CHAPTER 3

THE NATIONAL ACADEMY OF LABOR AND EMPLOYMENT ARBITRATORS?

DENNIS R. NOLAN*

The idea for this talk and paper came to me two years ago after the confluence of two seemingly unrelated events. The first occurred at the 1997 Annual Meeting in Chicago. After listening to the list of departed members, the introduction of new members, and the Executive Secretary-Treasurer's membership statistics, I realized that we were losing more than we were gaining. The second occurred about the same time. I began to receive more nonunion arbitration appointments and fewer labor arbitration cases. I wondered whether that was just a fluke or a symptom of a bigger trend. It took only little reflection to realize that these developments not only were connected but that they also posed a serious challenge for the Academy. That in turn caused me to suggest expansion of the Academy's scope as a possible topic to Program Chair Jack Clarke.

My perception of a connection between falling Academy membership and the rise of employment arbitration was hardly unique. As has happened many times before, I looked into a problem only to discover that others had preceded me. Nevertheless, someone has to bell the cat, and the Program Committee decided that this was the proper time. I naively assumed that the pros and cons would be clear and would lead to strong recommendations about the Academy's future. Instead, the issues have proved more complex, more numerous, and more closely balanced than anyone who has not investigated the subject could imagine. As a result, I offer my

*Member, National Academy of Arbitrators, Columbia, South Carolina. A score or more of my Academy colleagues graciously shared their thoughts with me over the last 2 years, in private conversations, in Academy programs, in letters, and in e-mails. Without attempting to name them individually, let me thank them collectively and dedicate this paper to them.

analyses and views with a degree of humility to which I am not accustomed.

In keeping with this year's theme of *Quo Vadis* (which properly should be in the first person plural, *Quo Vadimus*, rather than in the second person singular, my paper begins with an examination of where we have been, follows that with a summary of where we are, and then speculates about where we are going. I conclude with a few recommendations to help us in our future progress. Given the importance and intricacy of the topic, I hope that you will pardon me for taking more of your time than I would normally want to do.

Where We've Been: 1947–1990

One cannot hope to understand the present, let alone predict the future, without understanding the past. Before discussing the Academy's options as we enter the new century, therefore, we must briefly review its history and the labor relations environment in which it has existed. Our base year is 1947. This was not only the year in which the Academy began, it was also the year the American labor movement most conclusively flexed its muscle in the great postwar strike wave. Finally, it was also the year that Congress passed the Taft-Hartley Act,[1] the federal statute that led to judicial endorsement of labor arbitration.

Formation of the Academy

The National Academy of Arbitrators began in Chicago 52 years ago. In addition to encouraging "friendly association among the members of the profession," its constitution listed several high objectives, including fostering integrity and competence, adopting canons of ethics, and promoting understanding of the arbitration process.[2] The constitution addressed only "arbitration of industrial disputes," which later amendments changed to "labor-management arbitration." The exclusive focus was *labor* arbitration; not until the 1990s did any Academy document suggest concern with what we would now call *employment* arbitration.

---

[1]Labor Management Relations Act, 29 U.S.C. §§151 et seq. (1947).

[2]Gruenberg, Najita & Nolan, The National Academy of Arbitrators: Fifty Years in the World of Work (BNA Books 1997), 26.

Largely composed of War Labor Board alumni, the Academy functioned for its first years primarily as an opportunity for members of a lonely profession to meet for pleasure and business. Despite the new group's stated aspirations, it is hard to believe that any of the founders could have foreseen how large and how prestigious the Academy would become, if only because the very notion of an arbitration "profession" hardly existed at the time. For all its intended or accidental merit, the new professional association was a direct product of the labor relations environment. As that environment improved, so would the Academy.

Growth of Unions From 1947

Union membership grew from about 14 million in 1947 to a peak of 22 million in the mid- and late-1970s.[3] From that day to this, membership slowly but steadily declined, with only a few minor and temporary reversals. By 1990, the figure was down to 16.7 million, barely more than organized labor had in 1952 and a one-quarter drop from the 1975 peak. Presaging the rise and fall in absolute numbers of union members was union density—the unionized percentage of the work force. Union density peaked far earlier than membership numbers, in 1954 at 34.7 percent. It then began the more precipitous decline that (despite the phenomenal growth of public-sector unionization since the 1970s) brought the rate to about 16 percent of the work force in 1990, less than one-half the rate at the labor movement's zenith. Take away the public-sector membership, which operates in very different economic and political contexts, and the remaining private-sector density rate in 1990 was under 12 percent, barely one-third of what it was 35 years earlier.

Of the two figures, density is more important than absolute numbers. Membership numbers may determine the union movement's income, but union density determines its bargaining power. A labor movement representing just one in every six or eight workers can hardly dictate wage levels or other terms of employment. Moreover, because employees join unions primarily for economic gain, a persistent lack of bargaining power will soon produce a decline in membership. Until recently, however, the union movement's numerical strength and its disproportionate

[3]Unless otherwise noted, all figures on union membership are from Nolan & Abrams, *Trends in Private Sector Grievance Arbitration*, in Labor Arbitration Under Fire, eds. Stern & Najita (1994), 42, 67.

influence in certain key segments of the economy hid its relative decline. Collective bargaining agreements, while failing to provide the wage gains of earlier eras, continued to provide for arbitration of contractual disputes. That, and the strong support of Congress and the federal courts, guaranteed a great deal of arbitration work.

The Supportive Legal Environment

The Taft-Hartley Act of 1947 contained two provisions relevant to our work. One was section 203(d),[4] which stated a public policy favoring grievance arbitration. The other and more significant part was section 301,[5] which empowered federal courts to enforce collective bargaining agreements. As interpreted by the Supreme Court in *Lincoln Mills*[6] and the *Steelworkers Trilogy*,[7] section 301 meant that the federal courts should enthusiastically enforce both arbitration agreements and the awards rendered pursuant to them. These decisions and their progeny dramatically boosted the value of arbitration agreements to unions. Without the guarantee of court enforcement, employers' promises to arbitrate were mere words; once the courts agreed to enforce those promises, the words became gold. Later, by specifically enforcing the no-strike promises unions made in return for employers' agreements to arbitrate,[8] the Supreme Court increased the worth of arbitration clauses for employers, too. Predictably, virtually all parties soon included arbitration provisions in their collective bargaining agreements.

