during the 1973 meetings of this Academy, my associate, Herman Sternstein, outlined what we regard as the essential qualifications of a neutral in a tripartite interest case: open-mindedness (that is, a willingness to plow new ground); experience and basic competence in the handling of economic and statistical material; diligence in reviewing the record and the arguments of the parties; and a combination of the kind of flexibility that will enable him to move from a position he may have been inclined to before the sessions began and the kind of toughness that will enable him to do battle for his position once he has reached a position he is satisfied is justified in the light of all he has heard in the hearings and in the executive session.

It is not by accident that 22 of the 31 past presidents of the National Academy of Arbitrators have served (several of them on a number of occasions) as neutral arbitrators in tripartite transit interest cases, and you may be interested in knowing that we now have several agreements in the industry that require that the panel of arbitrators from which the neutral is selected be members of this Academy.

Let me close these comments with this summary observation. Given my background and how I make my living, I would prefer *two-man* arbitrations—a neutral and a union representative. But until I can convince some management to go along with that notion, I will opt for tripartite arbitration for both grievance and interest cases every time.

Comment—

ROGER H. SCHNAPP*

My comments today will be limited to tripartite *grievance* arbitration. I have no personal experience with tripartite interest arbitration and will, therefore, leave that subject to those members of this panel who do have such experience.

I am an enthusiastic proponent of tripartite grievance arbitration. My experience with it has been in the airline industry. At American Airlines, I frequently functioned both as a member of system boards of adjustment and as an advocate before those system boards. At Trans World Airlines, my role has been lim-

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ited to that of advocate. I also have had experience as an advocate, outside the airline industry, with sole-arbitrator arbitration. As a result of both experiences, I believe that the parties and the arbitration process are best served by tripartite grievance arbitration.

Arnold Zack has been critical of a number of practices that can and do occur under a tripartite system. I do not disagree with him concerning the undesirability of most of the practices that he has criticized. I would, however, place the blame differently. From my perspective, when tripartite grievance arbitration does not work properly, it is generally the fault of the arbitrator, not the parties. Like all generalizations, it is certainly not true in every instance. However, I respectfully submit that it is true in the great majority of situations.

In support of this proposition, I would like to relate to you two of my experiences with tripartite grievance arbitration. The first, I believe, is an example of the process at its best. The second is an example of the process at its worst.

For my example of the process at its best, let me describe an American Airlines case where I was the company-appointed member of the system board of adjustment. The case involved American's ground employees, and the issue was one of contract interpretation. At the hearing the company advocate did an outstanding job of supporting the denial of the grievance. Subsequent to the hearing, the union system board member and I had occasion to be together on another matter, and he took the opportunity to discuss the grievance with me. In essence, he agreed that the grievance was without merit and explained that the union had taken it to arbitration for essentially political reasons. Therefore, he had no trouble concurring in a decision denying the grievance. However, he was concerned about the *opinion* as opposed to the award. He shared my view that the company advocate had done an outstanding job of presenting the company's position and, as a result, his concern was that the arbitrator might go too far in denying the grievance. By "too far," he meant that the arbitrator might have found the advocate's arguments so persuasive that he would read the language as even more favorable to the company than the parties had intended. The union system board member and I were in complete agreement concerning the intent of the language and its proper interpretation. Similarly, we both agreed that the grievance should be denied in its entirety. As a result of our discus-

sion, we also agreed that the opinion that was ultimately handed down by the system board of adjustment should be consistent with our joint understanding of what the language meant.

When we subsequently met with the arbitrator, the worst fears of my union counterpart were realized. The arbitrator was prepared to accept the arguments of the company's advocate and issue an opinion that was far more favorable to the company than the parties had intended when they negotiated the agreement. However, after the arbitrator had heard the arguments of his two "wingpersons," he agreed to modify his opinion so that it would be consistent with our joint understanding of what the language meant. In this instance, I believe that the tripartite process provided a result far superior to that which would have occurred in a sole-arbitrator situation. The company and union system board members were able to contribute something to the arbitrator's deliberations that would otherwise have been absent.

