which would test their knowledge of arbitration procedure and/or the substantive law of collective bargaining agreements." Only 507 did not think that such an examination would be relevant, and 170 strongly disagreed with the idea of an examination. An analysis of an earlier mailing of the questionnaire to the committee disclosed that over 80 percent of management attorneys favored such a requirement, whereas only 60 percent of the union lawyers, of the labor arbitrators, and of the nonlawyers in the control group felt the same way.

In the earlier survey, several respondents warned that it would be difficult to design an examination appropriate for labor arbitrators. And, not surprisingly, several respondents who supported certification felt that candidates who were attorneys should not be required to take such an examination.

To put the questionnaire in context, two out of three ABA respondents felt that labor arbitrators should be licensed attorneys. Three out of four would require arbitrators to have a law degree from an accredited law school. The earlier survey indicated that lawyers who represented unions were less enthusiastic, and a majority of the nonlawyers in the control group did not favor such requirements.

Virtually all of the respondents agreed that the ABA should encourage the development and training of arbitrators. Most of them felt that the ABA should participate in programs for the development of arbitrators. Two out of three of the lawyers thought that the ABA itself should certify arbitrators as "qualified" or "not qualified" through a periodic polling of the Labor Relations Law Section or some other method. Here, the nonlawyers were almost equally split.

The ABA questionnaire was designed by lawyers. It was mailed primarily to lawyers. The ABA returns represent the lawyers' personal response, not necessarily the views of their clients. In fact, the nonlawyer response, although small in number, does indicate that nonlawyers in this field do not completely endorse the lawyers' view as to the importance of legal training for arbitrators. Nevertheless, the ABA survey does indicate that, if it were left to lawyers, most arbitrators would be lawyers, most arbitrators would have law

degrees, and most arbitrators would have to pass certifying examinations.

These same lawyers were asked to identify the best sources for labor arbitrators. Their answers were consistent with their expressed preference for lawyer-arbitrators. The most acceptable sources were ranked as follows: (1) experienced labor lawyers who have represented unions or companies (3,135); (2) retired government lawyers or hearing officers with experience in labor law (2,848); (3) law professors (2,676); (4) industrial relations professors (2,438); (5) retired government officials experienced in labor relations (1,982); (6) retired judges (1,856). The least acceptable sources were clergymen (176) and retired government officials not experienced in labor relations (151).

The ABA survey indicates that lawyers give a high priority to training and experience in labor law. Their first preference is for lawyers who have actually represented adversaries in the process. Parties are looking for competent arbitrators. But can an attorney who continues to represent clients in the field of labor relations be accepted as impartial? Most spokesmen for appointing agencies say "no." The parties, in selecting arbitrators, say "sometimes." In this survey, both the lawyers and the nonlawyers indicated a broad difference of opinion on this issue. In commercial arbitration, many arbitrators serve with impartiality in spite of representing clients in the same industry. This will continue to be a controversial question. Perhaps it is not necessary to be doctrinaire.

The nonlawyers in the survey gave slightly different answers to the "acceptable sources" question. Their selections were: experienced labor lawyers (109); industrial relations professors (97); law professors (84); followed by retired government lawyers and officials and retired management and union representatives (75 and 70). They gave other categories a substantially lower rating. Again, their answers appear to give somewhat less weight to knowledge of the law than they do to experience in labor relations.

Another available window into the reality of this question of what parties are looking for was to ask for opinions from arbitrators who have achieved acceptability in recent years. I identified 70 members of the AAA labor panel who have substantially increased their caseloads during the past five years or have achieved significant initial acceptability during that period. These people had an average age of 52; half had law degrees; 41 had earned advanced degrees in other academic areas; 44 were engaged in full- or part-time teach-

ing. Half favored certification; half did not. Their suggestions as to how to gain acceptability are reported in Appendix B.

Based upon the 59 questionnaires returned, these arbitrators believe that the following factors are responsible for their own entrance into the profession: (The bracketed figure indicates a weighted degree of importance.) (1) experience in labor relations (405); (2) professional contacts (378); (3) listing by appointing agencies (353); (4) legal training (232); (5) exposure at educational programs (226); (6) personality (220); (7) other academic training (204); (8) government experience (154); (9) published articles (90); (10) other (60). Experience in labor relations is seen as a major factor in gaining acceptability.

Recent experimental programs to lure new talent into the field exhibit a variety of approaches. In the recent GE-IUE training program at the University of Michigan, the trainees were lawyers, primarily from an academic background. But when the Steelworkers and the steel industry recruited arbitrators for their system of expedited arbitration, they selected young trial lawyers with no experience in labor relations.

Neither of these programs appears to have placed a high value on a candidate's experience in labor relations, relying instead upon legal knowledge. And an argument can be made that a knowledge of labor law is increasingly important. Social legislation is becoming an ever larger influence on labor relations, so that arbitrators need to know more about employment laws and regulations.

Similar complexity has crept into the arbitration procedure. Arbitration is "taking on the appearance of a courtroom procedure."[3] The AFL-CIO Executive Council has urged its affiliated unions to demand expedited arbitration procedures in order to eliminate transcripts and other time-consuming steps. AAA experience shows that expedited procedures produce substantial reductions in costs and delays.

In *Warrior & Gulf,*[4] the United States Supreme Court reminded us that "[a]n arbitration hearing is not a court of law and need not be conducted like one. Neither lawyers nor strict adherence to judicial rules of evidence are necessary complements to industrial peace and stability—the ultimate goals of arbitration."

My survey and similar surveys of practicing labor arbitrators confirm that many labor arbitrators are neither lawyers nor graduates

[3] John Zalusky, *Arbitration: Updating a Vital Process,* 83 AFL-CIO Amer. Federationist 1 (November 1976).

[4] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

of law schools.[5] In thousands of cases, parties have selected arbitrators who are not lawyers and have selected them over and over again, in preference to practicing lawyers, law professors, or arbitrators with legal training.

Labor arbitrators have never had to pass licensing examinations. They have never been obliged to complete a particular course of study at an accredited professional school. Any attempt to install such barriers would invite charges that such requirements are not related to job performance. Licensing examinations in other professions are being attacked in the courts. Professional self-regulation by labor arbitrators would not be exempt from challenge.

When other professions are moving toward removing barriers, in keeping with the spirit of Title VII, labor arbitrators should not move in the opposite direction toward a traditional credentialing program. For those of you who are interested, I recommend an article entitled "Credentialing by Tests or by Degrees: Title VII of the Civil Rights Act in *Griggs* v. *Duke Power Company*," by Sheila Hoff, which appeared in the *Harvard Educational Review*.[6] Employers and unions are subject to the constraints of civil rights statutes. Their sensitivity to the danger of adopting credentialing in their own activities should be reflected in their selection of arbitrators. In general, parties are unlikely to encourage the establishment of a certification program based upon elitist or exclusionary principles.

Both the National Academy and the American Arbitration Association have tried to bring a higher percentage of minority and female arbitrators into the practice of labor arbitration. Should we pick this very moment to put new barriers in their way?

One also must ask whether any such requirements would result in better performance. Do we really believe that enforcing academic requirements on arbitrators would improve performance? In *Education and Jobs: The Great Training Robbery*, Professor Ivar Berg instructs us that this idea is a myth: increased academic credentials are seldom justifiable on the basis of performance. Such requirements might result only in increased fees and lesser availability. If we decide to establish labor arbitrators as a professional elite, we should do so with skeptical eyes, understanding the costs involved in such a choice.

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[5] Henry K. Brown, *Structural Change in the Labor Arbitration Process*, 55 Personnel J. 616 (December 1976).

[6] Hoff, *Credentialing by Tests or by Degrees: Title VII of the Civil Rights Act in Griggs v. Duke Power Company*, 44 Harv. Ed. Rev. 246 (May 1974).

The relationship between academic training and the on-the-job performance of decision-makers was tested at the Federal Aviation Administration (FAA). As reported in *Education and Jobs,* the study involved 507 upper-grade air-traffic controllers. The job requires a high degree of decision-making ability, decisions of some personal interest to itinerant arbitrators. Half of these controllers had no formal education beyond high school. Based upon the FAA's performance-awards program, "education proves not to be a factor in the daily performance of one of the most demanding decision-making jobs in America."

The FAA study is one of several cited by Professor Berg. As Eli Ginzberg states in the book's foreword: "In every instance, the data prove overwhelmingly that the critical determinants of performance are not increased educational achievement but other personality characteristics and environmental conditions."

Many members of the National Academy are qualified job analysts. Ask yourselves: What skills and information must a labor arbitrator bring to the table?

To the extent that the craft can be learned from books and lectures, there should be no problem. A curriculum can be designed to cover hearing procedures and the law of arbitration. Several such training programs have already been carried out. The most comprehensive was the course administered by the University of Michigan School of Law for novice labor arbitrators, sponsored by the General Electric Foundation and the International Union of Electrical Workers. That program and others, less ambitious, have exposed participants to the law and practice of arbitration. An important part of the GE-IUE training program involved the participation of veteran arbitrators, advocates, and administrative personnel. The course was thorough but expensive, costing over $70,000. Less elaborate training programs can be offered at a lower unit price, and if such a course can promise that its graduates will be appointed to arbitration cases, a tuition scheme would reduce the cost to its sponsors.

If the goal is only to expose the candidate to the law and practice of labor arbitration, such training can be provided. But there is more to being an arbitrator. The mechanics can be taught. But how about the art? Is experience the only tutor?

The contract is the arbitrator's primary frame of reference. We say that an arbitrator is limited to the evidence presented at the hearing. In theory, that is true. In practice, arbitrators saturate themselves with information about the parties and about the total

setting in which the dispute arose. The arbitrator's input at the hearing is not the equivalent of reading the transcript. Hearings are a total experience, loaded with body language and off-the-record comments. How do we train people to acquire the skill to absorb these kinds of signals?

A doctrinaire view of the arbitration process may mislead us as to the parties' expectations. We may be looking in the wrong places. We need a wide range of models. We require special talents, broader than purely verbal skills. The arbitrator's ability to manage the hearing and construe the contract covers only part of the job.

Parties seek something unique from labor arbitration, something different from what is otherwise available in court. In many jurisdictions, decisions can be obtained promptly and inexpensively from general-purpose judges. In foreign countries, labor courts and labor tribunals make similar decisions. But seemingly, American unions and employers prefer to use private arbitration tribunals, molded to their own peculiar needs. Let's examine that preference.