In only one respect did the Supreme Court qualify its endorsement of arbitration. In *Alexander v. Gardner-Denver Co.*,[9] the Court held that a collectively bargained arbitration agreement could not interfere with an individual employee's statutory rights to protection from racial discrimination. Later cases extended the principle to other statutes. That decision was of little practical concern to labor arbitrators or to the Academy. The notion of dealing with statutes in any respect was still novel and a bit suspicious in 1974. The idea of an entirely new field of statutory employment arbitration, if anyone thought about it at all, appeared to be blocked by *Alexander*'s protection of the individual's right to litigate statutory

---

[4]29 U.S.C. §173(d) (1982).
[5]29 U.S.C. §185 (1982).
[6]*Textile Workers v. Lincoln Mills,* 353 U.S. 448, 40 LRRM 2113 (1957).
[7]*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).
[8]*Boys Mkts. v. Retail Clerks Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).
[9]415 U.S. 36, 7 FEP Cases 81 (1974).

issues. Accordingly, labor arbitrators perceived no threat and no loss from *Alexander*. Because their pocketbooks were not affected, they had little reason to take offense at *Alexander*'s critical comments about the suitability of arbitration for the resolution of statutory questions.

This combination—high (albeit declining) union membership, virtually unmitigated legislative and judicial support, and universal use of arbitration agreements—naturally benefited arbitrators and the Academy.

Resulting Increases in the Number of Arbitrations and Arbitrators

At least temporarily, union membership figures have more influence than density rates on the number of arbitrations. Reliable arbitration statistics are hard to collect because so many parties select their arbitrators directly, use permanent umpires or panels, or use the services of state or municipal arbitration agencies. The best available proxy for determining the flow of arbitrations is the combined total of American Arbitration Association (AAA) and Federal Mediation and Conciliation Service (FMCS) arbitration filings. That figure climbed fairly steadily from 16,000 in 1970 (the first year for which combined statistics are available) to nearly 50,000 in 1986. It then tailed off to fewer than 44,000 in 1990.[10]

There is no reliable way to estimate the number of labor arbitrators in the United States because there is no central registry. Anyone can claim that title without ever hearing a case. The best proxy for the number of *established* arbitrators, those who hear the vast majority of arbitration cases, of course, is membership in the Academy. As one would expect, given the growth in unionization, the supportive legal environment, and the universality of arbitration clauses, Academy membership grew rapidly and steadily from 1947 to 1990. (See Table 1, which is the source for all cited Academy membership figures.) At the end of its first year, it had 72 members. Forty-three years later, there had been almost a tenfold increase, to 702.

With the exceptions of 1974 and of 1990 itself, more arbitrators joined the Academy every year than left it through death and

[10]Unless otherwise indicated, all arbitration statistics come from Nolan & Abrams, *supra* note 3, at 69. I use AAA and FMCS filings rather than actual awards because the latter figure fluctuates wildly for no apparent reason. Despite their yearly variations, the award statistics show the same general trend, peaking in 1986 and then declining.

Table 1. NAA Membership History*
1947–1999

Year	*Members at Start*	*Deaths*	*Resignations*	*New Members*	*Members at End*
1999[a]	639	4	2	0	633
1998	654	19	8	12	639
1997	663	13	5	9	654
1996	670	13	8	14	663
1995	678	12	8	12	670
1994	679	9	10	18	678
1993	692	19	13	19	679
1992	692	17	10	25	692
1991	697	13	10	18	692
1990	702	17	7	19	697
1989	692	12	3	25	702
1988	665	9	5	41	692
1987	646	10	4	33	665
1982	599	10	5	34	618
1977	468	8	8	31	483
1972	384	4	0	25	405
1967	345	3	5	10	347
1962	294	4	3	8	295
1957	235	2	0	12	245
1952	149	2	1	18	164
1947	0	1	0	73	72

*Data gathered from the NAA Database, Directory, Secretary-Treasurer's Reports 1947–1999.
[a]As of May 22, 1999.

resignation. Even as late as 1988, the Academy's entering class numbered 41, in a year when there were just 9 deaths and 5 resignations. Many of the newcomers came from different backgrounds than their predecessors, and many practiced primarily in the public-sector arena rather than in traditional private-sector settings, but on the whole they blended in well with the long-term members.

Where We Are Now: The 1990s

The Fall of Labor Arbitration

By the start of the 1990s, therefore, prospects for established labor arbitrators (and through them, for the future of the Academy) were rosy. It may be impossible for the Academy's newest members, who have had to struggle to gain enough cases to satisfy

the Academy's membership requirements, to understand the optimism felt by those of us who joined before 1990. The warning signals of declining union membership and density and the recent slight decline in the number of arbitrations were easy to miss. Only in hindsight is our collective vision 20-20. None of us had any idea in 1990 what would happen to our field and our organization by the end of the century.

