

## II. SOME FAR-SIGHTED VIEWS OF MYOPIA

RICHARD I. BLOCH\*

I am a full-time arbitrator. I would be pleased to say to you that my background was that of an academician. However, while I taught law school for four or five years, I cannot in good faith tell you I was an academician. The only real publishing experience I contemplated was to update the labor law classic by Cox and Bok. I attempted to recruit Nicholas Katzenbach, Arnold Zack, and Eli Rock to join me: Cox and Bok, Katzenbach, Zack, Bloch, and Rock. But the publishers said it wouldn't sell.

I suffer similar qualms, however, in claiming to be an arbitrator. Surely, I have some of the indices of success—some transitory “permanent” commitments, an *Avis Wizard* number, and a set of matched towels from the top Holiday Inns in the country. But I grew up under Dave Miller. He viewed this job as a craft. In that regard, my on-the-job training has been of the highest quality, but since I've become a full-time arbitrator, my access to continuing education is severely limited, and unfortunately, that is probably true for all of us. The craft is changing and we are not.

In the next 20 minutes, I hope to highlight some very real changes in the labor-relations scene which have created a substantial dilemma for arbitrators—and highlight them only, for their existence has been more than adequately documented by others. Then I shall discuss the areas in which I think we as an Academy are lacking, and conclude by offering a few suggestions we might pursue together.

The newest developments in arbitration law and practice are co-extensive with the newest developments in labor law in general. As should be obvious from the subject matter of the Academy, the ABA, IRRA, and others, the “hot issue” of the seventies is the increasing interplay between public statutory law and the private law of the collective agreement.

Ben Aaron, in his superb *Wingspread* paper, forecasting an ever-greater public responsibility being thrust on the private arbitrator, asks whether all remaining distinctions between the private contract and public law will disappear, yielding instead to a uniform body of law governing grievance settlement. He says, and we tend to agree, that this is not likely in the near future. But whether arbitration will

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\* Secretary, National Academy of Arbitrators; Arbitrator, Washington, D.C.

soon be forced into a more compliant or responsive posture with respect to the law is another question.

I do not for a moment believe that arbitrators should or will yield their positions as interpreters and appliers and, to a certain extent, creators of the common law of the shop. But to the extent the private collective agreements become less private and the “common law of the shop” grows uncommonly complex, we must adjust. If we fail to recognize the growing manifestation of public rules in what used to be a purely private game, we do the parties a distinct disservice.

David Feller, in that same Wingspread conference, noted the progression of American labor law from a basic system of private rules toward one inevitably incorporating a burgeoning array of federal regulations:

“In the last decade or so . . . we have had an increasing quantity of substantive federal regulation of the terms and conditions of employment. In 1963 we had the Equal Pay Act, in 1964 Title VII of the Civil Rights Act, in 1970 the Occupational Safety and Health Act, and as well, Title III of the Consumer Credit Protection Act limiting the right of an employer to discharge on account of garnishment, and in 1974 the Employee Retirement and Income Security Act. For a period we had wage controls under the Economic Stabilization Act, and we may have them again. Other statutory regulations will undoubtedly be proposed. The British, in the Industrial Relations Act of 1972, for the first time provided Public Law Protection against unjust discharge, and similar proposals have been made in this country. The statutes now on the books, and those which seem likely to come, present what I believe to be one of the major factors affecting the future of labor arbitration.”<sup>1</sup>

In last year's meeting, Professor Feller foretold the coming end of “arbitration's golden age.” The golden age he referred to was that time following World War II, punctuated by Dean Shulman's plea (generally heeded) that the courts stay out of labor arbitration. The mid-sixties, highlighted by the proliferation of federal regulations just mentioned, may have marked the beginning of the end of this golden age. Thereafter, posited Feller, arbitrators were to become reduced to the level of “junior adjudicators” who may get first crack at labor-relations problems, but “whose decisions must always be subject to correction and review by the authorities properly charged with interpreting the law.”

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<sup>1</sup> Feller, *The Impact of External Law Upon Labor Arbitration*, in *The Future of Labor Arbitration in America* (New York: American Arbitration Association, 1976), 89.

I believe Feller has identified, with unerring accuracy, the current trend and its probable impact on labor arbitration. However, I think he may have overstated the problem.

I have never really regarded the arbitration process as more than a hopeful attempt at achieving some transitory certainty. We are, if not junior, at least trial-level adjudicators. Our words are written not in stone, but on paper, and they may last only to the next negotiation, the next Section 301 suit, or the next NLRB or EEOC hearing, at which point the solution may be modified or overturned or just plain ignored. Our judgments are, and always have been, subject to review and appeal. There are only nine men that I know of about whom this may not be said. Even they are subject to the ultimate wisdom of the Supreme Being and must eventually abide by his or her judgment.

It is true that the arbitration system has been regarded as, essentially, the final step in a self-contained system of industrial self-government. Appeal and review have been rare. They will probably be less rare in the future. If Aaron, Feller, and others are right, the rise in applicable statutory rules by definition creates increased involvement by those bodies endowed with the responsibility of their interpretation and enforcement.

What can arbitrators do about this? Clearly, nothing. If we take cognizance of the laws, either because the parties require us to do so or otherwise, the courts will inevitably become involved. And if we do not take notice of those laws, the courts will, because, after all, someone must.

This dilemma may explain why, at Wingspread, Feller cautioned against arbitrators wallowing in outside law, lest we lose deference to arbitral competence; while in San Francisco he urged against wholesale avoidance of decisions on external law, since arbitration exists not to serve the arbitrators' interests, but the parties'. I find these responses notably reflective of the growing anomaly posed by the incursion of public concepts in private contracts.

