CHAPTER 1

PRESIDENTIAL ADDRESS: THE NAA AND ITS FUTURE

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Well, here we are, again considering the future. And rightly so! This has become part of the Academy's tradition. As many of you already know, and, as has been mentioned often at these gatherings, this custom began at the first Annual Meeting of the Academy in 1948. There, Professor Edwin F. Witte's subject was "The Future of Labor Arbitration—A Challenge."[1] Since then, as we have matured organizationally and in comparative membership age, our tendency has been to revisit the issue one way or another ever more frequently. The most recent occasion was only 2 years ago at our splendid 50th Anniversary Meeting in Chicago. As you may recall, the theme for that program was "Celebrating our past—anticipating our future."[2]

In his 1997 Presidential Address at Chicago, George Nicolau noted that he and President-Elect Milton Rubin had established the Special Committee on Employment-Related Dispute Resolution, chaired by Michel Picher (the Picher Committee).[3] In addition, he announced an action of the Academy's Board of Governors (the Board) had just taken on recommendation of that committee. It adopted a "Statement of Principle" opposing unilaterally imposed employer arbitration plans that require employees, as a condition of employment, to waive "direct access to either a judicial or administrative forum for the pursuit of statutory rights."[4] Acknowledging that some courts had enforced such plans, the

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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, 1948–1954, ed. McKelvey (BNA Books 1957), 1.

[2]*Preface*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), vii.

[3]Nicolau, *Presidential Address: The Challenge and the Prize*, *id.* at 1, 16.

[4]*Id.* at 19.

Board also adopted a set of "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems."[5] The Board also cautioned members asked to serve as arbitrators in such cases to "consider and evaluate the fairness of any employment arbitration procedures in light of the Academy's 'Guidelines'. . . ."[6] George Nicolau asserted: "All of this is designed so that the Academy and its members can use our moral authority to ensure procedural, substantive, and remedial fairness [in such arbitrations]."[7]

These Board actions were consistent with the 1993 revision to the Academy Constitution to promote the study and understanding not only of labor-management disputes, but of employment disputes as well. We also extended coverage of our Code of Professional Responsibility[8] to members serving as arbitrators in such cases. George described these measures as "an important and unprecedented step for this Academy and a clear signal that we intend to lead." Furthermore, he observed:

> If we continue to do so, if we continue to expand our horizons, then we must seriously consider once again our membership criteria. I suspect that the examination of this area will be painful; it always has been. Yet the expansion of our horizons and our membership, though separate questions, are clearly linked. For if we say to those who are arbitrating statutory issues, some of which are highly complex, that you must do so at a particular ethical level, we must ask ourselves if we should continue to say that what those individuals do and the professionalism with which they do it is not worthy of consideration for membership purposes.[9]

Yesterday at our "Members Only" session, Dennis Nolan recommended in his masterful paper that we move in the direction George Nicolau alluded to; that we open up our membership to those who act professionally as arbitrators primarily in the employment field; that we become the "National Academy of Labor and Employment Arbitrators."[10] Dennis first proposed his paper to me and Program Chair Jack Clarke in the fall of 1997, as fitting "perfectly" with our chosen "Quo Vadis?" program theme for this meeting. He also wrote: "I have no doubt that such an address

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[5]*Appendix C: Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems, id.* at 313.

[6]*Appendix B: Statement of the National Academy of Arbitrators on Conditions of Employment Agreements, id.* at 312.

[7]Nicolau, *supra* note 3, at 19.

[8]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (as amended, 1996).

[9]Nicolau, *supra* note 3, at 21.

[10]Nolan, *The National Academy of Labor and Employment Arbitrators?, infra* at Chapter 3, p. 52.

would prove controversial." I fully agreed, and suggested another subject. However, the Program Committee subsequently decided, with my blessing and with no objection from the Board, that this was an appropriate time for a paper on the pros and cons of such a change. And knowing Dennis as I do, I was confident he would do a thorough job.

Additionally, in January of this year the Picher Committee was about to begin a survey of our members' experience in arbitrating and mediating disputes involving statutory claims arising under collective bargaining agreements or employer-promulgated arrangements.[11] In anticipation of hearing Dennis' views, and looking forward to receipt of the survey's preliminary results, I decided to establish a Special Committee on the Academy's Future. President-Elect Ted St. Antoine and President-Elect-designee John Kagel joined me in choosing its members and in designating outgoing Vice President George Fleischli as its chair. In a message to members about this in March, I stated in part:

> The committee's charge will include considering whether to expand the Academy's membership to those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field, and if so, how? The committee will receive its challenge from Dennis Nolan in his paper at the members only session in New Orleans.