Contrast this case with the next one I will describe—which, in my experience, is an example of tripartite arbitration at its worst. This case involved an indefinite suspension of a flight attendant for health reasons. I was neither the company system board member nor the company advocate, but was functioning in my role as TWA's chief in-house industrial relations attorney. The grievant was an epileptic who had been suspended for medical reasons after having an epileptic seizure while working on board an aircraft. While TWA had a consistent policy, of long standing, of not permitting epileptics to work as flight attendants, a new area medical director permitted this flight attendant to return to duty after having been assured by the flight attendant's physician that there was no reason to expect a recurrence of the problem. On the attendant's first flight after returning to duty, a second seizure occurred, early in the flight. It not only incapacitated the flight attendant in question, but required another attendant to take care of him. Thus, as a practical matter, there were two less working flight attendants than there should have been. The flight attendant was suspended indefinitely for medical reasons. Two issues were submitted to the arbitrator: (1) Should the flight attendant have been suspended (as of the date of his suspension)? (2) Should the flight attendant have been continued on suspension (as of the date of the hearing)? The arbitrator answered both questions in the affirmative. He agreed that the flight attendant should have been suspended

and should have been kept on suspension at least until the date of the hearing. However, he went on to indicate that he did not agree with the company's policy of not permitting epileptics to work as flight attendants. In the executive session, the company board members (it was a five-person system board) reminded the arbitrator that he had been asked only two questions—by either the company or the union—and that his gratuitous comments concerning the company's policy exceeded his authority. The arbitrator, demonstrating what I considered to be an egregious lack of integrity, withdrew that portion of his opinion and award which dealt with the company policy and *reversed* his position on the second question. Thus, his ultimate decision was that it was proper to suspend the grievant (at the time of the suspension), but that the grievant had to be reinstated. Regrettably, the arbitrator in question, while a member of the Academy, is not present today. Since he is, therefore, not able to defend himself, I have decided not to mention his name. That decision, however, represents the nadir of tripartite arbitration in my own experience.

Before closing, I would like to discuss briefly some questions that arise in tripartite arbitration and give you the benefit of my own thoughts on them. I should first indicate that the views that I am about to express are my own and do not always represent the view of my clients—the labor relations and personnel departments of TWA.

When I have served as a system board member, I have intentionally and studiously avoided acquiring any knowledge of the case prior to the hearing—other than that which is in the submission to the arbitrator. My reason for this is that I want to be in the same position as the neutral when the case is presented. Too often a company system board member does not recognize that the record is inadequate because his or her own knowledge—having been supplemented by a briefing prior to the hearing—is not similarly inadequate. By avoiding such a briefing, I attempt to insure that any inadequacy in the company's presentation will be as obvious to me as it is to the arbitrator. Often this results in my raising questions during the hearing—addressed to both parties—when I feel the need for clarification. Hopefully, my own need for clarification simply reflects a similar need by the neutral. My own experience has been that this "planned ignorance" has served me well as a company system board member.

A related, but somewhat different, problem occurs when a member of the system board has had previous contact with the case. For example, there are certain individuals who are routinely consulted concerning disciplinary matters by operating management. While they are not the ones who make the disciplinary decisions, they advise the supervisors who do. It is not uncommon for the same individuals to be selected as system board members. When this occurs, these individuals are, to some extent, reviewing their own advice. There have been a number of court decisions upholding the right of a party to select an individual as its system board member even though that individual has had prior contact with the case. TWA is now being sued by a former pilot who is alleging that the Air Line Pilots Association violated its duty of fair representation. One of the elements of this pilot's case is that ALPA did not challenge a TWA system board member who had previously been involved in discussions of the discharge decision. At United Airlines, company board members have been challenged, on the basis of their prior contact with the grievance, and it is my understanding that they have voluntarily disqualified themselves. This appears to be a subject that will receive increased attention in the future.