The experiences of the past decade are familiar enough that I need not describe them in detail. Let me just provide a few statistics. First, the decline in union membership and density continued apace.[11] There were just 16.2 million union members in 1998, down another one-half million from 1990. More importantly, union density is down from 16 percent to less than 14 percent, and the private-sector density fell to just 9.6 percent, less than one-third of what it was 45 years ago. Second, and inevitably, the number of arbitrations continued to plummet. The AAA's labor caseload has fluctuated since 1990 but the unmistakable trend is down. Last year's total was just 14,621, off 10.5 percent in 8 years.[12] The number of panel requests to the FMCS fell from more than 27,000 in 1990 to just 19,000 in 1998—down 30 percent from 1990 and 40 percent from the 1986 peak.[13]

What should trouble us more as an institution is the consistent decline in our own membership. After 40 years of continued growth, deaths and resignations have exceeded the number of new members in every year since 1990. The size of the Academy's entering classes is indicative. The largest classes were those of the early 1980s: 44 in 1980 and 47 in 1981. Last year the Academy took in 12 new members; the year before, just 9. Last year alone there were 19 deaths and 8 resignations, so we lost more than twice as many members as we gained. The membership committee has correctly maintained our high standards for admission, and members have tacitly ratified its approach. The inexorable result, though, has been a slow shrinkage, from 702 in 1990, to 678 in 1994, to 639 in 1998, and to 633 before this

---

[11]Current statistics on union membership and density are from *Unions: Union Membership Numbers Up in 1998, but Percentage of Workforce Declined*, 1999 Daily Lab. Rep. (BNA) (Jan. 25), No. 15:AA-1, E-23.

[12]*Id.*; fax to the author from AAA Vice President Richard Reilly, May 5, 1999.

[13]FMCS statistics are from the FMCS annual reports and an e-mail to the author from the FMCS's Peter Regner on April 13, 1999. Some of the 1998 drop is undoubtedly due to the FMCS's introduction of a fee for its services. According to Regner, the FMCS expects a slight increase in 1999.

meeting.[14] We have lost 10 percent of our membership in the last 9 years.

The Rise of Employment Arbitration

At the very time union membership, labor arbitrations, and Academy numbers were falling, however, the Supreme Court opened the door to a new field of arbitration practice. In *Gilmer v. Interstate/Johnson Lane Corp.*,[15] the Court relied on the Federal Arbitration Act (FAA)[16] to enforce an employee's promise to arbitrate all disputes with his employer, thus barring his Age Discrimination in Employment Act (ADEA)[17] suit.

The Supreme Court carefully distinguished rather than overruled *Alexander,* but in the course of its opinion, it knocked some of the props from beneath the earlier decision. *Alexander* had asserted that arbitrators and the arbitration process were unsuited to resolving statutory disputes. *Gilmer* flatly rejected that conclusion, suggesting that the time for such misgivings had ended. "Such generalized attacks on arbitration," said the Court, "'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"[18] The "mistrust of the arbitral process"[19] expressed in *Alexander,* the Court went on, has been undermined by more recent decisions. Quoting a commercial arbitration case, the Court stated that "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[20]

---

[14]The figure of 633 is misleadingly high, because it includes 13 Honorary Life Members and 45 Standing Members, few of whom participate in Academy activities. Because those special categories correlate with advanced age, it is reasonable to assume that there are many more than in the Academy's earlier years. That means the drop in active membership is far greater than the raw numbers would suggest.

[15]500 U.S. 20, 55 FEP Cases 1116 (1991).

[16]9 U.S.C. §§1 et seq. (1947).

[17]29 U.S.C. §§621 et seq. (1967).

[18]500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989)).

[19]*Id.* at 34 n.5.

[20]*Id. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626–27 (1985)(quoting). More recently, in *Wright v. Universal Maritime Serv. Corp.*, 119 S.Ct. 391, 159 LRRM 2769 (1998), the Court again avoided overruling *Alexander,* holding instead that the collective bargaining agreement at issue was not sufficiently clear to constitute a waiver of

The Court's language in *Gilmer* indicates that *Alexander* was correctly decided, but only for one of its stated reasons. Having decided that the relevant statutes (the ADEA and FAA) permitted enforcement of arbitration agreements and that arbitration was a competent forum, the Supreme Court left standing only one of *Alexander*'s rationales: because a union's objectives may conflict with the grievant's, the group could not waive the individual's statutory rights. (That rationale is especially powerful because union membership is often, for both legal and practical reasons, compulsory.)

To be sure, some arbitrators are neither trained nor qualified to decide complicated statutory questions. This concern may be overrated, however, because few employment arbitration cases turn on such issues. Most involve routine factual disputes of the sort arbitrators have satisfactorily resolved for half a century. (That fact, by the way, is one reason why nonlawyer arbitrators may continue to play a major role in the new era of statutory arbitration.) More importantly, the parties can easily avoid arbitrators lacking statutory skills.

And, of course, arbitration lacks some of the procedural niceties of a federal suit. That concern is a two-edged sword, however. The very niceties that help assure more accurate factual determinations also maximize the cost and minimize the speed of the judicial process—so much so, in fact, that many meritorious statutory claims are never litigated. Every plaintiff's attorney will attest to rejecting most potential statutory employment plaintiffs because of the costs, risks, and delays of litigation and the limited remedies available. The greatest error in the debate over the wisdom of employment arbitration is the tendency to compare a realistic picture of arbitration with an idealized portrait of litigation—cost-free, efficient, and available to all claimants. Arbitration does have its warts, but so does litigation.

Whatever *Gilmer's* merits and demerits, lower federal courts (with the notable exception of the Court of Appeals for the Ninth Circuit) have enthusiastically welcomed the ruling. Well they might. The Supreme Court's forceful opinion was joined by seven members and one of the two dissenters has left the Court. More pragmatically, *Gilmer* allows federal courts to divert from their chambers thousands of complex, fact-intensive, time-consuming,

---

statutory rights. *Wright* reinforces another point of distinction the *Gilmer* Court used to avoid the *Alexander* precedent: in *Alexander* the arbitrator was not authorized to decide statutory questions, while in *Gilmer* he was.

and often nasty cases. From the perspective of a federal district court judge, enforcing an employment arbitration agreement is like voting for a free lunch.