Grievances do not arise in the vacuum. They bubble up from an employment relationship. Both parties share an interest in the success of the enterprise. The workers value job security and their prospects for future wages. Management needs to safeguard the vested interests of executives as well as of investors. Both parties benefit if good things keep flowing from the employment relationship. With few exceptions, both parties prefer that grievances do not disrupt production. They need arbitrators who are sensitive to their mutual interest in maintaining the firm's ability to operate profitably.

Here the arbitration process is quite different from traditional adjudication. Courts operate under the principles of law, selecting according to legal precedent from among whatever colliding or competing legal theories are argued by the attorneys. Secondary principles or equitable or emotional considerations are irrelevant, to be considered, if at all, only surreptitiously. Often the result in court is conceptual rather than practical, doing violence to human relationships upon which the parties' future may depend.

An arbitrator has more flexibility than a judge, both as to the evidence that can be introduced at the hearing and as to the potential range of remedial action. The practical needs of the contracting parties can more easily be considered by an arbitrator. Conflicting and secondary principles can be weighted, as can equitable and human factors. The arbitrator needs to have a working knowledge of behavioral psychology. That can be the key to determining the credibility of witnesses, to understanding the motivations of partici-

pants, and to forecasting the likely result of an award. The arbitrator has broad powers and should be aware of the impact upon the people involved in the dispute.

The arbitrator is free to suggest settlement or, in appropriate cases, to attempt to mediate. The Code of Professional Responsibility is flexible in this regard. Few labor awards are challenged because a labor arbitrator has attempted to mediate. In practice, a "bionic neutral" frequently sets the parties upon the road toward settlement.

These considerations lead me to a tentative conclusion that practical experience in collective bargaining may be the most important baggage that an arbitrator can bring to the table—more important than legal or academic credentials.

And yet we all know that arbitrators, both new and old, must prepare themselves for new challenges. At the AAA, we see a continuing need to offer instruction in these areas. Professor Harry Edwards's recent study concluded that labor arbitrators need to become more knowledgeable about employment-discrimination laws. In the public sector, the proliferation of compulsory-arbitration and last-best-offer laws for police and fire impasses will require us to train neutral arbitrators in the nuances of public budgeting and administration. And other developing areas—hospitals, pensions, productivity—will provide new challenges to the arbitrator. Here the National Academy, the American Arbitration Association, and other educational organizations will find more than enough demands for their attention.

In summary, I would not recommend that labor arbitrators create a traditional certification program at this time. The listing procedures of the appointing agencies should be keyed primarily to the arbitrator-selection market, emphasizing experience in collective bargaining first and labor law second. Compliance with the Code of Professional Responsibility should be given great weight by agencies placing arbitrators in the free market of labor-management arbitration.

There is a need for new recurits, for a more diversified pool of labor arbitrators, and for a wide variety of training programs. There is a need for internships. But, in general, the competence of arbitrators will be achieved by practical experience, by self-study, and by a thoughtful understanding of what the parties expect from the process.

Appendix A

CERTIFICATION AND TRAINING OF LABOR ARBITRATORS: SHOULD ARBITRATORS BE CERTIFIED?*

The need to guarantee high standards of service, competency, and ethical fitness makes a strong argument for the training and certification of labor arbitrators. The current pressures in the field caused by an increase in expedited labor-arbitration cases and public-sector arbitration (for example, last-best-offer arbitration) demand experienced and expert arbitrators. All indications point to a continued growth in these and other closely aligned areas.

I. Certification Program

A certification program for present labor-panel arbitrators could be administered by the educational arm of the American Arbitration Association and financed by certification fees. The requirements for certification could include:

Experience

Five years' experience in industrial/labor relations positions in industry, government, teaching at the university level, or applicable experience in the legal profession should be required. This experience would guarantee a working knowledge of labor-management relations and personal experience concerning the subtleties of dealing with a controversy which cannot just be settled with a winning and losing side. In fact, it has to be settled in a manner that returns the parties to a strengthened working relationship.

Academic Preparation

A minimum of a Bachelor's degree with emphasis on a labor-management relations curriculum should be required. An advanced degree in a related subject and/or a law degree should be encouraged.

While the emphasis in arbitration is on informality (with the exception of transcripts in some cases) rather than on the strict procedural requirements of the courtroom, a law degree will assist the arbitrator in framing the issues, interpreting the contract provisions, and wording decisions based on statutory constraints. In fact, sur-

* Appendix A was prepared by Alfred J. Smith, Jr., Boston, Mass.

veys have shown that in the near future most industrial-relations professionals will be required to have a law degree in order to interpret the many state and federal regulations which govern the specialty. Labor representatives will be similarly qualified. To have an arbitrator less qualified would seem to be unacceptable.

References

References will be identical with those presently required by the labor panel. The four union and four management references will be given the same close scrutiny that they presently receive. As part of this phase, a personal interview by the applicable regional director or his designee should be held as an additional opportunity for the AAA representative to get to know an arbitrator whom he will be called on to recommend or list at a later date.

Continuing Education

To remain certified, an arbitrator should be required to attend a minimum of one annual conference to insure a constant updating of expertise by a review of applicable arbitration awards. The program, which could be structured as panel discussions or seminars, could be administered by the staff of the regional offices or by the various educational and training divisions of the American Arbitration Association.

Time Commitment

In order to be certified, and under the aegis of the Code of Professional Responsibility, an arbitrator would be required to make a commitment to allow a new arbitrator to observe several of his arbitration hearings and to discuss subtleties of the issues prior to an award and the reasons for the award as part of a formal training program for the prospective arbitrator. Finally, the certified arbitrator should observe the arbitrator being trained to be able to make a report to assist the regional office in classification.

II. Training, Testing, Internship, and Recruiting

In addition to certifying presently listed arbitrators, there is a need to initiate a program that will insure a continuing source of competent and qualified arbitrators. To accomplish this, there is need for training and/or testing, internship, and recruiting. Questions about the possible exclusionary motives for these programs

can be countered by the need to insure a high degree of competence in new arbitrators so as not to compromise the high ideals and standards of the American Arbitration Association and the National Academy of Arbitrators. Would you put your controversy in the hands of an inexperienced or untrained arbitrator?

Training

If a new and inexperienced arbitrator completed a formal program of training (which could have a tuition charge to cover design, implementation, and administrative costs) and fulfilled the academic requirements, then he could be certified with the examination requirement waived.

The training program could be patterned after the GE-IUE or Steelworkers' programs, with a formal curriculum of study augmented by lectures by experienced arbitrators, films of actual arbitration hearings, and role-playing sessions where the trainees would play the parts of the parties to the controversy.

The formal curriculum of study should be designed to cover a wide variety of subjects with which a new arbitrator must be acquainted. These could include: types of arbitration tribunals (single v. arbitration board, temporary v. permanent arbitrator, etc.); scope of arbitration (as defined by the parties, or covering rights v. interests); arbitrability (determined by the arbitrator or a court); interpreting the contract (intent of the parties, without rewriting it); preparation for arbitration (study time necessary); conducting the hearing (sources of procedural rules, methods, transcripts, etc.); handling controversy within the hearing (the need to hear all pertinent testimony); management rights (views and limitations); seniority rights (types of standing and listings); discharge and discipline (factors to consider in evaluating penalties); standards in interest disputes (existence of outside controlling factors); closing the hearing and time limit for rendering award (as of the end of hearing testimony or upon filing of final documents by both sides); reopening the hearing (to hear material evidence not available at time of hearing); the award and opinion (time limits, oral or written); interpretation of award (by the arbitrator on request from both parties); common errors in arbitration (on the part of either party).

Some or all of these subjects may be currently covered by films, video tapes, or lecture and seminar material presently in the American Arbitration Association library. If so, the shaping of the curriculum could be achieved without a large expenditure. If certain areas need further development, a campaign to supplement the

material with voluntary assistance by the acknowledged experts in the field, the members of the Academy, could keep costs at a minimum. Present video tape and audio equipment could be utilized.

Testing

Without disregarding the principles of *Griggs* v. *Duke Power* that all testing must be job-related, tests could be formulated to examine the potential arbitrator on a variety of subjects deemed necessary. A strong case can be made for basic skills, aptitudes, and exposure to academic studies on the part of the arbitrator. Certainly organizations with far less stature than the American Arbitration Association and the National Academy of Arbitrators have designed testing methods for applicants, and these tests have been validated and are presently in use. With some effort on our part, we could do likewise.

If outside examination-consultants were deemed advisable, to design, validate, and administer the examinations, there are a number of qualified firms from which to choose. The Educational Testing Service of Princeton, New Jersey, with offices throughout the country, is the most widely known of these organizations; its testing centers are already established. Other firms, such as the Professional Examinations Division of the Psychological Corporation, of New York City, have assisted in the design and have handled all of the administrative tasks involved with the testing, correcting, and notification of final-examination results for a number of professional-certification programs.

Certainly not to be overlooked are the regional offices of the American Arbitration Association which could administer examinations in conjunction with the various educational branches of the Association, such as the National Center for Dispute Settlement in Washington, D. C. Additional personnel would be needed to staff such a testing program and there would be additional costs, but the costs could be offset by testing fees paid by the applicants.

Internships

If the testing route to certification were considered infeasible or inadvisable, the possibility of establishing an internship program could be explored. An internship would be of a set duration and under the supervision of a certified arbitrator.

Since one of the criteria for certification for experienced arbitrators would be a time commitment on their part to interface with

new arbitrators, the internship program could be designed to introduce and familarize the new arbitrator with the practical day-to-day requirements and pitfalls in the field.

The need for practical experience or exposure in a new field cannot be overemphasized. In the field of education today there is a definite trend toward giving students an opportunity to attain as much practical experience as possible while they are completing a formal course of study. Cooperative education has been an accepted educational model for a number of years in such areas as business, accounting, engineering, and law. Northeastern University in Boston is completely organized under the work/study concept of education; for example, it offers a five-year program under which an engineer graduates with a Bachelor's degree and at least one full year of experience, and a four-year program under which a lawyer receives a Juris Doctor degree and has a year of practical experience (and most likely a job).

A unique approach has been undertaken in Indiana where the Board of Bar Examiners allows law students to take the bar examination following completion of their second year of legal study. After passing the bar, these students pick a specialty, attend classes on that specialty for one semester, and then work in their area of specialization for the second semester. Upon successful completion of this practical phase of their legal education, they are admitted to membership in the Indiana Bar.

The Academy could consider a similar approach, emphasizing the practical side of education, in structuring a training and internship program.