I see the trend of expanding judicial involvement inevitable. I see it neither as a necessary threat to arbitration nor as an end to a golden age. The institution of arbitration may suffer, but if it does, it will not be due solely to increased intermingling with the judiciary. The real tragedy is not that we should be reversed on occasion, but that we should be roundly ignored.

It may well be that the specifics of the law are for the courts, unless we are contractually authorized and obligated to the contrary by the parties. But we may, indeed, be so obligated to the extent

that reference to the specifics of various statutes and case analysis may be both unavoidable and necessary if the arbitration forum is to remain a helpful tool in internal dispute-settlement procedures. In this context, to rest easy in the knowledge that ours is a limited scope and that our overall expertise and general knowledge need not be broadly wrought or widely developed is to exhibit a serious case of myopia or self-indulgence.

Arbitration will remain a viable process only so long as it is useful for parties to employ it. If a growing nexus between private and public law decreases the element of finality which has always been so important to this process, and if arbitration becomes a mere detour on the way to the federal courts, then there is little reason to regard arbitration as a cheap and expeditious alternative, for it will not be an alternative at all.

Thus, while the Meltzer-Howlett issue has provided us enormous intellectual stimulus in the past, I am suggesting that the issue may shortly be irrelevant. Consider carefully the proposition that more and more contracts are either specifically setting forth nondiscrimination, health and safety, or even fair-labor-standards laws, or they are incorporating them via savings clauses which stipulate that any portion of the contract found illegal is to be considered unenforceable.

In either case, one may be thrust into the rigors of statutory analysis. The parties may entrust the arbitrator with the power and responsibility to interpret and apply the provisions of the agreement. In so doing, however, they will also require him or her to interpret the law in the same manner as would a district court, a state court, and/or regulatory agencies. At this point arbitration becomes, in Feller's words, "the Universal Solvent," broadening the scope of the private labor-relations procedure toward resolving all the labor-related problems of the working person.

This may, of course, be disastrous and may yield the monopoly problem suggested by Harry Arthurs. I would, however, take issue to some extent with his assumptions. I suggest that the monopoly situation exists only in those situations controlled by external forces or external law—divorce or property exchange, to use his examples. But the beauty of this process, and the central distinction which counters the restricted output and high price level associated with monopolies, is that the rules here are made by the same people who employ the process.

I don't wish to minimize the dangers or endorse the concept of the "full-service arbitrator." To a certain extent, these problems

must be met by the parties. If one believes that arbitration is not the proper forum for resolving grievances which, albeit labor-related, derive their essence from the law, and that arbitration is private machinery created by private parties to resolve issues under private contracts, then it is up to the parties to direct those disputes elsewhere or to somehow eliminate them from the arbitrator's purview. (Quaere, however, whether excluding discrimination grievances from arbitration might not itself be viewed as discrimination.<sup>2</sup>)

At the same time it is difficult to ignore the extraordinary breakdown of the EEOC itself which, at last count, had over 130,000 cases backlogged. Private disposition of these disputes may be essential. But judicial and administrative review will then become more likely. I'll not even attempt to indulge in a case-by-case catalog of horrors in this area. Permit me instead to defer to Dean St. Antoine's discussion tomorrow. He will give you a fair and meticulous portrait. I will content myself today with a quick and dirty caricature. Thus will Michelangelo be preceded by Walt Disney.

*Hines v. Anchor Motor*<sup>3</sup> said that arbitration will not be final if it is tainted by a union's failure to represent; in *Collyer*,<sup>4</sup> the NLRB relegated certain labor-law issues to the arbitrators, and this means, unavoidably, that more arbitral decisions will be reviewed by the Labor Board under the *Spielberg*<sup>5</sup> doctrine; *Holodnak*<sup>6</sup> suggested constitutional considerations as inherent in the arbitration proceeding, and *Gardner-Denver*,<sup>7</sup> of course, recognized potential arbitral concern with Title VII law. One final word about *Gardner-Denver*: it is significant that, in attempting to accommodate the dual-forum issue, the courts spoke of arbitrators' expertise not in terms of mastery of the "common law of the shop," but rather in terms of a sensitivity to broader "legal type" concerns now recognized as inherent in labor relations and which, indeed, were viewed as justification for the two bites of the apple.

In discussing deferral, footnote 21 talked about such things as the "existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, the adequacy of the record with respect

<sup>2</sup> Harry Edwards sets forth some excellent suggestions as to the types of discrimination cases which should or should not be brought to arbitration. See Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 Lab. L. J. 265 (1976).

<sup>3</sup> *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976).

<sup>4</sup> *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

<sup>5</sup> *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

<sup>6</sup> *Holodnak v. Avco Corp.*, 381 F.Supp. 191, 87 LRRM 2337 (D.Conn. 1974).

<sup>7</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

to the issue of discrimination, and the *special competence of particular arbitrators*." It is that special competence about which I am concerned.

What I shall suggest is that, as a body, we are ill-prepared to deal fairly and responsively with most questions of outside law. Of the 409 Academy members to whom Harry Edwards sent his 1975 questionnaire,<sup>8</sup> only 200 answered. Of them, only 52 percent of the respondents said they read labor advance sheets, 40 percent responded they did not, and 8 percent declined to answer the question. Yet, of those arbitrators who never read a judicial opinion involving Title VII or never read advance sheets to keep abreast of current developments, 50 percent of this group responded that they nevertheless felt professionally competent to decide legal issues in cases involving race or sex discrimination. Of those who said they did not feel competent, 50 percent had heard and decided such cases during the past year.