Employers were slow to adopt mandatory arbitration rules, but that seems to be changing. Anecdotal and slight statistical evidence suggests that many employers have found arbitration of discrimination complaints preferable to litigation and are therefore putting arbitration clauses in employment contracts and employee handbooks.[21] The AAA estimates that three million employees in 300 companies are covered by arbitration agreements incorporating AAA rules.[22] Its employment arbitration caseload has tripled from 591 in 1995 (when it first classified employment arbitrations separately from commercial arbitrations) to 1,727 in 1998.[23]

Many of us, in fact, have already added employment arbitration to our own repertoire. Just how many I myself did not know until just before this meeting. The Committee on Employment-Related Dispute Resolution (the Picher Committee), who will report to you in more detail in a later session, has authorized me to disclose a startling statistic from the detailed survey of our membership conducted by Cornell University under the committee's auspices. The survey found that 46 percent of our members have heard at least one employment arbitration case in the last 3 years. The "density" of such activity is not yet high—most respondents reported fewer than five such cases—but the significant fact is the breadth of our participation. Half of us have already lost our innocence.[24]

One other survey result puts those numbers in perspective. The committee has also authorized me to state that the "overwhelming majority" of those who have not yet done any employment arbitration work would accept an offered appointment. They have no insuperable ideological objection to employment arbitration;

---

[21]Most of us know of major employers who have done so. Some of these programs even apply to statutory claims raised by unionized employees whose nonstatutory claims are subject to collectively bargained arbitration agreements. A 1996 survey of Fortune 1000 General Counsels found that employment arbitrations and mediations had increased by 28% in just 3 years. *Alternative Dispute Resolution: Mandatory Arbitration Better for Workers With EEOC, and Courts Stretched, Professor Says,* 1997 Daily Lab. Rep. (BNA) (Aug. 6), No. 151:C-2.

[22]*Arbitration: AAA Issues Revised Rules; Officials Discuss Training Program,* 1997 Daily Lab. Rep. (BNA) (May 28), 102:A-6, E-17.

[23]Fax to the author from AAA Vice President Richard Reilly, May 5, 1999.

[24]Meanwhile, as our many sessions on the application of external law to labor arbitration attest, our traditional work is beginning to look more like employment arbitration than ever before. The same statutory issues often arise in both arenas, and in many cases individual grievants have separate counsel who work with or even take the place of the union's normal representative.

rather, they are simply awaiting an invitation to the dance. As a practical matter, one who wishes to make a career of arbitration may soon find it difficult to avoid employment arbitration. As one Academy member put it in a message to me, "if you want to survive in California as an Arbitrator / Mediator you must be prepared and willing to accept 'employment cases.'"[25]

Our Current Position

As we close the century and the millennium, the Academy's situation is more precarious than we could have thought in 1990. Our traditional field of work is contracting, and with it the Academy's size. Meanwhile, a tangentially related field, still in its infancy, is booming. There is no sign that Congress or the Supreme Court will soon check employment arbitration's growth.

We are now at a fork in the road. Move we must, if only to get out of the way of those coming behind. But which route shall we take? There are, it seems to me, just three choices. We can continue to trod our customary path or we can take either of two new directions. Let me describe as best I can what lies ahead on those three roads, to help us decide which to choose.

Quo Vadimus, Choice One

The easiest choice for the Academy would be to stay on the trail we have always walked. We could continue to offer our usual high quality services to our usual clients. Although labor arbitration may be in decline, we as individuals might not suffer greatly. Most of us, after all, could make a good living simply doing for the rest of our working years what we have always done. There will always be some union strongholds, and Academy members are likely to do the bulk of the labor arbitration work coming from those strongholds. The main losers are unidentifiable—some people who would in an earlier era have become labor arbitrators will no longer have that option. By continuing straight on, moreover, we could avoid the difficult debates and decisions that any alternative course would require.

What would be satisfactory for us as individuals would not be so good for us as an institution. If we tie ourselves irretrievably to a declining portion of the economy, the organization will suffer in at

[25]E-mail to the author from Joe H. Henderson, March 13, 1999 (quoted with permission). Needless to say, a few members decline such cases as a matter of principle.

least two respects. First, it will continue to shrink in size and thus in ability to serve its members and the employment community. The demographics of our current membership present a stark future: because of the longevity that seems to come as a happy side benefit of Academy membership, we are aging. That inescapably means that death and retirement will claim even more of our members each year. The Academy's founders were mostly young. In the first survey of Academy membership, the average age was under 50. By 1987, the age had increased to 59.8.[26] Today the *median* age of today's members is 63. In other words, half of our members are at or beyond the age at which other professionals retire. (My wife Fran likes to comment that one benefit of belonging to the Academy is that it is the only professional organization where, at age 54 and with 14 years of seniority, I am still regarded as a youngster.)

Extrapolating current trends is seldom accurate and always risky, but the past decade's rate of a 1 percent decline each year will likely rise for several years before it levels off. That may already be happening. In 1995 and 1996, we lost 1 percent each year; in 1997 we lost 1.4 percent, and in 1998, 2.3 percent. If the number of labor arbitrations continues to fall and we maintain our membership standards, there simply will not be enough qualified applicants to replace the departed. At that rate we will fall beneath 600 within 3 years. We would then be back to the size we were in 1981.

The only member I know who has directly faced this prospect is Arnold Zack. On several occasions he has asserted that we must remain loyal to our labor and management parties, heretically adding, "even if it mean[s] phasing out in the next decade. . . . [w]hen we get too small we should fold."[27] That possibility is not one that appeals to any of us.

The second way the Academy would suffer is through reduced influence. If we continue on our usual road, our voice will resonate in a very limited domain. Private-sector union membership is under 10 percent and falling. All our hopes for guiding the course of employment relations in this country will be futile. While we

---

[26]Holley, *Members of the National Academy of Arbitrators: Are They Different From Non-Academy Arbitrators?*, in Labor Arbitration in America: The Profession and the Practice, eds. Bognanno & Coleman (Praeger 1992), 43–45.