As I mentioned, Dennis' paper is excellent. It exceeded my expectations. He "covered the water-front," and "touched all the bases." At its outset, he correctly recognized that the factors for and against the Academy extending its membership are quite "complex, . . . numerous and . . . closely balanced." He likewise realized that "[o]ne cannot hope to understand the present, let alone predict the future, without understanding the past."[12] Some of you have heard me this year talk about the two statues on Pennsylvania Avenue outside the National Archives building in Washington, D.C. One is female and the other male. Each is seated, holding an open book. The base of the former has the simple wording: "What is Past is Prologue." The other in like fashion advises: "Study the Past."

I firmly believe that in order to accomplish meaningful and effective organizational change, one must have full knowledge of

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[11]The Picher Committee was assisted by The School of Industrial and Labor Relations at Cornell University.

[12]Nolan, *supra* note 10, at 53.

how an institution presently operates and what has gone on before. I suspect that the upset and havoc experienced last July, when the Federal Mediation and Conciliation Service (FMCS) announced new procedures for handling arbitration selection panels, may have been caused because these changes were made without sufficient background information. Fortunately, FMCS Director-Designate Richard Barnes quickly saw this. Through the vehicle of a Focus Group which Barnes convened, this has since been substantially corrected. The Focus Group includes representatives from labor and management, three Academy representatives led by past President Arthur Stark, and nonmember arbitrators as well.

Returning to the Nolan paper, it succinctly outlines the Academy's development, and "the labor relations environment in which it . . . existed" from 1947 to 1990. Dennis pointed out that the Academy "was a direct product" of that environment;" that with the steady growth of union membership from 1947 to the late 1970s and the supportive legal atmosphere the Supreme Court engendered in its 1957 *Lincoln Mills*[13] and 1960 *Steelworkers Trilogy*[14] decisions, membership in the Academy steadily increased to a peak of 702 in 1990. This occurred even though union membership began to decline steadily in the 1980s. The number of arbitration cases later in that decade apparently declined as well, at least according to American Arbitration Association (AAA) and FMCS statistics.[15]

Dennis commented that: "By the start of the 1990s . . . prospects for established arbitrators (and through them, for the future of the Academy) were rosy."[16] In his 1987 Presidential Address here in New Orleans celebrating the Academy's 40th year, Bill Murphy expressed the very same sentiment, describing the Academy as "fat, fair, and forty."[17] Nonetheless, Dennis notes the continued fall in union members since 1990, a similar trend in the number of arbitrations, and "a slow shrinkage" of our membership ranks to 633 today.[18]

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[13]*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

[14]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[15]Nolan, *supra* note 10, at 54.

[16]*Id.* at ___.

[17]Murphy, *The Presidential Address: The Academy at Forty*, in Arbitration 1987 The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 1, 11.

[18]Nolan, *supra* note 10, at 58.

Referencing the Supreme Court's enforcement of a stock broker's agreement to submit all disputes with his employer to arbitration,[19] Dennis notes that the arbitration of nonunion employment cases has grown. For instance, those handled by the AAA increased from 591 in 1995 to 1,727 in 1998—a threefold leap.

Later yesterday Michel Picher and David Lipsky, Director of the Cornell Institute on Conflict Resolution, presented to our members Preliminary Results of the survey I mentioned earlier. With an 86 percent response rate, this is the most extensive polling of our members ever conducted.[20] Before making its report, the Picher Committee permitted Dennis to disclose three of its findings: (1) in the prior 3 years 46 percent of our members had arbitrated to decision at least one nonunion employment case; (2) the average number heard was five; and (3) assuming acceptable due process protections, a large majority of our members who have not had such assignments would accept them.[21]

The survey also revealed that 37 percent of the labor-management cases our members decided during this time frame were in the public sector; 82 percent of our members had to interpret or apply a statute under a collective bargaining agreement; 10 percent of all collective bargaining arbitration cases involved a statutory claim; and 17 percent of our members declined a nonunion employment arbitration due to perceived unfairness of the procedures.[22]

From his review, Dennis concludes the current state of the Academy is "precarious." He notes as well that our members' traditional work is "contracting," as is the Academy's size, while employment arbitration is "booming." He submits that now is the time to begin one of three courses: (1) We can remain an organization of individuals primarily engaged in arbitrating cases under collective bargaining agreements. (2) We can change by opening membership to those mostly acting as arbitrators in disputes between employers and their nonunion employees. Or, (3) we could sponsor a separate "new association of nonlabor employment arbitrators."[23]

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[19]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

[20]Picher, Lipsky, Seeber, National Academy of Arbitrators Survey of Professional Practice, Preliminary Results, June 3, 1999, *infra* at Appendix B.