It is fair to assume that if we are generally ill-versed in the widely known Title VII law, we are similarly uninformed in the area of OSHA, ERISA, and other similar statutes, each of which could conceivably produce *Gardner-Denvers* of their own. Permit me to suggest, moreover, that we are lacking in areas not nearly so esoteric but which, due to increased emphasis on due process, procedural fairness, and adequacy of the record, may now become extremely meaningful: the rules of evidence, for example. Surely we cannot go on forever ignoring objections and arguments with respect to evidence, allowing ourselves to be content to "let it in for what it is worth." There comes a time when the appearance of fairness mandates our responding to an evidentiary objection on the merits. And let me add that there is a meaningful difference, even in the context of relaxed administrative proceedings, between understanding a rule of evidence but opting not to apply it, and letting it all come in because we don't know the rules to begin with. That's not the type of procedural propriety or special expertise that will gain the confidence of a court. This doesn't mean we all have to be lawyers. Because you don't practice it doesn't mean you don't understand it.

So far I have been talking in great part about avoiding judicial interference. I might add that there is a lot to be said for reaching the right conclusion. So, if we are not yet convinced that the courts

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<sup>8</sup> 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.

or administrative agencies will be tinkering with our wisdom, or if we don't give a damn about tinkerers, let me suggest that changes are needed in the interests of being correct, without regard to subsequent review. As an Academy, we should accept the responsibility in the future of educating ourselves because (a) it is right that we do so, and (b) no one else is going to do it for us. And if we are going to advance, we must begin by recognizing a serious case of professional myopia.

This Academy perpetuates, year after year, a compellingly seductive misimpression. This misimpression is that, as professionals, we have "made it." Some of this illusion is supported by the lovely cities, the lavish hotels, and meticulous arrangements. There are those who protest that the settings and structure of these meetings do much to destroy the all-too-infrequent chances we now get to renew acquaintances among ourselves and talk freely among ourselves—in short, to be ourselves. And in response, there are those who would justify our present meetings on the grounds that it gives labor and management a chance to see each other and the arbitrators in a reasonably informal and noncompromising position—and that this, too, is healthy for all concerned. Permit me to move past this very substantial question by simply noting that whatever may be said for or against these meetings in their present form, they are, among other things, beguiling cosmetics.

There is another, more seductive factor. It is represented by the standards of admission into the Academy. The *sine qua non* of admission to our midst is acceptability to the parties. But surely, the willingness of the victim does not always mitigate the heinousness of the crime. Put a sadist and a masochist together and you still have some nasty flogging going on. Acceptability is simply not synonymous with excellence. The "Academy" label is not enough. I am reminded, in this regard, of Alice in Wonderland's experience in selecting that fateful first drink. The analogy between that and arbitral selection is not entirely inappropriate. You will remember she found a little bottle with a paper label saying "DRINK ME," beautifully printed in large letters.

"It was all very well to say 'DRINK ME,' but the wise little Alice was not going to do that in a hurry. 'No, I'll look first,' she said, 'and see whether it's marked 'poison' or not,' for . . . she had never forgotten that, 'if you drink much from a bottle marked poison,' it is almost certain to disagree with you, sooner or later.

"However, this bottle was not marked 'poison,' so Alice ventured to taste it."

So much for labels, and selection and acceptability.

I am not advocating a change in admission standards for, while I must admit I have been at times uncomfortable in my duties on the Admissions Committee, I am convinced that we should not adopt the organizational chutzpah necessary to implement any other standard. But this doesn't change the fact that admission to the Academy should not stand as evidence that we are doing our job as professionally, carefully, or competently as we possibly can. Here is where the expertise of the Academy members, lawyers, and other labor-relations experts should be better shared among other Academy members. We are not doing it, and we must.

There is little in our professional existence which stimulates us toward self-improvement. We sit at the end of the arbitration table, constantly dispensing opinions, and it is inevitable that from that vantage point we see ourselves as teachers and not as students. If we are to assume that we have "made it" and that, therefore, there is nothing left to learn, we engage in a destructive conceit we can ill afford. We become the victims, not the masters, of our own trade.

There is plenty of opportunity for management and labor to be indoctrinated into the art of presenting arbitration cases. Titillating titles such as "How to Win Your Arbitration Case" or "How an Arbitrator Decides," among other topics, are ceaselessly purveyed by the AAA, the national and local bar associations, and various other groups acting either in concert or individually.

Moreover, there is an increasing opportunity for new—and by this I mean embryonic—arbitrators to become exposed at least to the very basics of the arbitration process. But no one is upgrading those who have just begun to make it, and no one is honing, polishing, and developing the skills of the well-established arbitrators. To assume that our arbitral expertise necessarily becomes sharpened through constant exposure to the heat of battle is at least questionable. The problem with depending entirely on the actual practice of arbitration to sharpen our skills is, simply: it may not. That is to say that practice does not alone make perfect. With increasing case-loads may come carelessness. The product of mounting time pressure and the rather heady glow of acceptance may well be a certain complacency. The final result is that the time we spend practicing may simply serve to ingrain poor habits or disguise gaps in our abilities.

What, then, must we do? We must create an Academy which is itself creative. We must begin to educate ourselves and to share our ideas. If we do not, the Academy will not die, but neither will we



have the avenue to escape the meanness and meagerness of mere professional existence.