[27]E-mail from Arnold Zack to James Harkless and Theodore St. Antoine, November 11, 1998 (quoted with permission). In a telephone call on May 22, 1999, Arnie reminded me that for half its life the Academy had fewer than 400 members and suggested that it could continue to operate at that smaller level. The arbitration universe was vastly smaller then, however, and there was no employment arbitration. A 400-member Academy in the 21st century would thus be far less significant than 400-member Academy in 1972.

advance to our institutional old age, our junior sibling, employment arbitration, will reach maturity. Without some unexpected intervention, employment arbitration will be the strong and growing dispute resolution arena in the next century, with the clear potential of surpassing labor arbitration. One does not need a crystal ball to know that sooner or later some professional association will arise to meet the needs of those who work in the new field. If more employees are subject to employment arbitration agreements than to collectively bargained arbitration agreements, there will be more employment arbitrators. An organization representing them will be heard more clearly than the Academy. As reluctant as we might be to admit it, such an organization might even demonstrate the enthusiasm and vibrancy shown by the Academy in its earliest years.

Moreover, because employers are the progenitors and paymasters of employment arbitration plans, employment arbitrators will naturally be especially sympathetic to their interests. The joint monitoring of labor and management forces labor arbitrators and the Academy to remain strictly neutral. In contrast, employers' exclusive control over employment arbitration will, in the absence of a countervailing voice like that of the Academy, destroy at least the appearance if not the reality of arbitral neutrality.

In October of 1997, the Board of Governors allocated $50,000 for a public relations campaign to promote the Academy's visibility. The 1998 Annual Report of the Executive Secretary-Treasurer stated that the other purposes were to "take affirmative steps on material issues in labor and employment arbitration, and to take steps toward establishing the Academy as the leading representative in the labor and employment profession." That effort would be of little consequence if we allow ourselves to be upstaged by a new association with a broader mission. In response to one senior member's concerns, President Harkless and one of the idea's sponsors, former President George Nicolau, later described that statement as inaccurate. Nevertheless, subsequent Academy actions such as filing amicus briefs in employment arbitration cases demonstrate that we do indeed intend to speak about (if not *for*) both the labor and employment arbitration fields.

Finally, we may have no choice but to expand or disappear. The decline in traditional arbitration may be so steep and inevitable that there would effectively be no Academy in 10 or 20 years if we stick strictly to our current course. To maintain our current membership while the market is declining, we would have to lower

our admission requirements, perhaps drastically. Given the alternatives, expansion might seem the least offensive. After all, who would argue that the Academy would be better off as a less elite group limited to a narrow slice of the world of work than as a more elite group serving a larger portion of that world?

Quo Vadimus, Choice Two

The Objective

There is an alternative. Rather than slide into a stately dotage, the Academy could decide to revitalize itself by welcoming the new field and those who practice in it. We could, in short, become the National Academy of Labor and Employment Arbitrators.

Before exploring the problems facing us down this path, we should remember that we have been considering our direction for at least 7 years. While the Academy as a whole has not gone very far, we have sent out our scouts and have received their reports. As these have come in, we have taken the first steps in a new direction.

The first of our scouts to report was President Anthony Sinicropi in his 1992 Presidential Address, a model of the kind.[28] Because he spoke before the impact of *Gilmer* was discernible, it might be better to describe him as a scout up our traditional path. He saw the future and it did not work. Change was essential, he said. Traditionalist to the core, he nevertheless urged the Academy onto the new road:

> I state emphatically my belief that, while we as an Academy must forever remain loyal to the roots of our profession in the traditional labor-management dispute-resolution field, we nevertheless must broaden our reach to embrace all forms of employment-related arbitration.[29]

Two years later, with *Gilmer* taking effect, Walter Gershenfeld predicted that by the year 2004 employment cases would form "a significant part of the workload for at least half of our membership," and that our membership committee would count employment cases along with labor cases when evaluating applicants.[30] In

---

[28]Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities,* in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 1.

[29]*Id.* at 18.

[30]Gershenfeld, *New Roles for Labor Arbitrators: I. Will Arbitrators' Work Really Be Different?,* in Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 275, 285.

1995, it was Arnold Zack's turn. In his Presidential Address, he described the growth of employment arbitration, noting that we "find ourselves in a burgeoning world of ADR where the potential of arbitration for over 100 million workers dwarfs our collective bargaining world of 15 million."[31] Despite the temptation of that new work, he recommended that the Academy stick to its course while allowing its members to venture into the new world. Paradoxically, though, he urged the Academy to try to guide the development of employment arbitration while remaining apart from it. Two years ago, George Nicolau's Presidential Address took the same theme a step further, advocating "a more assertive role for the Academy" in serving as the conscience and the voice " 'of the employment-related dispute-resolution profession.' "[32] He too expected the Academy to work from without rather than expanding to incorporate employment arbitrators.

We should also remember the tangible steps we have already taken. Perhaps the most important was the 1993 report of the Beck Committee.[33] That committee made several recommendations the Academy later adopted, including broadening our statement of purpose and extending coverage of the Code of Professional Responsibility[34] to those engaged in employment arbitration. A second important step was the Academy's initiation and 1995 endorsement of the Due Process Protocol for employment arbitration.[35] That Protocol applies only to employment arbitration, so our endorsement of it represents an attempt to exercise influence if not jurisdiction over our sibling field. A third step came in 1997 when, somewhat inconsistently, we voted both to oppose employer-mandated arbitration provisions and to provide guidelines for members arbitrating cases arising under the very programs we

---

[31]Zack, *Presidential Address: Protecting NAA Standards in the World of ADR,* in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 1, 4.

[32]Nicolau, *Presidential Address: The Challenge and the Prize,* in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 1, 19 (quoting Sinicropi, *supra* note 28, at 14).

[33]*Appendix B: Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures,* 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), 325. Having saddled the committee with such an impossible name, members have little alternative but to refer to it by its chair's name.