[21]*Id.*

[22]*Id.*

[23]Nolan, *supra* note 10, at 75.

Dennis sets out the considerations involved in each, identifying six difficult problems or obstacles we will encounter in choosing the second course. These concern membership standards, ethical issues, Academy governance, meetings program content, client relations, and the effect of such a change on the Academy's "particular ethos." Despite these "critical questions" he comes down firmly in favor of taking that route. In fact, he makes a compelling case that we already have moved a long way in that direction. In partial support of this, Dennis cites the views expressed by three recent past presidents in their presidential addresses: Tony Sinicropi in 1992, Arnold Zack in 1995, and, as I related earlier, George Nicolau in 1997.[24]

Despite the strong case Dennis presents for his view, I find myself unable at this time to support it. I am not persuaded that we now have all the pertinent facts and arguments before us. As I see it, there are still many unanswered questions. Has the number of traditional labor-management arbitrations actually dropped some 30 to 40 percent since 1986, or are the parties increasingly resorting to direct appointment of arbitrators? Our study of labor arbitration in America as it existed in 1986–1987 found that almost 65,000 grievances of unionized employees were arbitrated in that time period.[25] This figure is substantially higher than the 50,000 case filings AAA and FMCS reported for 1986. In fact, there are numerous state and local agencies that provide labor arbitration panels to unions and unionized employers. Yesterday, the Academy Research and Education Foundation awarded a small grant to Walt Gershenfeld and Nels Nelson to find out, among other things, how many arbitral appointments these agencies make each year.

Are there significant numbers of individuals hearing traditional labor-management arbitrations who would qualify for Academy membership, but choose not to apply? If so, why? How many arbitrators primarily handle employer-promulgated arbitration cases in the United States? What is their average case load? Do they have any interest in joining a National Academy of Labor and Employment Arbitrators? As Dennis asks, "What would our current clients, particularly labor unions, think about our becoming an Academy of Labor and Employment Arbitrators?"[26]

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[24]*Id.* at ___.

[25]Bognanno & Coleman, eds., Labor Arbitration in America: The Profession and Practice (1992), at 4, 92.

[26]Nolan, *supra* note 10, at 65–66.

In 1987, despite his positive view of the state of the Academy at that time, Bill Murphy foresaw the possibility of continuing decline in union members. He also said:

> We are told that inevitably, as a child of collective bargaining, arbitration will also gradually phase out, and in the meantime arbitrators will decide issues of lesser importance than in the past. . . .
>
> It is just possible that economic forces as yet undetected or not yet in existence may bring about a renaissance in unionism. If not, then we must face the reality that life does not begin at 40. If our profession is destined to enter a slow decline, then we must accept the prospect with equanimity as being beyond our power to prevent . . . and adjust our careers accordingly.[27]

In 1993, a year after Tony Sinicropi endorsed the majority final report and recommendations of the Beck Committee to broaden the Academy's role with regard to nonunion employment disputes, and after further extensive discussion of this issue, the Academy decided not to extend its membership to arbitrators primarily handling such cases. Moreover, Dave Feller observed in his Presidential Address that year:

> Labor arbitration, unlike other arbitration, remains a distinct profession with its own traditions and with a common bond of precedent and practice. Misnamed as it may be, the Academy remains an association of labor arbitrators bound by ties of experience and familiarity with the collective bargaining process. As unionism and collective bargaining decline, in the private sector at least, many of our members will inevitably engage themselves in other kinds of dispute resolution. When they do so, particularly in statutory disputes, they will face different problems perhaps requiring different techniques. As an institution, as we decided only this week, we must expand our educational efforts and our Code of Ethics, to cover arbitration not falling within the traditional kind that binds us together. But the Academy must remain, and will remain, a unique institution consisting of men and women doing the specialized work of arbitration of union-management disputes.[28]

I remind us of these views, not to take a position in support of or against them. Rather, I do so because they are an important aspect of our present and past. We know from Dennis Nolan and the preliminary Picher Committee survey results that in just 6 years there have been striking changes in labor-management arbitra-

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[27]Murphy, *supra* note 17, at 11.