The continuing-education function is being only partially served by the speeches presented at Academy meetings. These are important papers, and they contribute significantly to the field of arbitration and its literature. But even the most avid student cannot hope to truly improve by merely sitting and listening to what are sometimes rather complex issues which must better be read in print even, if needs be, a year later. They need further discussion, further study, and practical application.

A program of continuing arbitral education must be instituted by us. Seminars, lectures, and workshops should be presented on a regional basis, supported by the Academy as a service to us, with lecturers from either within or outside our group speaking to us and working with us in their particular area of expertise. We should have little trouble availing ourselves of university faculties and facilities as well as the considerable talent provided by the teachers in our midst and the practitioners who are our acquaintances.

Topics might include the following: (1) The rules of evidence. (2) Writing critiques. (3) OSHA. (4) Title VII. (5) ERISA. (6) Municipal financing and labor economics, for those involved in public-sector work, particularly interest arbitration. (How can people properly evaluate the ability-to-pay argument if they are not familiar with at least a basic working terminology of public-sector finance considerations?) (7) Other public-sector aspects. There is a difference. People may simply not assume that private-sector knowledge and techniques may be superimposed on public-sector problems. (8) Workshops. This Academy has dabbled with the idea of workshops in the past; thus my suggestion is not particularly novel. I'm simply suggesting that it not be confined to annual meetings.

I am not here advocating that we all become some sort of "full-service" arbitrators, donning our legal or contractual hats at will. But I am suggesting that some cognizance of the legal impact of an award is almost as useful as some sensitivity of what it will do back in the plant. And it is this overall sense of resolution, fairness, and impact that distinguishes the great arbitrators among us. What I am suggesting, in short, is that our overall senses should be expanded in light of the realities of the workplace, for it is not the same workplace that existed in the thirties, forties, or fifties.

I have sought to say that we are, as a group, vulnerable to atrophy. There are members among us who lead the field in continuing research and writing and suggesting innovations, who con-

sistently provide us with clear-headed discussions and overviews as to the direction of arbitration in new fields. But as a group, we fail significantly in sharing these ideas in a practical and useful format. In so doing, we fail to observe the changing tenor of the times.

The message the courts are giving us is as follows: "We will enter your domain in two situations. First, we will look at your awards when they are not broad enough. Alternatively, we will intercede when, albeit broad, they are not good enough."

Court intervention, as I have indicated above, may be a foregone conclusion and may reflect in no way on the expertise of the arbitrator. Thus, while we may wriggle uncomfortably with the prospect of judicial intervention, this should merely be considered a natural result of the increasing legal issues that become inevitably entwined with what used to be pure contract questions. There is a lesson to be learned. If we once took heart from the generous (Feller says "extravagant") words of the Supreme Court in the *Warrior & Gulf*<sup>9</sup> case, let us not be blinded to the meaningful shift in the law and in the realities (for they are not always identical) which surround our profession. It is our job to strive toward continuing self-improvement, and it is the Academy's obligation to provide ample support toward that end.

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<sup>9</sup> 363 U.S. 574, 46 LRRM 2416 (1960).

III. FUTURE DIRECTIONS FOR LABOR ARBITRATION  
AND FOR THE NATIONAL ACADEMY OF ARBITRATORS

RONALD W. HAUGHTON\*

My assigned topic is "The Future Directions for Labor Arbitration and for the Academy." At the time I was recruited by Program Chairman Harry Edwards, he expanded the charge by saying that the committee would like the panel to do some serious soul-searching about where we are at the present time and where we should be in the future, both in the practice of arbitration and in the National Academy of Arbitrators. I have opted to emphasize the role of the Academy as contrasted to a full consideration of the past, present, and future of arbitration per se.

My experience is that I have been active in the Academy, and I have been a full-time arbitrator. However, since I have been active in another area for the past few years, I have refreshed my memory by going to past Academy Proceedings and generally available documentary material. I chatted with a few old friends in the Academy and then conceived the obvious approach: I would send a questionnaire to the some 400 people on the Academy's membership mailing list. The numerical response was good, and the quality of the answers was high. Some 115 members returned the questionnaire, and many included personal notes and letters to amplify their responses. In one way or another, this paper contains quotes from at least 75 or 80 of the respondents.

My thanks to those who did such a thoughtful job of responding to my cry for help. Those of you who found some of the questions hard to answer in depth were not alone. Several past presidents said just that in little notes. One of our most experienced and articulate members wrote, "Just a note to help complete your head-count on the NAA questionnaire returns. I tried fairly valiantly to work out responses to at least some of the questions. But I realized I was making them up. Better to admit that I'm now just too far away to know what I'm talking about. So I'm going to pass."

The questionnaire contained 14 open-ended questions which read as follows:

1. What do you believe have been the major contributions of the Academy?

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\* Member, National Academy of Arbitrators; Vice President for Urban Affairs, Wayne State University, Detroit, Mich.

2. In what areas might it have done more?
3. What should the role of the Academy be in regard to the Code of Ethics?
4. Should the Academy take a position on pending legislation?
5. Should the Academy propose legislation where it has not been seriously suggested?
6. How active, if at all, should the Academy be in the formal sponsorship or encouragement of specific research in arbitration?
7. Do you perceive a real division of interest among the academics, the lawyers in general practice, and the full-time arbitrators?
8. Do you have any suggestions regarding a change in the internal committee structure?
9. Do you have any comment on the matter of liaison with the American Arbitration Association and with federal, state, and private agencies concerned with arbitration?
10. Should the Academy demonstrate an interest in the commercial arbitration process?
11. Do you think the Academy should concern itself directly with programs for the training of arbitrators as they are proposed and developed around the country?
12. Should membership admission criteria be strengthened or broadened?
13. Do you believe that the Academy should have a full-time secretariat?
14. Where should the Academy be ten years from now?