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

[35]*Appendix B: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship,* in Arbitrary 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 298.

opposed.[36] A fourth was our 1997 decision to position ourselves through a public relations effort as the leading institution in our field. A fifth was our publication of *The Common Law of the Workplace*[37] in 1998, a project endorsed 3 years earlier precisely because it would "provide a similar set of benchmarks for those handling employer-promulgated arbitration."[38]

All these actions reflect a belief that the Academy has a major role to play outside the confines of labor arbitration. Viewed in retrospect, they seem like slightly haphazard attempts to edge closer to employment arbitration while preserving our labor arbitration purity. The clear if not always stated objective has been to create an ethic of fairness in what might otherwise remain a jungle. There is good reason for our leaders to walk a tightwire on this issue. Many of our members, particularly senior members who grew up in an era when organized labor was seen as a moral force rather than as an interest group, sincerely believe that participation in employment dispute resolution systems that exclude unions would betray the labor movement. The Academy, they would argue, should not sup at the devil's table.

While labor was on the upswing, the Academy could plausibly ignore the rest of the work force. No doubt our founders expected most workers to see the light and come within range of our ministrations. After 45 years of declining union density, however, we simply have to accept the fact that unions do not, and will not in our lifetimes, represent anything more than a tiny minority of American workers.

We also should understand that most employers did not adopt the arbitration plans to avoid unions, because they had no need to do so. Most are in industries where unions are no threat. *Gilmer* and a large proportion of the other cases came from stock brokerages, for example. Many of the rest use the plans primarily for professionals and executives who were unlikely to unionize in any event. Employer-promulgated arbitration systems may not be as good as the collectively bargained systems we prefer. For many nonunion employees, however, employment arbitration plans that meet minimum standards of fairness are better than nothing. Finally, as

---

[36]*Appendix B: Statement of the National Academy of Arbitrators on Condition of Employment Agreements*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 312; *Appendix C: Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems*, *id.* at 313.

[37]St. Antoine, ed., The Common Law of the Workplace: The Views of Arbitrators (BNA Books 1998).

[38]Zack, *supra* note 31, at 9.

long as those plans are legal, there will be people to serve as arbitrators. Withholding our contributions might make us feel a little holier, but it will not improve the lives of the 9 out of 10 workers without access to labor arbitration.

In light of our members' widespread willingness to arbitrate statutory cases, our leaders' repeated urging that we do more in that area, and the practical if uncoordinated steps we have already taken, expansion of our mission would not be as radical *conceptually* as it would be *practically*. It is worth remembering as well that our organization's name does not exclude other types of arbitrators. Nevertheless, it is presumptuous of us to announce rules for "arbitrators" generally while restricting our membership to one small and declining subset of that group.

Obstacles in Our Way

The review so far may make it seem that we have but one choice, or more accurately none. If our traditional path is undesirable, then surely expansion is the road to follow. The matter is not so simple. In fact, the more I explored the question, the more complicated it became. The problems facing us if we were to expand our scope—the obstacles in our way, to continue the metaphor—are many and major. They are so troubling, in fact, that some will not think the prize worth the effort. At the very least, we must realize at the outset that the resulting organization would be very different, perhaps fundamentally so, from the Academy we know today. An influx of arbitrators not subject to monitoring by both parties would have the potential of shifting the Academy toward a turf-protection role rather than its usual altruistic function. We also must recognize that making the necessary changes would be more contentious and more painful than anything the Academy has endured in its history.

On this occasion I can barely do more than pose some of the critical questions. Answering those questions will take far more thought and time than either you or I can spare right now. The issues fall in six categories: membership, ethics, governance, programs, client relations, and ethos.

1. Membership Standards. To begin at the beginning, who would belong to the new organization? Labor and employment arbitrators, obviously, but which ones? At a minimum we would have to count at least some employment cases toward our test of general

acceptability.[39] But would we insist on the 50 *labor* case minimum and count employment cases only as the "cream" beyond that number that we now expect of most applicants? Or would we count them *toward* the 50-case threshold itself? Walter Gershenfeld used the example of an applicant with 45 cases in each category;[40] the more difficult case, I suggest, is the applicant with 25 in each category, or worse, with 20 labor cases and 30 employment cases. Or would we go the whole way and accept an applicant who worked only in the employment area?

Which employment arbitration cases would we count, if we were to count any? Confidentiality is of even more concern in employment arbitration than it is in labor arbitration, so applicants may not be able to submit many of their decisions for our review. Many employment arbitration cases lack reasoned opinions, so reviewing one-page awards will tell us little about an applicant's ability and objectivity. We might try to limit countable cases to those complying with Protocol standards, but who will undertake the necessary investigations, and how?

We could ease our way into expansion by first welcoming those who are primarily labor arbitrators, then opening up to those who are secondarily labor arbitrators, and later still accepting "pure" employment arbitrators. This seems unnecessarily dainty. If we are to become an Academy for both fields, we must, sooner rather than later, treat work in both areas equally.

If we open the door to employment arbitration, should we hold it open for those engaged in other forms of alternative dispute resolution (ADR) like mediation and fact-finding? That was the line President Sinicropi drew in 1992, when he urged us to deal with employment arbitration but not with other forms of ADR lest the Academy become "spiderized."[41] But if one primary reason for

---

[39]Presumably we would count only those employment cases satisfying the Protocol and resulting in a reasoned award. That would require some mechanism to analyze the arbitration systems and the text of the submitted cases rather than merely counting numbers. Who will devote the necessary time? In an e-mail to me on May 21, 1999, John Kagel raised the possibility of counting even nonemployment arbitration cases because some employment arbitration "does not require common law of the shop 'knowledge'" but might require knowledge about "valuing stock options, or handling trade secret theft matters." Arnold Zack made a similar suggestion in a telephone call the next day, albeit in the context of his preference for a new association of statutory dispute arbitrators. Others have urged consideration of embracing commercial arbitrators as well as employment arbitrators. As intriguing as those suggestions are, I leave them for others to present.

[40]Gershenfeld, *supra* note 30, at 275.