Recruiting

The design of a recruiting program for arbitrators presents an interesting problem. Since most arbitrators rely on other sources of income than that derived from arbitration, the field is a part-time occupation (though a full-time commitment) for most practitioners.

The 1976 survey of members of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements of the American Bar Association's Labor Relations Law Section produced some insight into areas where some of the best labor arbitrators have been produced. Initial emphasis in recruiting should be given to these areas. Recruitment could be planned on a national basis and coordinated by the AAA regional offices, or it could be carried out by asking practitioners in the field to submit the name or names

of persons, with education and experience backgrounds similar to their own, as candidates for appointment or training as arbitrators.

A number of universities—Purdue, Loyola of Chicago, Michigan, and Cornell, among others—offer degree programs in industrial relations, and the AAA should undertake some college recruiting to plant the seed of interest in arbitration, supplemented by an education program emphasizing career opportunities in the field for lawyers, university professors, and representatives of both management and labor.

III. Conclusion

The need for developing sources of competent arbitrators has been established, and some methods of assuring the satisfaction of that need have been identified, but are open for further consideration. A comprehensive program of training, testing, or internship, coupled with an active recruiting effort, could achieve the goals of the American Arbitration Association and the National Academy of Arbitrators, namely, continued public service in the settlement of disputes.

Appendix B

RESPONSES TO QUESTIONNAIRE SENT TO 70 RECENTLY SUCCESSFUL ARBITRATORS

Question: What should a candidate for labor arbitrator do to gain acceptance?

Try to get on educational programs; meet as many labor professionals as possible; have a means of making a living while waiting to achieve acceptability.

There is no real answer to this. Everyone must do his own thing. Those with sense, taste, and restraint may have a better chance if exposed enough in the better forums.

Meet other arbitrators and lawyers at Bar Association meetings, IRRA, etc. Attempt to become listed by state agencies.

Become known to the parties on a personal and professional basis. Participate and attend conferences, education programs, etc. Assuming that one has the attributes to become a mainstream arbitrator, the key to acceptability becomes exposure.

Become known to the practitioners in the field either by government service, seminar, or conference participation. Exercise patience and fortitude.

Patience. Be professional, both in the conduct of the hearings and in the writing of opinions and awards.

The following are most likely to be useful: go to a good law school and then get to know the local fraternity of labor lawyers through the Industrial Relations Research Association and other labor meetings; run hearings effectively and spend a lot of time on early awards, without billing for full time spent on preparation.

Demonstrate knowledge in field.

Must have experience in the field. Have an opportunity for exposure and be listed.

Parties hesitate to use a person they do not know. Perhaps the answer, partially, lies with the Association. Sessions where parties and arbitrators meet should be scheduled.

Internships are a good way to break in, but hard to find. Steel industry is an excellent starting point.

Be well versed in the field of collective bargaining. Knowledge of federal and state labor laws.

Serve as a neutral in mediation and gain trust and confidence of parties.

Serve an apprenticeship with a busy arbitrator.

Get experience representing both labor and management. Serve as an ad hoc fact-finder or mediator. Make contacts with labor and management representatives and neutrals through such organizations as IRRA.

The candidate should somehow acquire training and experience in the labor-relations field; should demonstrate an active and sincere interest in being an arbitrator and should write well-reasoned, concise, and timely opinions when selected.

A great deal of voluntary work in all industrial relations areas; i.e., schools, committees, speaking engagements.

Get exposure and experience in arbitration through whatever means are available.

Become an apprentice to a full-time arbitrator.

Meet the people who appoint arbitrators. Successfully complete a comprehensive training course.

Develop knowledgeability in the field and exposure to parties.

Serve an apprenticeship with accepted arbitrators.

Work as an apprentice with an established arbitrator.

Should have exposure and acquire a reputation for being fair and knowledgeable.

Attend and participate in professional meetings with labor and management groups and publish relevant articles.

Have experience, preferably as a neutral, in labor relations for at least 10 years.

Gain exposure in nonarbitral setting. When selected for the first few cases, be firm, courteous, and demonstrate knowledge, understanding, and integrity. Permit full development of the parties' cases. Write up the parties' arguments fully and persuasively, whether they win or lose.

A labor arbitrator needs contacts and acceptability by those who select arbitrators. Any activity that increases an individual's exposure to those who select arbitrators and builds confidence in that person's ability helps that person gain acceptance.

Extensive experience in the field should be a prerequisite. An apprenticeship is most helpful for a neophyte.

Be seen and be heard from. Exposure is important to let people know who you are.

Teach, lecture. Can get wonderful training serving as mediator or fact-finder in public sector.

Listing by agencies; exposure at seminars; improve knowledge of labor relations.

Continued auditing of arbitral hearings with accepted arbitrators provides personal contacts with both parties. The parties will not select a neutral that they haven't had a chance to meet.

Before becoming an active candidate, obtain maximum experience in labor relations with either management or unions. Thereafter, activity in professional organizations.

Prepare professionally. Make contacts, work with an experienced arbitrator.

Should have either academic training in labor relations or experience in the field. Good idea to attend arbitration conferences to meet representatives of the parties.

Need initial experience as advocate in labor relations.

Develop a working relationship with other arbitrators. Make sure that awards are well reasoned and consistent with arbitral authority.

Try to apprentice with an experienced arbitrator.

Candidates must attend hearings with an arbitrator. The arbitrator should take time to teach the candidate how to arbitrate and expose the individual to the parties.

Acquire training and skills; establish neutrality.

Develop contacts with labor and management at conferences, teaching situations, and any other occasions. Study the literature intensively, so the initial cases will be well handled. Attend hearings with an experienced arbitrator, to learn procedure and the types of problems that can arise. In addition to AAA and FMCS, state and local agencies use mediators and fact-finders. Any appointments of this nature, or teaching assignments, gain helpful exposure and experience.

Establish an identity in labor relations, preferably as a neutral. Make availability known to practitioners who are in a position to select an arbitrator. Become a member on all possible panels of arbitrators.

Patience is a must. A new entry must have another source of income for at least the first five years. Expertise in a specific field, such as pensions, insurance, or industrial engineering, would be helpful as an opening wedge. Issues in the public sector, particularly in the field of education, require specialized knowledge. This field appears a little more open as many of the experienced arbitrators apparently avoid public-sector disputes because of the legislated limit on per diem. A good working knowledge of industrial-relations practices is helpful, plus an understanding of contractual language and its interpretation.

Publish.

Gain experience with a professional position in labor relations that will involve working out problems with labor-relations practitioners. Over a period of time, this builds into a reputation and creates willingness on the part of others to accept a candidate as a neutral who has demonstrated a potential for understanding decisional factors.

Practice labor relations for labor and for management.

The reputation of being completely objective, with an open mind and for deciding fairly and independently.

Write good decisions, one at a time.

Assuming appropriate education and experience, seek a neutral position (i.e., college teaching, government agency) from which to operate.

The first imperative is to become acquainted with the people who make the decisions concerning who shall serve as arbitrator. If you are unknown to them, you are going to wait a long time for an appointment.

Attend training sessions sponsored by various agencies. Work in personnel department for either company or labor organization.

Comment—

CHRISTOPHER A. BARRECA*

I believe that it is worthy of note at the outset that Bob Coulson is in very good company when he howls over the seemingly dead horse of arbitrator certification because, as he mentioned, Benjamin Aaron came to much the same conclusion on the question of whether arbitrators should be "professionalized" or "licensed" in his after-dinner speech to the Academy last year.[1] Nevertheless, the question of whether this horse is truly dead apparently continues to fascinate the Academy—perhaps this year because of the American Bar Association study of the qualifications and training of arbitrators.

In any event, if I have correctly interpreted Bob Coulson's response to the question, "Should Arbitrators Be Certified?"—his answer is that "arbitrators should not be certified in the traditional, formal way." Instead of such traditional, formal certification, he suggests that the less formal listing procedures currently followed by the American Arbitration Association and the Federal Mediation and Conciliation Service (the two national appointing agencies) should be continued.

Now, I find that *Webster's Dictionary* defines "certified" as the condition of being "endorsed authoritatively."[2] And I suppose that Bob Coulson would agree that listing by the AAA or FMCS is a form of certification. Therefore, on a scale of one to ten, with ten being the most formal certification procedure, his view, as I see it, would be close to, or at least closer to, one.

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[1] Aaron, *Should Arbitrators Be Licensed or "Professionalized"?* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 152.

[2] Webster's Dictionary (Springfield, Mass.: G. & C. Merriam Co., 1948), at 166.

In trying to put this whole question into better perspective, I am reminded of the story of the middle-aged man and young woman at a Washington cocktail party. After an exchange of some pleasantries, the man asked the young woman if she would be willing to spend the night with him for $10,000. Flattered by this evaluation of her charm and other endowments, she enthusiastically said that she would be delighted to do so. The young woman's eagerness caused the older man to reconsider the situation and, apparently not troubled by the nice legal question as to whether the young woman's response was a binding acceptance of a valid offer or merely an offer on her part in response to his invitation to an offer, the man then said, "Well, how about $10?"

Crushed by the turn of events, the young woman indignantly asked the older man, "Just what do you think I am?"—to which he replied, "We've already established that. Now, we're just quibbling about price."

As a practical matter, I see the question, "Should Arbitrators Be Certified?" in much the same light. The question is not really whether, but how much. In other words, what should be required in terms of qualifications by the American Arbitration Association or by the FMCS to be listed as a labor arbitrator on the respective rosters and, consequently, to be held out to the parties as such?

In his remarks Bob Coulson spelled out in a summary way what is now required to be listed as a labor arbitrator on the panels of the American Arbitration Association. I can report that his brief summary is verified in an AAA pamphlet entitled "Labor Arbitration Procedures and Techniques."[3]

Because I have been a member of the Arbitration Advisory Committee of the Federal Mediation and Conciliation Service, I know firsthand of the anguish that Larry Schultz and his associates have recently experienced in developing suitable standards for admission to the FMCS roster of arbitrators. Interestingly, in the newly published regulations concerning the standards of eligibility of arbitrators for admission to the FMCS roster, after listing several general criteria involving technical competence and ethical considerations, the regulations state, "Applicants who qualify under the criteria for admission to the FMCS roster of arbitrators shall be certified by the National Director of FMCS for a period of two years."[4]

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[3] *Labor Arbitration: Procedures and Techniques* (New York: American Arbitration Association, 1973), at 12.

[4] *Policies, Functions & Procedures* (Washington: Office of Arbitration Services, Federal Mediation and Conciliation Service, 1977), §1404.2(a)(7).