I did not include specific questions with respect to the current discussion on the recent dues increase, or on the content of programs for national annual meetings, or on that old chestnut—whether or not there should be guests. I assumed (and I was right) that the respondents concerned about these matters would find good reason to raise them under the rubric of one or more of the 14 questions.

My review of the literature, particularly the Proceedings of the Annual Meetings, shows that virtually all of the questions I put to the membership in October 1976 have been raised many times in the past. Long-term goals were set by the late Ed Witte, one of the dearly loved founding fathers of the Academy, in a speech at the first annual meeting in 1948. At that time he said that it was his

conviction that the development and functioning of the National Academy of Arbitrators would have a great deal to do with the future of arbitration. Membership in the Academy would serve as a badge of distinction. He suggested, and the responses to my questionnaire almost 30 years later support this conclusion, that election to the Academy is equivalent to a certification of competence by the leaders in the profession. He said that the National Academy of Arbitrators would also serve the very desirable purpose of enabling labor arbitrators to get together, to discuss their problems, and to profit from the exchange of experiences. He said that the Academy had great potentialities in the sound formulation and general acceptance of professional standards for arbitrators.

Generally speaking, my respondents feel that the dreams and hopes of our founders, as articulated by Witte in 1948, substantially have been achieved. Ed also suggested that one of the main purposes of the National Academy of Arbitrators should be to increase popular understanding of the purposes, values, and limitations of labor arbitration and of the conditions essential to its effective use. My respondents generally gave the Academy a good mark on the achievement of this purpose. Almost 20 percent, however, voiced strong criticisms of the form and expense of the annual meetings. A frequent complaint was that the guests usually outnumbered the members and that they were overindulged. On the other hand, at least twice as many members expressed satisfaction with the way things have been handled. Several respondents expressed specific approval of the policy of including a large number of guests at the annual meetings, saying that it is a good thing for the speakers and for the attending Academy members to be directly exposed to the criticisms and concerns of the very parties who use and support the institution of arbitration.

Self-analysis, setting goals, and even self-flagellation is standard procedure in professional associations. The Academy has been no exception. I have already noted that Ed Witte set goals in 1948. Then, John Larkin, in reviewing the first decade of our history in his presidential address in 1957, emphasized that the Academy was created for the specific purpose of improving the process of arbitration, and he reminded us that the purposes and aims as initially stated were: "To establish and foster high standards of competence among those engaged in the arbitration of industrial disputes on a professional basis; to adopt canons of ethics to govern the conduct of arbitrators; to promote the study and under-

standing of the arbitration of industrial disputes." He came out in favor of annual meetings as we have known them by suggesting that perhaps they were the greatest contribution toward the strengthening of the arbitration process that the Academy had made in the first ten years.

In that same year, Ralph Seward, the first president of the Academy, looked ahead to the next ten years. He referred to the first ten as having been a good shakedown period which had seen the development of a Code of Ethics and the construction of the basic framework of a sound membership policy. He then asked, "Where do we go from here?" and answered his own question by saying that he hoped, in part, that the answer would be "more of the same." Like the majority of the respondents in today's questionnaire, he spoke well of the national and regional meetings and suggested that there should be more of the latter. He spoke of the continuing need for an educational program; so have our respondents these 20 years later.

Ralph suggested, as does a substantial majority today, that Academy members have a responsibility to help develop arbitrators. Finally, he wondered if the arbitrators had been too cautious about taking positions relating to the whole process of collective bargaining, and he reminded us that the real measure of an organization is not only its past and present activities, but its aspirations.

As recently as 1972, a substantial portion of the annual meeting for that year was devoted to a consideration of "25 Years of Labor Arbitration—and the Future." Mickey McDermott suggested in his presentation at that time that the Academy could be proud of having successfully accomplished its original and important purposes: membership policy, ethics, grievance activity, and the annual meetings.

I have presented this brief reference to our past efforts at self-examination and goal-setting so that we can consider in the perspective of history the answers to my current questionnaire. Answers came in from coast to coast, and from five Canadian members. There was a good response from long-time members, past presidents and officers, and new members. A great majority expressed pride and satisfaction in their membership. The majority seemed to be satisfied with things as they are. However, there were many who expressed frustrations, the chief among them seemingly related to the one to which I already have referred—the form and structure of the annual meetings. The current dues con-

trovercy was mentioned by only two or three respondents as being a real problem.

I have procrastinated long enough. The time has come to give you a breakdown of the answers to the questions contained in the questionnaire. I only wish that time would allow me to share with you the detail of these answers so that you could know firsthand the great concern the membership has for the effective, meaningful, professional functioning of the Academy.

At my request, almost all of the questionnaires were unsigned, and since almost all of those that were signed were done so without requesting confidentiality, I am going to ask the Office of the Secretary to be the repository of most of the 108 completed questionnaires. Thus, their content can be of benefit to future Academy historians, and even to interested members who may be visiting Washington from time to time. I will, of course, retain the few that are signed and marked "confidential."

Frequently the respondents gave multiple answers to questions contained in the questionnaire. Accordingly, I must warn you that the total of the percentages entered under any one question often is more than 100 percent.