[41]Sinicropi, *supra* note 28, at 17. He referred, of course, to the Society of Professionals in Dispute Resolution, known by its acronym SPIDR.

expansion is to increase our membership when labor arbitration is declining, would it make sense to look in just one direction? If Congress or the Supreme Court reversed *Gilmer,* employment arbitration would disappear and we would be back right where we started. We must decide whether the important distinction is between arbitration and nonarbitration ADR, or between workplace and nonworkplace dispute resolution.

Would we revisit our ban on advocates? Most non-Academy employment arbitrators do some advocacy work, and many who do not have partners who do so. Our current rules would bar them from membership. Accepting only those who are not advocates or partners of advocates would frustrate our recruitment goal. As John Kagel pithily put it, "The arbitrator will not want to give up his day job."[42] Moreover, limiting membership in that way might not deter formation of a specialized association that was not so particular. But if we accept advocates who arbitrate in employment cases, could we sensibly continue to exclude advocates who arbitrate in labor cases? And what would we do if a new employment arbitrator / advocate / member decided to accept a labor arbitration case?

Finally, admission of employment arbitrators in any significant numbers could widen another of the Academy's fault lines, this one between lawyer and nonlawyer arbitrators. The Academy now has a good balance. Almost all employment arbitrators, though, are lawyers. Our current nonlawyer members might reasonably wonder why we should assist development of a field from which they are excluded, and might just as reasonably worry whether admitting a large group of lawyers might marginalize them within their own professional association.

2. Ethical Issues. Although the Code of Professional Responsibility for some purposes now covers labor arbitrators when they perform employment arbitration, it was not designed for that field. One can almost hear the Code creaking when we apply it outside its normal realm.

Advertising. Consider, for example, the problem of advertising. Our current ban would almost certainly require modification. Many employment arbitrators in California already believe that they must advertise as a matter of economic survival. Denying them entry would make our purported expansion a charade. But if we accept employment arbitrators who advertise, do we then expel

---

[42]E-mail from John Kagel to the author, May 21, 1999.

them if they accept a labor case? Or do we permit them to advertise when wearing one hat but not another?[43] Permitting employment arbitrators to advertise when wearing either hat would pressure "pure" labor arbitrators to do so as well. Is advertising one's employment arbitration business really advertising one's self? Should we rethink the advertising ban generally, and attempt to regulate only solicitation and misrepresentation rather than publication of truthful information?

But even banning advertising in the employment arbitration field might require a Code amendment. The current Code expressly applies to "Labor-Management Disputes," even though the amended Preamble states that it is intended to "guide the impartial third party serving in all of these diverse procedures." The amended Foreword, oddly enough, states that Code provisions *"apply* to covered arbitrators who agree to serve"[44] as employment arbitrators. In other words, the Code governs labor arbitrators wearing an employment arbitration hat, but not to "pure" employment arbitrators. One way or another, that inconsistency will have to go. Either all our members should be free to advertise in both the labor and employment fields, or none should be allowed to advertise in either field. If we sought to resolve the conflict by banning all advertising, would our Code partner, the AAA, go along with us? Not only does the AAA itself advertise, it lists many employment arbitrators who do so. Were we to reopen the question of the advertising ban, we might even find it difficult to sway the FMCS to support an anticompetitive restriction.

Disclosure. Disclosure requirements are stricter for employment arbitrators than for labor arbitrators. The AAA employment arbitration rules require arbitrators to reveal relationships that labor arbitrators comfortably ignore because our continuing relationships and the nature of the labor relations "family" increase familiarity and breed trust. California law also requires more disclosure for employment arbitrators. The Revised Uniform Arbitration Act is likely to follow that model. That raises two questions. First, should we comparably tighten labor arbitration disclosure rules? And second, if we do accept advocates as members of the broadened Academy, will we have to disclose our professional

---

[43]That is already a problem, with at least one Academy member using a web site to advertise his employment arbitration business in a way that might not be permitted for his labor arbitration business.

[44]Emphasis added.

association with them? The problem is not just that employment arbitrators sometimes wear another hat. Because employers create and control their employment arbitration systems, typically including selection or removal of arbitrators and full payment of arbitrators' bills, employment arbitrators may not seem so neutral even when they are wearing their arbitrator hats.

3. Governance. Opening the door to employment arbitrators but excluding them from a role in Academy governance would not enhance recruitment. If the first employment arbitrators are a small minority of our membership, they will feel like (and be perceived as) outsiders. But how could we guarantee employment arbitrators full participation? Would we simply treat them as regular members and tell them to wait their turn in leadership roles? Or would we provide some special leadership positions for them? If we did that, would the new Academy in effect be a bifurcated organization, with different classes of membership?

Farther down the road, we will encounter a different problem when employment arbitrators constitute a large percentage of the membership. Members of that group would no doubt compete for Academy leadership. That could produce a divisive struggle that some would see as a battle for the soul of the Academy.[45]

4. Meeting Programs. A glance at the table of contents of recent Proceedings volumes shows that we spend an increasing amount of our meeting time on matters outside of traditional labor arbitration. If we were to admit employment arbitrators, we would have to do still more. Would we simply devote a higher percentage of our program to employment arbitration, thus annoying our labor arbitrator members? Or would we have to provide separate "tracks," which would minimize contact between the groups? Or could we assume that most members eventually will work in both areas, so that topics in either field will be of interest to the membership generally?

5. Client Relations. The Academy frequently considers the views (or the assumed views) of our two clearly identified client groups when we decide policy questions. For example, we debated long and hard before deciding to hold our Fall education meetings in nonunion hotels. Concerns over unions' reactions also weighed heavily in the debates over the Beck Report and its recommendations.