With respect to these "certification" procedures, my reading of a number of articles indicates some frustration with the selection procedures of appointing agencies, particularly on the part of those who see themselves on the outside looking in. For instance, one writer describes the embarrassment of having nothing to put in the bulk of the space on application forms of FMCS and AAA which pertain to "arbitration decisions" and chagrin at the response that "no formal training was in progress or was anticipated in the near future."[5]

Quite apart from the disappointment of not being included on these formal rosters of arbitrators is what some regard as the even more frustrating situation of not being selected by the parties themselves. It is a truism to state that a small percentage of those listed on rosters of "certified" arbitrators hear the great bulk of cases. Yet, it is also a truism that there is a growing shortage of acceptable arbitrators.

It is because of this shortage of acceptable arbitrators that General Electric and the International Union of Electrical Workers participated in the pilot arbitrator-development program, which Bob Coulson mentioned in his remarks, along with FMCS, AAA, and Ted St. Antoine and his people out at Ann Arbor. Our objective in that pilot program was to try to bring together all of the elements involved in the process—including nomination by appointing agencies, selection by parties, training by experts, actual experience as arbitrators, and publication of awards—so that the participants will have a better chance at acceptability when the program is over.

One of the letters I received concerning this pilot program was from an irate individual who described himself as a labor arbitrator and who challenged the need for any such development program. The letter, written on very fine stationery, flatly states that there are plenty of "acceptable" arbitrators available, like himself, who are just not being used by the parties. Perhaps the word "acceptable" needs further definition.

This Academy, of course, may itself be regarded as another degree of certification. In preparing for today's meeting, I came across the book compiled by Jean McKelvey in 1954 entitled *The Profession of Labor Arbitration* and found the speech delivered by the late Edwin E. Witte at the first annual meeting of the National Academy of Arbitrators in 1948, from which Bob Coulson has al-

[5] Nordlund, *The Arbitrator Development Process: An Outsider View*, 30 Arb. J. 34, 37 (1975).

ready quoted. Interestingly, with respect to the question of certification, Mr. Witte said:

> "The National Academy of Arbitrators will serve a most useful purpose if membership in the Academy comes to be regarded, as I believe it is already, as a badge of distinction. Constituted as it is, election to the Academy is equivalent to *certification* [emphasis added] of competence by leaders in the profession. In doing this, the Academy will stimulate beginners in arbitration to give their very best efforts and make available to employers and unions a reliable and easily ascertainable list of qualified labor arbitrators."[6]

In his remarks, Bob Coulson observed, "The sentiment in favor of a certification program is expressed mainly in the returns to a recent questionnaire sent out by an American Bar Association committee." With respect to that ABA survey, he also observed, "The ABA questionnaire was designed by lawyers."

I frankly suspect that he may have been baiting me with that comment because he, of course, knows that I was one of the people who "designed" the questionnaire. Moreover, along with the other ABA committee cochairman Max Zimmy, Bob Coulson and I will have to consider what to do with the survey results now that we have them.

So, snapping at the bait, I suppose that the first question to be answered is why a committee of the ABA should be conducting a survey on the qualifications and training of labor arbitrators at all. At the risk of presuming too much, our rationale was that labor-relations lawyers constitute one of the principal, if not the principal, groups of people selecting labor arbitrators to hear arbitration cases. Therefore, lawyers who practice in this field have a legitimate concern with regard to the availability of acceptable arbitrators.

On this question of the availability of acceptable arbitrators, whether or not the golden age of arbitration is coming to an end, as suggested by David Feller's presentation to this Academy in San Francisco last year,[7] "the golden age for arbitrators . . . is continuing," as Professor Feller also observed,[8] because the need for arbitrators continues to grow in both the private and public sectors. Moreover, as the average age of arbitrators hearing cases continues

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[6] Witte, *The Future of Labor Arbitration—A Challenge*, in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1954), at 17-18.

[7] Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, *supra* note 1, at 97.

[8] *Ibid.*

to rise, it might also be said that we are in the golden age of, as well as for, arbitrators.

In any event, in an advocate's role, I have a somewhat different view of the ABA survey results than does Bob Coulson, and I would like to share briefly with you a few of my reactions. First, I think it is significant that about half of the 400 lawyers on the ABA Committee on Labor Arbitration and the Law of Collective Bargaining took the time necessary to complete the original survey form. Even more significant, however, is that over half of the 6,000 members of the Section of Labor Relations Law were interested enough in this subject to respond to the expanded survey just completed. Incidentally, or perhaps not so incidentally, 131 nonlawyers (from a list supplied by the Academy) were specifically included in the expanded survey as a control group.

Analysis of the survey data is not yet complete. However, the raw data clearly suggest that lawyers in the labor-relations law field overwhelmingly favor a certification examination for labor arbitrators which would test knowledge of arbitration procedure and/or the substantive law of collective bargaining agreements. The actual count was 2,716 to 677. In other words, well over three-fourths of those surveyed favor such an examination. In this same vein, over 80 percent of the lawyers surveyed believed that the ABA should develop a policy statement with regard to the qualifications of labor arbitrators. More than 60 percent believed that the ABA itself should attempt to certify arbitrators as qualified or not qualified.

Now I am quite sure that many Academy members will disagree with these survey results. Yet the conclusions of the nonlawyer control group, supplied by the Academy, were not markedly different. On the question of the desirability of a certification examination, a surprising 82 percent of these nonlawyers favored such an examination. Perhaps even more surprising, 68 percent of the control group favored an ABA policy statement on the subject. However, only about 50 percent of these nonlawyers favored ABA certification.

Given these survey results, and even assuming that these results represent the parochial interests of lawyers, the obvious desire for a more objective measure of qualifications, as expressed by a substantial body of individuals who are actively involved in the process, should not be taken too lightly.

In another area of the survey, while over three-fourths of the lawyers believed that it would be at least desirable for labor arbitrators to have a degree from an accredited law school, only 21 percent of

them strongly agreed that labor arbitrators should have such a law degree. While 60 percent thought that admission to the practice of law should be a prerequisite for labor arbitrators, the lawyers surveyed divided almost equally on the question of whether an individual acceptable to the adversaries themselves, regardless of any other qualifications, should be recognized as a qualified arbitrator. At first blush, this last response seems at odds with the obvious thrust favoring certification. Perhaps, in fact, it is. However, when viewed in the context of private selection by the parties, as contrasted with selection from submitted panels, it may not be inconsistent at all.

On this point I suspect that most advocates would agree with Ben Fischer's often-expressed opinion that the parties should be able to select anyone they choose, on their own, to hear and decide a dispute between them. These same parties may demand a much different standard, however, when their contract requires them to select an arbitrator from a panel submitted by AAA or FMCS.

The survey also asked whether the ABA should take a position that qualification of an arbitrator to interpret and apply the terms of a collective bargaining agreement does not constitute qualification to interpret and apply federal and other statutes. Significantly, only 36 percent thought that qualification as an arbitrator constituted qualification to interpret federal and other statutes. In the nonlawyer control group, even less—only 20 percent—felt the same way.

Thus it would appear that both lawyers and the nonlawyers surveyed strongly support the so-called Meltzer view,[9] as well as Ben Aaron's admonition to arbitrators last year to "think small."[10] It would also appear that this conclusion in the ABA survey is consistent with the results of the empirical survey of arbitrators reported to the Academy by Harry Edwards in 1975.[11] If I am correctly paraphrasing Professor Edwards's conclusion from that study, the proper role of the arbitrator, irrespective of any broader personal competence he may have, is to interpret the law of the contract and not the law of the land.[12]

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[9] Bernard Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1.

[10] Aaron, *supra* note 1, at 158.

[11] Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 59-92.

[12] *Id.*, at 83.

Finally, on the survey results, almost everyone was in favor of encouraging the development and training of arbitrators. That now makes it unanimous for the various groups involved in the process.

If I had more time, I would quarrel with Ivar Berg's "instruction" that academic training is unrelated to on-the-job performance—perhaps because I still believe in the American dream that educational opportunity is truly the great class-equalizer in this country. By the same token, I would also quarrel with the conclusion that a more formal certification would necessarily work against increasing the number of minority and female arbitrators. It may be tougher to get into the club now.

In conclusion, I would like to leave you with a few questions instead of answers. First, is it relevant to this issue that the bulk of those listed on both national rosters are seldom, if ever, used? And, if you think so, even if these listings were pruned by tighter certification procedures, would the parties be willing to risk their cases to more inexperienced and unknown names? How does a new arbitrator break into the circle of acceptability if experience is truly the best qualification? Is there a need for arbitrator-development programs which include a commitment by the parties to use the trainees as arbitrators? Alternatively, are there enough Ralph Sewards in the Academy who would be willing to train the needed acceptable arbitrators one-on-one?

On the other hand, can the parties to a labor-arbitration proceeding be expected to ignore the implications of footnote 21 in *Alexander* v. *Gardner-Denver,*[13] with regard "to the weight to be accorded an arbitral decision" based upon evidence of due process, in an arbitration case with discrimination overtones? Likewise, can the parties ignore the lesson of *Anchor Motor Freight*[14] with respect to the impact of the duty of fair representation? Do these recent Supreme Court decisions dictate to unions and management more formality in arbitration proceedings and, hence, more formality in determining the qualifications of arbitrators?

Finally, in closing my comments on the question of whether labor arbitrators should be certified, I refer again to the story of the man and woman at the Washington cocktail party quibbling over price and simply say to all of you arbitrators: We all know what you are and, for the most part, we love you for it. Nevertheless, for the Academy, for the AAA and FMCS, and for the Bar as well, the issue remains: How much is enough?

[13] 415 U.S. 36, 7 FEP Cases 81 (1974).
[14] *Hines* v. *Anchor Motor Freight, Inc.*, 421 U.S. 928, 91 LRRM 2481 (1976).

Comment—

DEE W. GILLIAM*

I am in basic agreement with many of the positions taken by Mr. Coulson in his speech. I think that most of you would agree that certification has provided significant safeguards to the legal and medical professions. Labor arbitration, without taking anything away from it, is not a profession—at least not in the sense that practicing law or medicine is a profession.

Mr. Coulson suggests that advocates of certification claim that it can provide a genuine benefit where there is a need to insure that the public will receive uniformly high services or where practitioners grow concerned about their peer's below-standard performance. In the industrial-relations setting, the "public" or "consumers" would be those union and management representatives engaged in labor relations and arbitration. These individuals, generally, are most familiar with the arbitration process, including the technical procedures and terminology. On the other hand, the arbitrator frequently needs to be educated by the parties as to the technical operations, processes, and terminology of the plant or industry and their applicability to the provisions of the labor agreement in the matter at issue. Thus, arbitration differs significantly from the legal and medical professions where the "public" or "customer" knows little about the professional's work process, and the professional usually need not be educated as to the client's or patient's environmental situation.