1. What do you believe have been the major contributions of the Academy?

- a. No answer or "not sure." 7%
- b. Established professionalism in arbitration and provided a forum for discussing common problems. 78.8%
- c. Established and disseminated a Code of Ethics, thus contributing to a high level of professional integrity. 26.9%
- d. Contributed to understanding and growth of arbitration through published Proceedings and educational activities. 65.7%
- e. Provided the opportunity for arbitrators to meet informally with representatives of labor and management at its meetings. 1.9%
- f. With its membership lists, provided U.S. employers and unions with a reliable guide for the selection of competent arbitrators; not so in Canada. .9%

A typical response to this question was: "Basically, the Academy has afforded a forum for discussion for professionals with a common interest. It has stimulated thinking and research on labor relations problems. Its meetings and publications have enhanced

the professionalism of arbitration, and it has provided a vehicle for the recognition of persons who are substantially involved in the arbitration process."

Almost the only negative note read: "In my opinion, there have been few, if any, major contributions to the arbitral process by the Academy. It has designed a reputable although subservient Code of Ethics. Papers on relevant subjects have been presented at some of the meetings."

## 2. In what areas might it have done more?

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| a. Did not reply to this question.   | 20.5% |
| b. Should try to do more.  | 10.1% |
| c. Could have done more in the area of training new arbitrators.   | 24%   |
| d. Should sponsor more research, including publication of useful papers and articles.  | 16.7% |
| e. Should engage in more education activities.   | 17.6% |
| f. Should be more active in establishing professional standards.   | 7.4%  |
| g. Should have taken a stronger stand on basic issues, including legislation.  | 5.5%  |
| h. Should have been fewer guests at the annual meetings, and less lionizing of self-anointed elite.  | 10.4% |
| i. Should have been greater effort to determine the changing interests of members in the preparation of the program for the annual meetings. | .9%   |
| j. Should have promoted more interest in the subject of resolving racial and urban conflict.   | 2.7%  |
| k. Should have been more frequent and larger regional meetings.  | 2.7%  |
| l. Should have established an office of a full-time secretary.   | .9%   |
| m. Should have increased annual dues at an earlier date so that a fund could have been available to expand activities.                       | .9%   |
| n. Should have developed a malpractice insurance program.  | .9%   |
| o. Should have been greater liaison between the Academy and the American Arbitration Association, the Federal                                |       |



- |   |     |
|---|-----|
| Mediation and Conciliation Service, and other appointing agencies.                        | .9% |
| p. Should have more timely publication of the proceedings of the annual meetings.         | .9% |
| q. Could have done more in the area of encouraging national and community public service. | .9% |

One individualist wrote: "Since I am not much of an organization man, I think the Academy has done what it was set up to do." Another, who was more enthusiastic, wrote: "I find it difficult to define any areas where we might have 'done better' considering the fact that so few persons have had so remarkable an effect on the arbitration process and the contributions made to the entire field of the labor relationships between parties to Collective Agreements."

One of the most negative responses to Question 2 read: "No in depth research or consideration of the basic principles of arbitration in labor-management disputes. The Academy seems to be concerned with the practical problems of arbitration and has had no interest to explore why the arbitral process exists and its role in a changing economic and social environment."

### 3. What should the role of the Academy be in regard to the Code of Ethics?

- |   |       |
|---|-------|
| a. No answer or did not know the answer.  | 4.6%  |
| b. Should help promulgate, police, and aggressively deal with alleged violations of the Code of Ethics. | 56%   |
| c. Should continue substantially what it has done in the past with respect to the Code of Ethics.       | 41.6% |
| d. The Code should only be suggested and recommended.   | 8.3%  |
| e. The Code of Ethics should be simplified.   | 1.8%  |
| f. Should not be involved with a Code of Ethics.  | 2.8%  |
| g. Should create standards for certification of arbitrators.  | .9%   |
| h. Should limit membership to neutrals.   | .9%   |

One respondent suggested that the Code of Ethics is a thinly disguised conspiracy to restrain competition and said that he is sorry that the Academy ever got involved with it. Another simply said: "Enforce it. We have a good Code."

## 4. Should the Academy take a position on pending legislation?

- a. No answer. 2.8%
- b. No action or generally no action should be taken. 29%
- c. Should take a position on pending legislation only in the narrow area of arbitration. 43.5%
- d. Should be very careful about taking action on pending legislation, and should consider the nature of the legislation when doing so. 6.7%
- e. Should take action on pending legislation. 18%

Generally, the majority conditional affirmative view was expressed with the caveat, "and only with great caution." The "no" position can be summed up by the statement: "Every individual arbitrator has the right to speak his mind on pending legislation, but the Academy should not, as a body, seek to attempt to influence the passage or defeat of pending legislation. We are not, and we should not act as a 'lobby' except under the most unusual circumstances."

## 5. Should the Academy propose legislation where it has not been seriously suggested?

- a. No answer or do not know. 4.3%
- b. Should propose legislation only under certain circumstances of unusual import to the arbitration process. 34.7%
- c. Should propose legislation. 13.9%
- d. Should not propose legislation. 37.4%
- e. Generally should not propose legislation. 10%

Again, affirmative positions were couched in very careful terms. A typical affirmative comment included the qualification, "only when it is essential to arbitration as a profession."

## 6. How active, if at all, should the Academy be in the formal sponsorship or encouragement of specific research in arbitration?

- a. No answer or don't know. 4%
- b. Should be active in the formal sponsorship or encouragement of specific research in arbitration. 56%
- c. Should not be active at all in the formal sponsorship or encouragement of specific research in arbitration. 40%

The substantial number of respondents who were in the negative suggested that "academic institutions be encouraged to institute particular research in which they are interested, and the academic members be encouraged to engage in desired research as individuals and not with the formal sponsorship of the Academy." Generally speaking, those who reacted affirmatively still were reluctant to have the Academy grant substantial financial resources to research.