Arnold has indicated that he is troubled when the partisan system board members tell him to "just write the opinion and send it to us for signature, for concurrence or dissent." I am troubled by the mirror image of this situation. What disturbs me is the number of arbitrators who prepare a written decision—for all intents and purposes in final form—and bring it to the first executive session of the system board. By doing so, these neutrals destroy the essence of a system *board* of adjustment. The parties may as well have specified a sole-arbitrator system. While it is true that there will be the occasional situation where *neither* partisan system board member is willing to concur with the neutral's opinion and award, this is the exception and not the rule. Most often, the neutral can achieve concurrence by one or the other of the partisan system board members. To borrow a colorful phrase from the National Labor Relations Board, such conduct by a neutral has a "chilling effect" on the proper functioning of tripartite arbitration. I feel very strongly that a neutral should defer writing an opinion and award, or even becoming fixed in his position, until he has had an opportunity to discuss the case with the other members of the system board of adjust-

ment. I do not believe it to be undesirable for the neutral to be affected by the arguments of his fellow system board members. The fact that this may result in a different decision than would have been achieved with sole-arbitrator arbitration only means that the parties are getting just what they bargained for—a tripartite award and opinion, with all of the benefits that result from that system.

A problem that is of growing concern to me is the increased tendency of neutrals to treat a request for arbitration as if it were a request for a management consultant. This occurs when the arbitrator says to the company system board member: "I believe that the company interpreted the contract properly, but it is bad employee relations to insist upon this interpretation. Therefore, even though the company is right, I believe it is to the company's advantage to have me rule (at least in part) in favor of the union." This is outrageous. My counterparts in management and I are paid to make decisions of this type. By the time a case reaches a neutral, we have already decided that we are willing to accept any adverse employee relations impacts that may result from our insisting upon the correct interpretation of the contract. Right or wrong, we have exercised the judgment and discretion for which we are paid. For a neutral to attempt to substitute his judgment for ours is highly inappropriate. The neutral in tripartite arbitration is not being asked to give either party the benefit of his opinion on how it should conduct itself; he or she is being asked to determine which party is properly interpreting the labor agreement. If the company's interpretation of the agreement is the right one, it is irrelevant if the neutral believes that it is otherwise to the company's advantage not to insist upon the benefit of its bargain. This is one area where I believe that strong partisan board members can play a major role in deterring a neutral from exceeding his authority. I would recommend that all partisan system board members follow the same procedure that I do—that is, to remind the neutral of his role and ask that he restrict himself to it.

Arnold has expressed concern about disparity in the competence of partisan system board members. To me, this problem is no different from the unequal competence of advocates. The *parties* must deal with it. Both management and labor must insure that only competent people are placed on system boards of adjustment and that these people are properly prepared for executive sessions. If one or the other fails to do this, it is not inappropriate for them to reap as they have sown. A neutral

should not concern himself with this fact of life. As in the selection of advocates, a party gets just what it deserves when it selects an incompetent system board member.

In closing, let me join Iz Gromfine in noting that I am not now and never have been guilty of any of the sins of which Arnold complained in his presentation.

Rejoinder—

ARNOLD M. ZACK

I have sat here patiently through these vituperative comments made by allegedly informed experts on the subject of tripartite panels. I can take it no longer. I am at the end of my wits' rope. The clearly blind adherence to the concept of tripartitism leaves me speechless. I must therefore renounce anything favorable I might have said about tripartitism and revert to extolling the conventional wisdom of the single neutral. After a detailed and cursory examination of the literature, I can find no better recitation of the benefits thereof than in Chapter IV, pages 18 and 19, of the 1694 volume, *Arbitrium Redivivum or the Law of Arbitration:*

> The arbitrator's "power is larger than the power of any ordinary or other extraordinary judge; for an Arbitrator hath power to judge according to the compromife or fubmiffion after his own mind, as well of the Fact as of the Law, but the other Judges are tyed to a prefcript form, limited to them by the Law of Magiftrate.
>
> "And fince his power is so great and incontrolable, Men ought to be cautious how they make choice of Arbitrators; therefore it is thought fit that fuch perfons be Elected as are fufficient and indifferent.
>
> "That they have fufficient skills of the matter fubmitted to them, and have neither legal nor natural impediments. That they be not infants who by reafon of their few years may want difcretion and knowledge.
>
> "That they be neither Mad nor Ideots, for fuch are void of underftanding.
>
> "That they be neither Deaf, Dumb or Blind, for thereby their principal fenfes necessary for the apprehenfion of the Matter may be impaired.
>
> "As for indifferency, That they be void of Malice and Favour to either of the parties, that they be not notorious by Outlawry, Excommunicated, Irreligious, nor Covetous. . . ."[1]

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[1]See note 2 in John Kagel's paper, Chapter 5, *supra.*