The concern of the arbitrator's peers about below-standard performance is not particularly relevant as long as the parties are in control of the selection process. The selection process is complex, and in all probability it would not be significantly affected by peer-group evaluations. Most union or company representatives who have the task of selecting arbitrators have certain criteria, relevant to them, by which they measure potential arbitrators, and unrefined as these criteria may sometimes be, they do amount to a type of certification—a type of certification that is meaningful to the parties though perhaps not to academicians and arbitrators.

Mr. Coulson stated that "the demand for a more highly structured certification program has not been established." I wholeheartedly agree.

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He also discussed a 1976 survey of members of the ABA Labor Relations Law Section, and he questioned the results by pointing out, "The ABA questionnaire was designed by lawyers. It was mailed primarily to lawyers. The ABA returns represent the lawyers' response, not necessarily the view of their clients."

This survey is further in question by virtue of the fact that the clients, at least on the union side, often are not lawyers. Of course, none of the ultimate clients of arbitration is a lawyer—the ultimate clients of arbitration being the rank-and-file worker and the line foreman who must live with the arbitrator's ruling. Thus the arbitrator-client relationship is significantly different from the physician-patient or the typical lawyer-client relationship.

The ABA survey found that 75 percent of the management attorneys felt that labor arbitrators should be attorneys, and two-thirds favored a program of apprenticeship with an established arbitrator. An apprenticeship program can be very effective and has been used profitably by the Steelworkers on several occasions. Ralph Seward and Sylvester Garrett have aided greatly in the development of young arbitrators in their positions as chairman of the respective Boards of Arbitration of Bethlehem Steel and United States Steel Corporation. However, the success of this arrangement has not been due to the use of some detailed certification program or formal training or teaching program. The informal training supplied was valuable, but it must be noted that the selection of arbitrators to serve under Chairman Seward or Chairman Garrett was conducted with joint scrutiny by all three involved parties—the respective companies, the union, and Mr. Seward or Mr. Garrett.

Mr. Coulson implied in his speech that the lawyers are only one interest involved in the labor-arbitration process. "Parties seek something unique from labor arbitration, something different from what is otherwise available in court. . . . American unions and employers prefer to use private arbitration tribunals, molded to their own peculiar needs."

I wholeheartedly agree and would add that an arbitration hearing has great therapeutic value for both parties. The grievant generally feels quite relieved after he has had his chance to get whatever is bothering him off his chest by relating the matter to a neutral party. The foreman, I have been told by some management representatives, also feels better after the matter is discussed in arbitration. The grievant is apt to be more productive than he was while waiting for his grievance to be heard in arbitration.

Mr. Coulson noted the trend toward simplified arbitration procedures as an indication of the parties' preference for maintaining

control over the process and a defense of their right to select an arbitrator of their own choice: "In thousands of cases, parties have selected arbitrators who are not lawyers and have selected them over and over again, in preference to practicing lawyers, law professors, or arbitrators with legal training."

Again, I concur with Mr. Coulson. Sometimes certain individuals forget that unions and managements design and develop the arbitration procedure with great care. I, for one, would resent any outside person or group attempting to impose a modification of the arbitration procedure.

Mr. Coulson stated that "practical experience in collective bargaining may be the most important baggage that an arbitrator can bring to the table—more important than legal or academic requirements" and "in general, the competence of arbitrators will be achieved by practical experience, by self-study, and by a thoughtful understanding of what the parties expect from the process."

In addition, it should be emphasized that not all lawyers make good arbitrators. Especially undesirable is the lawyer who is so concerned with technical rules of procedure and evidence that the arbitration hearing is made unnecessarily complicated. The lawyer who is so concerned with technical rules of evidence and procedure that he cannot permit the parties to present to him a complete picture of the background and underlying cause of a bitter dispute may fail to give sufficient consideration to the real merits of the dispute. He may not take into full account the desirability of rendering an award based on the human element—that is, the gradually developing social convictions and social concepts as well as legal concepts.

One of Mr. Coulson's statements needs to be modified:"[W]hen the Steelworkers and the steel industry recruited arbitrators for their system of expedited arbitration, they selected young trial lawyers with no experience in labor relations." The sentence quoted mentioned only the steel industry. It should be noted that the following industries also have established expedited arbitration procedures: iron ore, metal container, aluminum, and portions of fabrication and nonferrous.

With regard to his reference to "young trial lawyers with no experience in labor relations," the following corrections and modifications are necessary:

> "They selected relatively young lawyers (not all of whom are restricted to a trial practice) *and law professors.* Although those selected *generally* have no *practical* experience in labor relations, each comes to expedited arbitration with significant credentials based on background, general

competence and interest. Thorough interviews of the would-be panelists were conducted, their resumes were carefully reviewed, and discussions took place with academic references and the Dean and/or Assistant Dean of the Law schools."

The expedited procedure was designed to be quick, informal, and inexpensive. Although for the most part the arbitrators selected were young lawyers, the purpose was to select those who would not be tied to legalistic rituals and those who could deal effectively with plant-level parties unaccustomed to presenting arbitration cases. Considerations in selecting arbitrators for these panels were ability to sift facts, ability to determine relative values of evidence, and ability to maintain order at the hearing. Prospective panel members were interviewed, and union and management participated jointly in making the selections.

It should be pointed out that the cases presented in expedited arbitration do not involve complex or novel issues; those cases that could be precedent-setting are specifically excluded from this procedure. The regular arbitration procedure is still used for such cases.

The freedom of the union and management to select an arbitrator is extremely important to our system of industrial dispute settlement. A certification program could adversely affect the free selection process of the parties. There is nothing to indicate that certification would provide anything better than that which the free-selection process has already provided—the overuse of a few arbitrators and the underuse of most arbitrators. If we eventually developed a certification system for arbitrators, would the next step be to certify all union and company representatives before they could present an arbitration case?

Comment—

MARCIA L. GREENBAUM*

In trying to put this whole question into better perspective, I am reminded of the story of the middle-aged woman and young man at a Washington cocktail party. After an exchange of some pleasant-

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ries, the woman asked the young man if he would be willing to spend the night with her for $10,000. Flattered by this evaluation of his charm and other endowments, he enthusiastically said that he would be delighted to do so. The young man's eagerness caused the older woman to reconsider the situation and, apparently not troubled by the nice legal question as to whether the young man's response was a binding acceptance of a valid offer or merely an offer on his part in response to her invitation to an offer, the woman then said, "Well, how about $10?" You know the rest of the story (particularly if you have read Christopher Barreca's paper on this subject, which begins on page 192 of this volume).

Three things should be kept in mind while reading my paper. First, if you find what I have to say is hard-hitting, I am batting "cleanup." Second, I am not an attorney. Third, some of my best friends and clients are.

While some would dispute that labor arbitration is a profession in the usual sense and prefer to describe it as a practice, craft, calling, or avocation,[1] the National Academy of Arbitrators has, since its inception, proclaimed arbitration a profession. Indeed, the published volume which contained selected papers from the first seven annual meetings was entitled *The Profession of Labor Arbitration.*[2] I suppose, professing as we do that labor arbitration is a profession, and given open season on professionals, it makes sense to question anew what makes one a professional arbitrator and whether there should be a "good peacekeeping" seal or some stamp of approval on those engaged in what is perhaps the only profession without any fixed entry requirements.

A number of professions have recently taken a more critical look at their requirements. Family-practice physicians, for example, are currently developing a program of periodic peer review of their practice. Even the American Society for Personnel Administrators has embarked on an elaborate accreditation program, including written examination, to demonstrate member mastery of a validated, common body of knowledge.

In his paper Robert Coulson addresses the question of whether labor arbitrators should be subject, as are members of other professions, to some form of official certification or licensing. He con-

[1] Benjamin Aaron, *Should Arbitrators Be Licensed or "Professionalized"?* in Arbitration – 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 152-53.

[2] The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1954).

cludes that such a requirement is not called for at this time and, indeed, might be more harmful than beneficial. I ageee—and not because I am afraid to bite the hand that sometimes feeds me.

Mr. Coulson told us what lawyers think. One might ask how arbitrators themselves feel about this. The only definitive expression was contained in the report of a 1969 survey of members of the National Academy.[3] At that time:

> "Eighty-five percent of the 200 arbitrators who expressed a definite opinion . . . opposed the institution of standardized entrance requirements for facilitating the acceptance of new arbitrators. The major arguments advanced by this group were that the field is too varied to yield itself to standardization and that inasmuch as it is the parties' right to select arbitrators on the basis of their qualifications, the profession should offer flexibility and diversity of training and experience. Others asserted that standards would not facilitate acceptance or change the attitudes of the parties and appointing agencies, but rather would tend to restrict entry to the field. Finally, it was argued that rather than risk the exclusion of desirable candidates by the institution of standardized requirements, the doors should be left open and the selection process would serve to eliminate the unfit. The remaining 30 arbitrators suggested that the employment of standardized entrance requirements would be useful: (1) in that rigid criteria would be in keeping with the responsibility of the profession; (2) so that aspirants will know what is necessary in order to become an arbitrator; and (3) in placing a visible imprint on the potential arbitrator which may contribute to his acceptability. Some of these arbitrators noted, however, that the requirements would facilitate acceptance only insofar as the standards met with the approval of companies and unions."

Mr. Coulson's paper is prompted in part by the results of the ABA Labor Relations Law Section questionnaires, sent first to the members of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, and second to the larger Labor Relations Law Section. It should be noted that this is not the first time that the ABA has taken an interest in the qualifications and training of arbitrators.

In 1961 its Committee on Labor Arbitration, reporting on "The Development of Qualified, Experienced and Acceptable New Arbitrators,"[4] said: "There is no adequate machinery for passing judgment upon the qualifications of arbitrators and communicating

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[3] *Survey of the Arbitration Profession in 1969,* Appendix C, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), at 280.

[4] *Report of the Committee on Labor Arbitration to the Section of Labor Relations Law of the American Bar Association,* Appendix B, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), at 243, 244, 246.

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." No mention was made of any need that arbitrators be attorneys.