7. Do you perceive a real division of interest among the academics, the lawyers in general practice, and the full-time arbitrators?

- |   |       |
|---|-------|
| a. No answer.                                   | 2.8%  |
| b. Do not perceive a real division of interest. | 54.6% |
| c. Do perceive a real division of interest.     | 27%   |
| d. Do perceive some division of interest.       | 17.6% |

The position of those who did not think there was any division was best stated by one respondent who said, in part: "I do not now, and I never have believed that there is any real division of interest among academics, the advocates of the parties, or the full-time arbitrators. We have always worked together and, while we may not have seen 'eye to eye' at all times, the history of our Annual Meetings and the manner in which we have functioned would lead me to believe that there is not and there never has been any real divergence of interest. I am deeply disappointed that a few members have raised the issue only because of the recent dues increase. There never has been a time when the direction of the Academy was dictated to accommodate the special interests of academics, part-time arbitrators or full-time arbitrators."

An affirmative response read in part: "There is no question that there is a division of interest between the lawyers in general practice and the full-time arbitrators. However, I think it is an internal matter which should be resolved internally through the political processes of the organization. While a part-time arbitrator myself, I cannot accept the blatant, ill-considered drumming up of opposition to the new dues increase by other part-time arbitrators. But the need for the overall amount of dues has, I believe, been established."

8. Do you have any suggestions regarding a change in the internal committee structure?

- |               |     |
|---------------|-----|
| a. No answer. | 13% |
|---------------|-----|

- b. Do have suggestions. 21.2%
- c. Do not have any suggestions. 65.7%

A comment of a respondent opting for change read: "I don't understand the committee structure; it appears to me to be the private preserve of the 'in group.' I'd like to see more opportunity for the bulk of the membership to get involved in committee activities."

Another, who suggested no change, said: "I have checked out the manner in which the internal committees have been appointed in recent years and I am quite pleased to note that in the vast majority of cases, younger members of the Academy have been appointed to membership on our most important committees. I would believe that no significant changes would be justified."

9. Do you have any comment on the matter of liaison with the American Arbitration Association and with federal, state, and private agencies concerned with arbitration?

- a. No answer. 13%
- b. No comment. 26.8%
- c. Close liaison, particularly with the American Arbitration Association and the Federal Mediation and Conciliation Service, is desirable. 55.5%
- d. Suggest maintenance of maximum independence by the Academy. 8.6%
- e. Want to learn more about the nature of the liaison function, purely with respect to how arbitrators are admitted to the lists and how the lists are administered. 1.8%

One respondent commented: "Dialog is always to be encouraged." Another suggested that "It makes sense for there to be considerable liaison between groups. There is a community of interest that should be fostered." Still another suggested that the Academy has been "too passive" in its relationship with the appointing agencies.

10. Should the Academy demonstrate an interest in the commercial arbitration process?

- a. No answer or do not know. 6.5%
- b. Negative. 73.1%
- c. Affirmative. 20.3%

A typical negative response to this question was: "I do not believe the Academy should become a national academy of commercial and labor arbitrators. I think we have our hands full being an academy of labor arbitrators. But this does not mean that we should be antagonistic to commercial arbitration. I think probably we should keep our options open to play some role at least in commercial arbitration. I do not see it now simply because it is so different from labor arbitration." Another member commented: "We probably should broaden our horizons. We should also consider environmental disputes, safety, etc."

11. Do you think the Academy should concern itself directly with programs for the training of arbitrators as they are proposed and developed around the country?

- |                           |       |
|---------------------------|-------|
| a. No answer or not sure. | 6.9%  |
| b. Affirmative.           | 65.7% |
| c. Negative.              | 27.7% |

In voting affirmatively, one respondent said: "It should concern itself directly with programs for the training of arbitrators, but as they have developed around the country, they are worthless. . . . I do not have the answer as to what these programs should be, but I do think that they have been poorly planned and poorly operated, and have achieved scant results as they have been developed." A negative response read: "I think the new arbitrator problem lies in the hands of the parties—who are reluctant to choose a 'new' arbitrator regardless of how well trained he is."

12. Should membership admission criteria be strengthened or loosened?

- |  |       |
|--|-------|
| a. No answer or do not know.                   | 12%   |
| b. The present procedure seems to be adequate. | 44.4% |
| c. Should be strengthened or tightened.        | 29.6% |
| d. Should be broadened or loosened.            | 13.9% |

A respondent said: "The present admission criteria are entirely too stringent. Admissibility should be based on case load, competence, and acceptability by employers and unions. The fact that an individual may also represent employers or unions or individual employees, as a reason for denying membership, approaches the immoral."

13. Do you believe the Academy should have a full-time secretariat?

- |                 |       |
|-----------------|-------|
| a. No opinion.  | 9.3%  |
| b. Affirmative. | 60.1% |
| c. Negative.    | 30.5% |

An affirmative comment read: "I think the secretary should have Academy pay for office help that he needs and should not be out of pocket as in the past." A negative comment read: "Maybe a half-time secretary—no more than needed for an association of less than 500 members. I get more just from the Academy than I do from much larger and complex organizations—much of it goes directly into the wastepaper basket." Another member said: "We have depended too long upon the major umpireships to provide this service. It is time we financed ourselves completely."