[28]Feller, *Presidential Address: Bye Bye* Trilogy, *Hello Arbitration*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 1, 13.

tion, in the arbitration of nonunion employment disputes, and in the work of our members. As one example, the Beck Committee generously estimated from its survey of our members that in the year and a half from January 1, 1989, as many as 1 in 3 respondents had arbitrated an employment dispute other than one arising under a collective bargaining agreement.[29] The comparable rate now is 46 percent.

Presently, our members span at least four generations, and probably five. According to our late beloved member Clara Friedman in her fine book *Between Management and Labor: Oral Histories of Arbitration*,[30] I belong to the third generation. We began our careers in the 1970s, following the first generation of exceptional arbitrators of the 1940s who founded the Academy, and the second, who entered the field in the 1950s and 1960s. The Academy is fortunate to have still with us a few of the first group. With the exception of Past President Ben Aaron and Jim Healy, both of whom are active members, the remaining six are Honorary Life Members. Yesterday, it was my great pleasure on behalf of our Board and members to bestow Honorary Life Membership on one of them, Alex Elson. Tomorrow, five members in the most recent generation will present a stimulating session on "Emerging Problems in Arbitration." We need to hear the views of interested members in every generation on the issue of expanding our membership.

Although Dennis recommends a quick and decisive move toward becoming a National Academy of Labor and Employment Arbitrators," he says:

> In thinking about this revolutionary change, we can neither ignore nor minimize the obstacles facing us. Those obstacles present the most difficult challenges the Academy has ever faced. Removing them will require Academy members' time and effort for many years. The endeavor will very likely force our membership, time and again, to debate and decide exceedingly painful questions.[31]

Dennis acknowledges that the Fleischli Committee is charged with the responsibility of studying this issue. Because of its crucial importance to our organization and the parties we presently serve, that committee must be sure it has all the relevant evidence and

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[29]*Appendix B: Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Dispute Resolution Procedures*, *id.* at 325.

[30]Friedman, Between Management and Labor: Oral Histories of Arbitration (Twayne Publishers 1995), 5.

[31]Nolan, *supra* note 10, at 77.

arguments. Only then, will it be able to recommend our future course for the next century and the new millennium.

Later this afternoon, the Fleischli Committee on the Academy's Future will have its initial meeting. Clearly, it is up to the committee to determine how it will proceed. However, I suggest that it must address most of the obstacles Dennis identifies *before* deciding to make the choice he recommends, not afterwards. Furthermore, if it can be done expeditiously and at a cost that is not prohibitive, the committee may want to conduct a study of the state of labor and employment arbitration in the United States to provide answers to the questions I posed. In the final analysis, Dennis is correct that if the Fleischli Committee decides to expand our membership, this can only be accomplished with approval by a substantial majority of the current members.

At the beginning of former Senator Bill Bradley's book, *Time Present, Time Past: A Memoir*,[32] a quote from T.S. Eliot is presented. I consider it to be an even better statement of the thoughts expressed on the National Archives statues. It is:

> Time present and time past
> are both perhaps present in time future
> and time future contained in time past

Surely, the answer to the crucial questions with which the Fleischli Committee must deal is right there before us in our present and our past. The task for the committee, with guidance from our future leaders as well as from our members, is to perceive it. I am confident that, through the long, hard process we necessarily must follow, we possess the collective wisdom, good judgment, and good will to make the right choice.

In conclusion, this has been a very special year for me. It has been a great honor and privilege to serve the Academy as president. Like most of my predecessors, active participation in the Academy has been my principal professional commitment. Since joining the Academy's first president, Ralph Seward, and Sy Strongin as an associate umpire with the United Steelworkers of America and Bethlehem Steel Company in the summer of 1970, I have attended every Annual Meeting. Attending them is like visiting an oasis. Although I don't compare my daily work as an arbitrator to being in the desert, for me it sometimes can be quite arduous and certainly lonely. The opportunity at this meeting and the

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[32]Bradley, Time Present, Time Past: A Memoir (1st Vintage Books ed. 1997).

Continuing Education Conference to be with respected colleagues, many of whom have become good friends, to discuss problems and learn about new developments in our field is very nurturing professionally.

By a happy circumstance, our distinguished Honorary Life Member Professor Archibald Cox accepted the invitation of the Program Committee to give the Fireside Chat. For 2 years, I sat at his feet in law school learning labor law and collective bargaining. Under his guidance, I wrote my third-year paper on "The Rights of an Individual Employee Under a Collective Bargaining Agreement." He instilled in me the desire to pursue a career in the field of labor law, and I am very delighted now to be able to thank him before this audience.

Professor, thank you.