It recommended that the ABA take the initiative in organizing a pilot program for the training of new arbitrators under the guidance and supervision of experienced, respectable arbitrators. It also recommended that "the ABA collaborate with the NAA, FMCS and the AAA in the formulation of certain minimal standards for arbitrators," which would be used to condition admission to the panels of the appointing agencies. While the committee was "convinced that the Bar must contribute to the development of a body of arbitrators equal to the responsibility entrusted to them," to my knowledge these recommendations were not implemented (except for some ABA participation in training programs).

Some 15 years later this committee surveyed its members. The majority responded that it was desirable to impose a requirement that arbitrators have law degrees, be lawyers, and pass certifying examinations. (Perhaps we arbitrators brought this upon ourselves by failing to heed the Biblical caveat: "Judge not, that ye be not judged.") As Mr. Coulson notes in his paper, the respondents to the questionnaire are attorneys. There is no evidence that their responses are representative of their clients' views. Ben Aaron, in his dinner address last year, attributed at least some of their response "to the natural propensity of any organization that can effectively enforce a closed shop to broaden the area under its control."[5] One may also ask whether the majority view expressed is simply an intellectual reply to a questionnaire, or whether it represents a hue and cry reflecting upon the qualifications and competence of existing arbitrators and/or a fear of future arbitrators.

Should Arbitrators Be Lawyers?

The question of whether arbitrators should have law degrees and be lawyers was considered and aptly answered by Ben Aaron. First, he noted:

> "Neither a law degree nor a license to practice law is a guarantee of competence as an arbitrator, or even as an advocate in an arbitration case. . . . A person may go through college and law school, and then

[5] Aaron, *supra* note 1, at 153.

> pass the bar examination, without ever having taken a course in, or been examined about, any matter falling within the purview of industrial relations, labor law generally, or arbitration in particular."[6]

Second he said that neither legal degree nor license is a "guarantee of informed perception and balanced judgment, essential elements in the qualified arbitrator's make-up."[7] In the wake of Watergate, I might add that it is also not a guarantee of integrity, another essential element.

Third, he said, "the basic subject matter of arbitration . . . is not the external public law, but internal, private law, a body of rules and practices that has gradually developed in a particular plant, enterprise, or industry."[8] Also relevant is Saul Wallen's statement in his devastating critique of Judge Paul R. Hays's "dissenting view of labor arbitration":

> "Labor arbitration is more than the interpretation of contracts. It involves their interpretation in the context of an on-going relationship in which the rights and wrongs are weighed against the parties' needs and aspirations which may transcend the immediate cause. It requires of the decider a sensitivity to the parties' whole relationship precedent and antecedent to the case at hand. This is not to say that such considerations dominate arbitral decisions. It is to say only that they may temper them in cases where other factors are in balance."[9]

This kind of "industrial jurisprudence," as Professor Aaron stated, "is not derived from the study of law," but rather "can be grasped only through direct observation and participation . . . a process of intellectual osmosis."[10]

It is noteworthy that, despite this, the carefully selected participants in recent training programs, such as that of GE and the IUE, have been primarily lawyers. The steel industry expedited-arbitration system has, as the prior speakers noted, also drawn its arbitrators from young trial lawyers with no experience in labor relations.

I find this increasing emphasis on lawyers and law degrees somewhat ironic. In going back through the Academy volumes I found much discussion in our early meetings on the need to keep the procedure informal and nontechnical, with no need for party repre-

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[6] *Id.*, at 154.
[7] *Ibid.*
[8] *Ibid.*
[9] Wallen, book review of Paul R. Hays, *Labor Arbitration: A Dissenting View*, 81 Harv. L. Rev. 510 (1967).
[10] Aaron, *supra* note 1, at 154.

sentatives to be attorneys and certainly no need for the arbitrator to be an attorney.[11]

In 1961 Sylvester Garrett spoke on "The Role of Lawyers in Arbitration," stating: "Only a few decades ago there was widespread belief that lawyers had no legitimate place in collective bargaining or arbitration. By training and experience, it was felt, they were stuffily conservative, enamored of formalism, wordy, devious, overly technical, and utterly unable to comprehend, let alone conform to, the overriding necessities of the collective bargaining relationship."[12] He noted, however, that "as most attorneys who became involved seemed to adapt to the new medium, this prejudice became less prevalent."[13] Now it appears to be tilting in the opposite direction.

There is no doubt that the legal backdrop against which contracts are presently negotiated has become increasingly complex. Collective bargaining agreements have reflected this, growing longer and becoming more entangled in the new social legislation. However, this is not a new phenomenon, but rather a continuing one. In *Spielberg*[14] and *Collyer*,[15] the NLRB sought to place an increasing burden on arbitrators to be cognizant of and apply, not only the law of the shop, but also the law of the land. Title VII, *Gardner-Denver*,[16] ERISA, OSHA, and a host of federal, state, and local statutes and regulations have expanded this body. This may be reason for arbitrators to be familiar with related law. However, a training program and/or course in labor law and related social legislation would suffice. It is not necessary to be a lawyer, so long as the parties and the arbitrator do their homework on the particular issue. Arbitrators, when faced with difficult questions, have proven their ability to rise to the occasion in the past, and there is no reason to assume that they (we) will not do so in the future. There also have been strong arguments in recent years for arbitrators to stick to the

[11] See John Sembower, *Halting the Trend Toward Technicalities in Arbitration,* in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 98-111; Harry Platt, *Current Criticism of Labor Arbitration,* in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), vii-xix. Also see *Creeping Legalism in Arbitration,* 13 Arb. J. 129 (1958).

[12] In Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), at 102.

[13] *Ibid.*

[14] *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

[15] *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971).

[16] *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 7 FEP Cases 81 (1974).

contract and leave the law to the courts,[17] where it is possible to do so.

The fourth reason for not making legal degree or license a requirement is that doing so would, as Ben Aaron noted, "deprive the parties of the services of a number of extraordinarily able persons."[18] While Academy members are rather well educated (the 267 members who responded to the most recent survey held 624 university degrees),[19] and somewhat more than half hold law degrees, only 20 percent are practicing attorneys.[20] Imposing such a requirement, particularly on existing arbitrators, would greatly diminish the supply—and at a time when the parties are calling for expansion of our number.

Fifth, if particular parties desire an attorney as an arbitrator for a particular dispute, or even for all of their cases, they are free to select one or more. There is an ample supply of lawyer-arbitrators and no apparent reason to impose this requirement on all arbitrators, whether established or aspiring—or for that matter on all parties, some of whom may not want a lawyer-arbitrator. Indeed, the frequent selection of nonlawyers as arbitrators is itself an expression of the view of the parties.

Should Arbitrators Be Certified?

This brings me to a more important reason for not imposing a legal requirement on arbitrators, which applies to the matter of certification as well.

Arbitrators are unique. We are called upon to serve as neutrals in an adversary proceeding where one party's pleasure usually is its opponent's pain. Selection is made, not by political appointment (as in the case of judges) or by a single person or monolithic group (as in the doctor-patient or lawyer-client relationship); rather, it is by two parties with competing and countervailing interests. As Gabriel Alexander noted: "It is basic to voluntary arbitration that in the parties, rather than in any appointing

[17] Bernard D. Meltzer, *The Parties' Process and the Public's Purposes,* and David E. Feller, *The Coming End of Arbitration's Golden Age,* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 46-60 and 96-126. See also Feller, *The Impact of External Law Upon Labor Arbitration,* in The Future of Labor Arbitration in America (New York: American Arbitration Association, 1976), 83-112.

[18] Aaron, *supra* note 1, at 155.

[19] *Attachment: Tabulations and Computations Made From the Committee's Questionnaire,* Appendix F in Arbitration—1976, *supra* note 17, at 378.

[20] *Id.,* at 378, 379.

agency or learned society, shall repose the ultimate power to set standards for qualification."[21]

It is the parties who select arbitrators. Tom Christensen stated at the recent Wingspread Conference: "The talents of the arbitrator are judged by the affected litigants in the very process of selection and subsequent reselection or rejection."[22] This process, which involves a system of checks and balances, is its own stamp of approval—in fact, a form of certification. The distinguished nonlawyer-arbitrator Saul Wallen (with whom I served an apprenticeship) would agree. He said: "Arbitrators who decide the majority of cases . . . , the ones who . . . are called back time and again to serve, have met a test no judge is called upon to meet—the test of the market place, the judgment of those in a position freely to contract for their services."[23] Indeed, if one is to sustain a career as a labor arbitrator, she or he must meet this test repeatedly. As Boston lawyer Sam Angoff said to one arbitrator: "All arbitrators are expendable. That's what's meant by a license to practice labor arbitration." (This has been referred to as the "porno theory" of arbitration, that is, what is acceptable is anyone or anything two consenting parties want in the mutual privacy of their own hearing room.)

The Academy implicitly recognized this unique nature of our calling in its first Code of Ethics. It did not list any specific qualifications for the office of arbitrator, but rather broadly stated: "Any person whom the parties or the appointing agency choose to regard as qualified to determine their dispute is entitled to act as their arbitrator."[24]

Thus, the first reason for opposing certification, licensing, accreditation, or the like, is that it is antithetical to a process of voluntary labor arbitration based on the exercise of freedom of choice by the parties who use the process.

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[21] Alexander, *Evaluation of Arbitrators: An Arbitrator's Point of View,* in The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), at 94.

[22] Thomas G. S. Christensen, *Private Judges—Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act,* in The Future of Labor Arbitration in America, *supra* note 17, at 63.

[23] Wallen, *Arbitrators and Judges—Dispelling the Hays Haze,* in Southwestern Legal Foundation, Labor Law Developments, Proceedings of the 12th Annual Institute on Labor Law (Washington: BNA Books, 1966), at 166-67. Reprinted in 9 Cal. Mgt. Rev. 17-23 (Spring 1967) and in The Saul Wallen Papers: A Neutral's Contribution to Industrial Peace, ed. Byron Yaffe (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, 1974), 26-37.

[24] *Code of Ethics and Procedural Standards for Labor-Management Arbitration,* Appendix B in The Profession of Labor Arbitration, *supra* note 2, at 154.

Second, as noted by Ben Aaron, licensing based on examination would be "no guarantee of even minimal competence. The nature of the arbitrator's function is such that an examination . . . would necessarily focus almost entirely on relatively minor procedural questions," and "a passing grade would not necessarily demonstrate competence in dealing with the bulk of arbitration work."[25]

Third, certification is usually invoked primarily to protect the consumer, who supposedly is not expert enough or lacks the necessary information to evaluate the quality of available services. Our labor and management consumers are knowledgeable and have a variety of methods for determining the quality of available arbitrators.