Another question was raised by the statement: "Too many organizations become passive and victims of professional staff which becomes bureaucratized, out of control, and then, because of its leverage, becomes unmanageable by the membership."

14. Where should the Academy be ten years from now?

- |  |       |
|--|-------|
| a. No answer or do not know.   | 23.1% |
| b. Should be essentially where it is now.  | 39%   |
| c. Should not continue the annual meetings at the same expensive level and with large numbers of guests.   | 9.2%  |
| d. Should be more research.  | 7.4%  |
| e. Should be more regional meetings.   | 4.6%  |
| f. Should be more prestigious and better known.  | 6.5%  |
| g. Should have a full-time secretariat.  | 2.7%  |
| h. Should be more service-oriented and should find a better way to service arbitrators in the public sector.   | 3.7%  |
| i. Must be ready to adjust to change when necessary and possibly should be contributing to society in broader issues of conflict resolution.             | 7.4%  |
| j. Should have a more active role in the development of legislation and in education and training.   | 4.7%  |
| k. Should include all members, if possible, in some phase of its activities, and should have a more representative membership in regard to race and sex. | 1.8%  |

A respondent who suggested that in ten years the Academy should be essentially where it is now wrote: "I would hope that the Academy would be in the same relative position ten years from now as it stands in the eyes of the parties and all persons and agencies concerned with labor relations programs, legislation, and the arbitration process. Our standards must never be reduced. We must continue to maintain the same degree of professionalism and to make certain that our members conduct themselves in the same manner that the Academy has stood for since its inception. I see no need for any revolutionary changes. Competence, integrity, and a deep love and respect for the process must be the standards that should guide our thinking in the years ahead."

A more critical respondent said: "Hopefully, it will be an organization providing more intellectual stimulation for members; more training in newer aspects of the practice; annual meetings oriented to members rather than clients (indeed, preferably without clients except as speakers); and one with all its current members still active." Another member said: "I suspect the Academy will be just about where it is now in another ten years. SPIDR may or may not succeed, but it and the IRRA have taken over the other directions where the Academy might have gone. I just hope that I will be around ten years from now to see it."

It is not surprising that the responses to the questionnaire were relatively conservative. The state of the art of arbitration is in reasonably high repute. Members of the Academy are reasonably secure in their work, and presumably are reasonably affluent. All this militates against a desire for change.

There were only a few surprises. One of these was the relatively little concern expressed about the recent dues increase, the controversy surrounding its introduction notwithstanding. Another surprise was the strong vote for increased sponsorship and encouragement of research in arbitration. The fact is, though, that the Academy has always looked kindly upon the research product of its members. It is only one small step from that position, given a realization of the importance of supporting any additions to the fund of knowledge, to the urging of more institutional support.

My conclusion is that the original goals of the founding fathers of the Academy, put in modest pragmatic terms by Ed Witte at the first annual meeting, generally have been achieved. It must be conceded, however, that, with the exception of a few training programs instituted by the parties, formal Academy-supported efforts to train new arbitrators have not been very successful. However, at the risk

of sounding like a Pollyanna, I am not so sure that our continuously expressed concern about our failure to meet the challenge to train new arbitrators on a rational basis is altogether justified. New arbitrators have been developed when needed, either by their own efforts, through the help of an all too underutilized apprentice system, or by the parties themselves—notably in the Bethlehem, General Electric, and U.S. Steel systems. Somehow, despite the dire warnings voiced at least every year since 1948, the number of acceptable arbitrators has continued to be almost in balance with the demand. It is true that there always seems to have been a shortage of “name arbitrators.” However, at the same time, studies have shown that the corps of part-time arbitrators, who generally have had good acceptability by the parties, could have increased their caseloads if called upon to do so.

My somewhat defensive position should not be interpreted as showing no concern about what some day could be a shortage of arbitrators. We should continue to offer a helpful professional and institutional hand to anyone with potential qualifications, who shows an interest and aptitude, in getting started as an arbitrator. For better or worse, I have trained at least four new arbitrators and have seen them go on past me to greater professional heights and acceptability. It is my impression that this kind of person-to-person professional help will continue to be one of the greatest aids in getting new arbitrators started. An oft-mentioned potential new source is the large number of people who are yearly recruited as fact-finders in public-sector labor disputes. But I must add that the membership deserves great credit for its resounding support of programs for training arbitrators, although, sadly, there seems to be a general understanding that such programs have not been very effective and that something new or more useful is needed.

I would be remiss if I did not credit the Academy itself for a great accomplishment in surviving and flourishing since its founding in 1947. This was done without an outside subsidy, as has been the case with many professional associations.

After preparing myself for this paper, I probably am as familiar as anyone with the content of the annual Proceedings, and I find them generally readable and worthwhile. Much of the content is very useful to the practitioner, the trainee, or the student. Usually proceedings are not worth publishing, and when they are, they are not read. Ours are considered worthwhile by a substantial reading public and by a grateful publisher. These annual Proceedings, together with the large volume of published arbitration cases, consti-



tute a body of knowledge that simply would not be around in the quality way if it were not for the work of Academy members. This base that they have constructed can be expected to have an almost controlling influence on the arbitration process into the foreseeable future.

Lest this sound too self-serving, I must emphasize that the job simply could not have been done without a warm and meaningful cooperative relationship between Academy members and the appointing agencies. Here I pay tribute to our friends in the American Arbitration Association, the Federal Mediation and Conciliation Service, and the many state appointing agencies. Finally, my thanks to Harry Edwards and his program committee for giving me this opportunity to renew through the mails relationships with so many arbitrators with whom I have had the privilege of working over these many years.