It is noteworthy that the 1972 survey of NAA members[26] showed that approximately 25 percent of their caseload emanated from permanent umpireships. Presumably, parties selecting permanent umpires have researched the qualifications of their appointees and select those who are qualified and acceptable to them. There is no need for an elaborate certification procedure to protect them.

Of the remaining 75 percent, which represented ad hoc cases, 45 percent were direct selections by the parties themselves, and 55 percent were selections or appointments through agencies, with the AAA and FMCS heading the list. Parties who choose arbitrators directly also may be assumed to be selecting persons whose qualifications are known to them. Those who use the various agencies select arbitrators who are subjected to a two-fold screening process: first, that of the agency on whose panel they are listed, and second, by the parties who select from the list or lists submitted to them.

Fourth, these evaluation procedures serve, in effect, as a certification process: (1) direct selection by the parties, as noted above, (2) admittance to the arbitration panels of the appointing agencies, and (3) admission to the National Academy of Arbitrators.

Academy Requirements

In 1948, then Academy President Edwin Witte noted that "constituted as it is, election to the Academy is equivalent to a certification of competence by the leaders in the profession."[27]

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[25] Aaron, *supra* note 1, at 155.

[26] *Survey on Availability and Utilization of Arbitrators in 1972,* Appendix F in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), at 266-67.

[27] Witte, *The Future of Labor Arbitration—A Challenge,* in The Profession of Labor Arbitration, *supra* note 2, at 17.

Since its inception, the Academy has been concerned with the standards for arbitrators. Our constitution and bylaws state: "The purposes for which the Academy is formed are: To establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis." To this end the Academy has promulgated a Code of Professional Responsibility and has set standards for membership, which include three basic criteria:

1. "The applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities."
2. "The applicant should have substantial and current experience as an impartial arbitrator of labor-management disputes." (This standard has been interpreted to mean approximately 50 cases in the most recent five years.)
3. "Membership will not be conferred upon applicants primarily identified as advocates or consultants for Labor or Management in labor-management relations."

Obviously these criteria are based, at least in part, on the other two types of evaluation. To become a member, a candidate must demonstrate continued acceptability, evidenced by caseload and references, which means in effect that she or he must be selected by parties and/or listed on agency rosters.

Agency Requirements

Both the AAA and the FMCS have fairly stringent requirements for admission to their panels. Indeed, in April 1976 the FMCS revised its standards of eligibility of arbitrators for admission to and retention on its roster.[28] The revised standards require conformance to the Code of Professional Responsibility, and state: "All applicants and arbitrators . . . must be able to demonstrate acceptable ability in analysis, recommendations, and decision writing," to conduct a fair and impartial due-process hearing in an orderly manner, and to "be physically and mentally equipped to withstand the tensions of an adversary proceeding, and be able to speak and write in a clear and concise manner." "Applicants also should be able to demonstrate experience, competence, and acceptability in a decision-making role in the solution of labor relations disputes."

[28] *Policies, Functions & Procedures* (Washington: Office of Arbitration Services, Federal Mediation and Conciliation Service, November 17, 1976).

Actual arbitration experience is preferred, with frequency, complexity, and variety of issues taken into account. Those who do not possess these qualifications may substitute other relevant experience and/or participation in acceptable orientation and training programs for arbitrators, examples of which are spelled out. Party advocates or representatives generally are not eligible. There also is a requirement that arbitrators "keep current with developments that are relevant to arbitration practice." The FMCS intends to certify for two years applicants who meet these qualifications. Those currently on the roster will be certified for three years "following an evaluation of their continuing compliance with the standards." The Service plans periodic review thereafter.

Survey of Appointing Agencies

Agency listing procedures also constitute a form of certification of arbitrators. If they are adequate, then we *can* indeed lay this dead horse to rest. To assist in making such a determination, I sent a questionnaire (Appendix C) to 53 private and governmental agencies and boards in the United States and Canada, who employ arbitrators as members of a board or on their staff, appoint arbitrators from a roster, and/or maintain a panel list from which parties select arbitrators. Some of these agencies maintain panels only for interest-arbitration cases, although the overwhelming majority are concerned with grievance arbitration.

These agencies, to whom I promised confidentiality for their responses, include the American Arbitration Association; federal agencies such as the U.S. Federal Mediation and Conciliation Service, Labour Canada Mediation and Conciliation Service, and the Canadian Public Service Staff Relations Board; a myriad of state and provincial departments of labor, agencies, and boards in both the public and private sectors; and some public-sector agencies at the local level, such as the Office of Collective Bargaining in New York City. Of the 53 questionnaires mailed, 29 were returned; of these, four were not applicable for several reasons. One indicated that its seven panel members are appointed by the President of the United States to resolve impasses in the federal sector, and that while most of the present members are labor arbitrators, the respondent was unaware of the specific criteria used by the White House in the selection process. Another said he was unable to complete the form since all appointments of arbitrators to the state board were made by the governor of the state. There were 25 usable

responses, 20 from the U.S. and five from Canada. I want to thank all those who, in this business of seemingly endless questionnaires, took the time to fill out mine and even appended detailed explanations.

A review of the responses indicates, as you might surmise, that there are no uniform requirements or qualifications for placement on the labor arbitration panels of appointing agencies. Of the 25 agencies responding, five indicated they had no specific requirements.[29] The remaining 20 gave responses varying from a detailed list to general statements such as "some experience in labor relations preferably as a neutral," or "qualified by experience and training in the field of labor management negotiations and arbitration." The most commonly listed requirement was "considerable experience in collective bargaining or labor relations, including front-line participation." The second most prevalent requirement listed was "knowledge of labor relations."[30] Some indicated that applicable to this were experience as an advocate for one party or both, an academic background or position in labor relations or labor law, and/or experience with a related government agency, for example, the NLRB. Some also cited experience as a neutral, or listing on the panels of other agencies, particularly AAA and FMCS, or membership in the Academy.

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[29] One respondent said that the only qualification is nomination by the governor of the state and approval by the executive council, and added: "There are no substantive requirements as to experience, although it is helpful." Another, a tripartite public-sector agency, indicated that applicants to its panel must meet unanimous approval of the tripartite board. Another noted that while it had no requirements, 98 percent of those on its lists have labor/management experience and/or have presented cases in arbitration, although they may not have actually served in the capacity of arbitrator. Another respondent, without specific requirements, said that most candidates are recommended by employers or unions, have law degrees, or have academic or practical experience in the field of industrial relations. And the last said that the Minister of Labour appoints arbitrators and maintains an unofficial list heavily weighted with lawyers.

[30] Other requirements cited with less frequency were: impartiality, sense of fair play and justice, neutral posture at time of application, reputation in the field, knowledge of legal procedures and ability to analyze problems, sound legal judgment, knowledge in depth of the theory and practice of labor law, ability to conduct a due-process hearing (some added, "in a kindly but firm fashion"), ability to write so clearly that reasons will be understood by the parties, quality of decisions, completion of a previously recognized orientation and training program with an established arbitrator or under the sponsorship of a university, local bar association, or joint labor-management association, or, in the alternative, demonstrated arbitration experience, showing frequency, variety, and complexity of issues. One respondent obtained its panel members from recommendation by provincial Departments of Labour and other government authorities. A more specific question was asked on whether the respondent required experience (academic or practitioner) in labor and industrial relations. About half required academic experience, with one noting that the academics were expected to have experience teaching labor law. Slightly more than half (12) required experience as a practitioner. One respondent noted that exclusively academic experience was insufficient and a balance was needed.

Half the agencies imposed a requirement that candidates have past experience in deciding grievance-arbitration cases; half did not. One, which had no requirements, noted that few applicants were approved without such experience. In response to the question of how many prior cases were required, four agencies said they had no fixed number; one said two; another said three or four; one specified six; one said "substantial," including submission of five recent awards; and another said "sufficient numbers to show a diversity of industries and issues."

The agencies also split almost evenly on whether they checked on the issuance of awards, with 11 indicating that they did, 12 that they did not, and one stating "sometimes." The methods for checking on awards varied. Three required submission of five awards; two merely requested copies; several checked with the AAA or looked in the AAA or BNA publications of awards; and two others required a personal interview with submission of awards at that time. In Canada, several agencies noted that the labor code requires that awards be filed with the government agency, and they checked these files or consulted with provincial authorities and various services publishing awards.

The respondents divided almost evenly (11 yes to 13 no) on whether they distinguished between experience in grievance arbitration as opposed to interest arbitration, fact-finding, and/or mediation. Several noted that grievance arbitration was given more weight. Others, who appointed interest arbitrators only, gave this more weight. Fact-finding was deemed relevant, and mediation tended to be given less weight, with one respondent noting: "Some mediators may not have writing skills or the 'guts' to make a final and binding decision."

The agencies were asked whether they barred those who have *recently* served or *currently* serve as advocates or representatives of one party or the other. On the question of recent service, the majority (17) said this was not a bar, and seven said it was, with one indicating this was so only if the person represented parties falling under the jurisdiction of the public-sector agency. On the question of current service, the overwhelming majority (17) said this would be a bar, and seven said it would not. One of those who generally barred current representational experience said this was not a bar if the work was "merely occasional as distinguished from primary." Agencies barring those who perform representational work were asked how long a candidate must be "neutral" before he/she would be accepted. Five said there was no fixed time, one said a reasonable

period, and nine indicated periods ranging from six months to two years, with one year being the most commonly cited. Other responses were: "The mutual acceptability to parties determines this," and "when in our judgment inclusion on a panel will not preclude possible selection."

All of the respondents indicated that they did not have a minimum degree or educational requirement. Several noted that they expected applicants to be college graduates, and one said that all appointments to date have had strong academic records (which I suspect is the experience of most agencies). All agencies accepted nonlawyers save one, which indicated that to date only lawyers or law teachers have been appointed. All accepted those who were college graduates or even just high-school graduates. When asked if they would accept individuals who were not at least high-school graduates, most said "yes," some indicating that it depended upon the experience and expertise of the candidate.A few indicated that they had not been faced with such an applicant, and two said that if they were, lack of a high-school diploma would bar acceptance.

Twenty-two agencies had no minimum or maximum age requirement. One said that it had a legally imposed maximum of 70; another that its limits were 25 to 75, but that the minimum was not rigid. A third indicated that its experience requirement generally precluded the very young. And a fourth noted that it would not accept "those who show signs of senility at any age." No agency required that those on its panel pass an examination.

More agencies required references (15) than did not (8). Some had no fixed number, others required between one and four, in four major categories: other neutrals, labor representatives, management representatives, and other, which included governmental agencies. Twelve agencies responded that they checked references, two said they did not, and two replied "sometimes." Some indicated that while references were not required, they often were submitted. The methods for checking references varied. Two required written responses, with one of these always checking all labor and management references, and others only as deemed necessary. Some checked references by mail, some by phone, others by informal word of mouth. Some checked with other governmental agencies, or AAA or FMCS.

Most of the agencies (20) responding did not employ staff arbitrators, but rather used people on an ad hoc basis. Four agencies did employ staff arbitrators full time. Of these, only one required that they pass a job-related examination. This examination gives the

facts of a rights arbitration case, with applicable contract language, and asks that the candidate write an award with supporting reasons. One agency employed only one full-time staff arbitrator who served as chief adjudicator and deputy chairman. One used staff people only for med-arb cases. Another had staffers who performed a variety of functions besides arbitration, and as a result were required to be licensed attorneys.

Fourteen agencies indicated that they had no training program for arbitrators, with one indicating that a program was in the process of development and another that it cooperated with various universities in occasional arbitration seminars. Of the nine agencies who reported training programs, one indicated that it cooperated with the AAA, another agency, and a university in a one-shot training program and added the graduates thereof to its panel. Another stated that it periodically held seminars for its panel members after admission to the panel, and a third indicated that its program was only for staff members. The programs ranged from simply having the trainee sit as an observer in several cases, to a plan for on-the-job training, including accompanying a mediator once weekly for a year, observing six arbitrations, and preparing four mock awards.

In response to a question requesting reasons why aspiring arbitrators have not been placed on panel lists, agencies most frequently noted lack of relevant experience or qualifications, and advocate or consulting posture. Some also cited lack of neutrality ("known bias"), references not satisfactory, lack of geographical proximity, and excessive fee.

With respect to other requirements (for example, political connections, etc.) or other screening devices, 15 agencies indicated they had none. One noted that use of political connection was verboten. Another said that political reference may result in exclusion, and a third responded, "I can state categorically and unequivocally that professional neutrals are utilized and political connections are not a basis" for appointment. Of the four agencies that used other screening devices, those mentioned were interviews, the necessity of unanimous approval by the labor and city members of the tripartite board, and, in one case, approval by the five employers in the public service and the 16 certified bargaining agents.[31] One agency

[31] One respondent had a requirement until 1975 that its board be comprised of four members representing employee interests and four representing employer interests. Another respondent said that it preferred a representative balance of the community and therefore encouraged women and minorities, but not white males, to apply—but also noted that it did not discriminate against white males if they did apply. One respondent reported that it was up-

noted that it had some people on its panel who were no longer named on lists sent out, either because they were put on the panel for some political connection or they had proved to have low acceptability and their names had not been removed. (I suspect this is true of other agencies as well.)

In response to the question, "Do you think there is a need to have formal certification or accreditation for labor arbitrators?" seven agencies said "yes," 15 "no," and three were essentially undecided. Of those who responded in the affirmative, one said "but the criteria must first be established"; another stated, "if the proper vehicle can be found," as "this is supposed to be a layman's court." Of those who replied in the negative, one indicated it was leary of who would control it and thought the "NAA closed shop" was "bad enough," and "the same for the FMCS." Another said "no" because it becomes "self-selecting." Of the three who were undecided, one said, "It may be desirable, but is not essential."

If the ABA finds some of these responses lacking, it seems to me that the place to begin is not with some uniform certification program, but rather with the agencies themselves, as the ABA committee suggested in 1961. Perhaps this is an appropriate topic for an annual meeting of the Association of Labor Mediation Agencies, of which most of these agencies are members.

Other Concerns

Should certification become more than an academic matter, it would raise such questions as: Will it improve the practice or profession of labor arbitration? Who would do the certifying? Is it something the Academy itself should undertake? How would it be funded? What standards would be set for certification? Would an examination be required, and if so, can one test for knowledge of arbitration procedure and substance? Should there be a periodic review of arbitrators even after they have been certified? How will the program be enforced? How do you decertify or disbar an arbitrator? And, will certification lead to "bootleg" arbitration?

We should remember that up to now the overriding problem has been not so much whether the supply of arbitrators is competent, but rather whether it is adequate. This concern was expressed as early as the 1948 annual meeting, when President Witte in his ad-

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dating its present system. Another said that its budgetary requirements simply did not permit it to pass judgment on, or review the background of, applicants in the manner suggested by my questionnaire.

dress warned that "the further progress of industrial arbitration depends upon" the development of "a large group of qualified and experienced arbitrators."[32] It has been echoed repeatedly over the years. At the 15th annual meeting in 1962 we had a workshop on "The Development of Qualified New Arbitrators."[33] There were a number of suggestions about the training of arbitrators and setting of standards. These apparently raised almost as many questions as they answered. Paul Herzog and Ralph Seward, for example, expressed reservations about institutionalizing and formalizing the blacklist.

In 1948 Academy President Witte said, "A self-selected group of arbitrators could conceivably become something akin to a racket and more likely nothing more than a restricted trade association. An organization interested primarily in setting fees and keeping out competitors is anti-social even if it adopts high-sounding declarations of purposes."[34] He then expressed his belief that he had no fears that such unfortunate results would follow the establishment of the Academy. Mr. Coulson has also noted that certification may be based on elitist and exclusionary principles, and at a time when there is legal challenge to such requirements and there is a need to expand the profession and avoid new entry barriers.

And Harold Davey has mused that "most veteran arbitrators are competent, dedicated and overworked, *but they are not immortal.*"[35] In the first survey of Academy members conducted in 1952,[36] the average age of arbitrator respondents was about 50, with only 11.6 percent under 40 and 16 percent over 60. In the most recent survey conducted in mid-1974,[37] the average age of respondents was 58.4 years, with just under 3 percent of the membership under 40 years of age, 47 percent over 60, and 82 percent over 50. On the one hand, we are getting older, and on the other, we must be admitting some younger members because, in 22 years our average age has advanced less than 10 years. Between 1970 and 1975, 100 arbitrators were admitted to the Academy. They were surveyed in 1976 and half responded.[38] Of these 50, 21 were under 45 at the

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[32] Witte, *supra* note 27, at 11.

[33] In Collective Bargaining and the Arbitrator's Role, *supra* note 4, at 205-28.

[34] Witte, *supra* note 27, at 18.

[35] Davey, *How to Revitalize Arbitration,* in Industrial Relations Guide (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1971), 42, 130.

[36] *Report of the Committee on Research and Education: Survey of the Arbitration Profession in 1952,* Appendix E in The Profession of Labor Arbitration, *supra* note 2, 178.

[37] *Supra* note 19, at 377.

[38] *1976 Report of Committee on Development of Arbitrators,* Appendix D in Arbitration—1976, *supra* note 17, 327-44.

time of their admission to the Academy, which on average was six years after hearing their first case. Fourteen began arbitrating before they were 35. The data showed that it normally takes at least three years and often much more to gain wide acceptability.

Admittedly, there is a continuing need for new, if not younger, members, particularly female and minority-group members who are conspicuously absent from our ranks in any sizable number. Over the years the Academy has moved slowly from lip service to active participation in an increasing number of geographically based training programs. While achievement was modest at first, increasing success has been reported annually by the Committee on the Development of New Arbitrators. This committee was appointed in 1970 by then President Jean T. McKelvey, who I can personally attest has done much to train new arbitrators.

Obviously we need to continue to support training programs for new arbitrators. Moreover, the Academy, the ABA, the agencies, and the parties themselves need to assist in helping aspirants overcome the catch-22 of arbitration: one must possess experience to achieve acceptability, and one must be acceptable to gain experience. Some have said there is no real shortage of people holding themselves out as arbitrators, but rather a shortage of acceptable arbitrators. Equally important is updating and improving the knowledge and skills of established ("used") arbitrators. Here we need continuing education. The Academy intends to embark on just such a program on a regional basis.

In summary, I do not believe that either a requirement for a legal degree, certification, accreditation, licensing, or any other such formal, uniform prerequisite will either overcome these problems, benefit the parties, or improve the arbitration process itself. In fact, the only reason for flirting with this notion seems to be to have a nice, short, definitive answer when asked the question: How does one become a labor arbitrator? However, there is a difference between "becoming" and "being."

Appendix C

QUESTIONNAIRE SENT TO APPOINTING AGENCIES

I. What, if any, are the requirements or qualifications for placement on your panel of labor arbitrators? Please spell out.

_____

A. *Prior Experience:*

1. Do you require that a candidate have past experience in deciding grievance arbitration cases? _____ 2. If so, how many? _____

3. Do you check on whether awards were issued? _____ 4. If so, how?

_____

5. Do you bar those who have recently served _____ or currently serve _____ as advocates or representatives of one party or another? 6. If so, for how long must a candidate be "neutral" before he/she will be accepted?

_____

7. Do you distinguish between the candidate's experience in grievance arbitration as opposed to interest arbitration, fact-finding, and/or mediation? _____ 8. If so, how do you credit these various experiences? _____

9. Do you require experience (academic _____ or practitioner _____) in labor and/or industrial relations? 10. If so, what sort? _____

B. *References:*

1. Do you require references? _____ 2. If so, how many and from whom? Other neutrals _____; labor representatives _____; management representatives _____; other _____

3. Do you check these references? _____ 4. If so, how? _____

C. *Education:*

1. Do you have a minimum degree or educational requirement? _____

2. If so, what is it? _____

3. Do you accept or bar candidates who are *not:*

	Accept	Bar
a. Lawyers	_____	_____
b. College graduates	_____	_____
c. High-school graduates	_____	_____

D. *Other:*

1. Do you have a minimum and/or maximum age requirement? _____ 2. If so, what is it? _____

3. Do you require that those on your panel pass an examination? _____ 4. If so, what type of exam is it? _____

5. Do you have any other requirements (e.g., political connections, etc.) or use other screening devices? _____ 6. If so, what are they? _____

II. If you employ staff arbitrators, what, if any, are the requirements for placement on your full-time arbitration staff?

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1. Do they have to pass an examination (civil service, or other)? _____ 2. If so, what kind? Aptitude _____; achievement _____; general _____; job-related _____. (If possible, please attach a copy of same. It need not be the current one.)

III. Other

A. For what other reasons have you not accepted aspiring arbitrators for placement on your panel list of arbitrators? _____

B. Do you have a training program for arbitrators? _____ C. If so, please describe: _____

D. Do you think there is a need to have formal certification or accreditation for labor arbitrators? _____

E. Any other comments? _____

Name of Agency _____

Name and Title of Respondent _____