---

[45]We might also place some financial issues under the "Governance" heading. Presumably dues would be the same for all regular members, but would our legal representation program cover employment arbitration? If so, at what cost? If litigation arising out of

What would our current clients, particularly labor unions, think about our becoming an Academy of Labor and Employment Arbitrators? After all, some employer-promulgated arbitration systems have at least an implicit union-avoidance objective even if most do not. Is there any way to restrict members from participating in "bad" employment arbitration systems while permitting them to work in "good" systems? Incorporating the Due Process Protocol into our Code might seem a partial answer, but how can an arbitrator know that a given arbitration program is substantively unfair or was adopted for antiunion reasons? Would the employment arbitrator have to begin each hearing with an exploration of the plan's origin and details? Or would unions have the right to veto certain plans? Could we feasibly separate the acceptable sheep from the disreputable goats? And if we accepted advocates as members, would parties doubt the Academy's neutrality regardless of our commitment to work only in "good" systems?

One other aspect of client relations is worth mentioning at this point. Our current client groups monitor us, as we do them. In a very real (if unneeded) sense, they keep us honest. Employment arbitration largely lacks that second client. Individual grievants, who will usually only arbitrate discharges, are one-shot participants. Once their cases are completed, they disappear from our view. Employers, on the other hand, will be repeat players and may even seem omnipresent. They will keep an eye on us, for their own ends, but who will balance their influence on us? Over time, the employment bar (especially those lawyers who belong to NELA, the National Employment Lawyers Association) may evolve into a credible second party, but that will take time. Besides, most plaintiffs will not be able to afford NELA lawyers, even if they knew enough to look for one. Bar associations, professional courtesy, and word-of-mouth may help general practitioners to tap the accumulated experience of those who represent employment arbitration grievants but those are inadequate substitutes for the existing network of labor lawyers and union representatives.

This is not merely a lament for the problems facing individual grievants. It presents a problem for employment arbitrators, too. Will we be able to maintain both our objectivity and our appearance of objectivity if we participate in a system in which there is, effectively, just one party monitoring our work?

---

employment arbitration consumed a disproportionate percentage of our legal representation expenditures, would labor arbitrators willingly continue to subsidize their employment arbitrator colleagues? Or vice versa?

6. Ethos. I have saved for last the most intangible and intractable issue. What would expansion do to the particular ethos we have developed since 1947?

Start with the most fundamental point. If there is one common thread among our present members, it is respect for collective bargaining. Employment arbitrators could hardly be expected to share that respect. Is their mindset so different from ours as to be incompatible? Or are we perhaps too narrow-minded to admit an alternative view? Would rubbing shoulders with those who did not share our view weaken our own commitment? Even if we could work amicably together, would it be possible to keep our focus on labor arbitration when an increasing percentage of the membership worked primarily in the employment arbitration field? More optimistically, could respect for fair treatment of employees and for good employment relations form a new "common thread" for an expanded Academy?

Parties in employment arbitrations typically try to litigate the way they would in court. Obviously arbitrators have to follow the wishes of the parties as to the degree of formality, applicability of rules of evidence, and so on. But if employment arbitrators became accustomed to the "legalism" of employment arbitration, would they change the character of labor arbitration?

On the other hand, we should also keep in mind that confronting challenges can strengthen an organization. Carlton Snow suggests that dealing with more diverse colleagues and exploring completely new topics might create a new ethos, causing us "to bond on the basis of not only collective bargaining but also on the basis of justice issues."[46]

Quo Vadimus, Choice Three

We have one final option, one urged most insistently by Arnold Zack. He recognizes the magnitude of the obstacles facing us if we decide to expand our scope and believes that some of them are simply insuperable. His greater worry, however, is that the changes wrought by expansion would destroy rather than reform the Academy. Counting employment arbitration cases toward membership would open the door to hundreds if not thousands of

[46]E-mail from Carlton Snow to the author, May 27, 1999. His suggestion reminds me of Nietzsche's comment in The Twilight of the Idols (1888): "What does not destroy me, makes me stronger."

people who arbitrate under the National Association of Securities Dealers (NASD) and similar systems. If they perceived any tangible benefit to Academy membership, they would flood into the group and change it forever.

He suggests as an alternative that we sponsor ("spawn" is how he put it) a new association of nonlabor employment arbitrators (and perhaps mediators as well). Doing so, he argues, would allow the Academy to remain true to its origins in monitoring labor-management relationships, to retain the strict neutrality and the ban on advertising mandated by our current Code, and to avoid the acrimonious disputes expansion would force on us. At the same time, we could contribute our experience and guide the development of employment arbitration. On matters of mutual concern, such as policy decisions like the Protocol, we could cooperate with the Academy of Employment Arbitrators.

Arnold is an extraordinarily persuasive fellow. Like any advocate, however, he tends to maximize the advantages and minimize the disadvantages of his position. For the Academy as an entity, the disadvantages would be overwhelming. Sponsoring a new organization would do nothing to stanch our loss of membership or influence, or to cure any of our other problems. The Academy would still face extinction or irrelevancy just as if we would if we continue on our current course. The only difference is that we might leave a bit of our genetic material behind. (Perhaps that is what Arnold meant by suggesting that we "spawn" the new group.)

Nor would the advantages to the world of work be great. If the Academy is really just to "spawn" another academy, as fish spawn their young, we would have nothing more to do with its development. If Arnold means that we should "raise" the new association after creating it, as mammals generally do, we would have to grapple with the intractable problems that prompt his desire to spawn a new group. Either way, the new group would soon be out of the Academy's hands and into the control of those without a labor arbitration background. At that point it would hardly be likely to follow our notions of neutrality, ethical behavior, or due process. For us to try to direct the course of the academy of employment arbitrators while remaining independent of it would be as effective as steering a horse by the tail. The only arguments in favor of the "spawning" option are that it might produce some good if expanding the Academy proves infeasible and that starting a new society would be immensely easier than reforming the existing one.

Recommendations

The Proper Goal

This recitation of the obstacles we would face in expanding our scope or in spawning a separate association may seem to balance the difficulties on our traditional path. That equation would be a prescription for inaction, however, and inaction is the one option that the Academy simply cannot afford at this juncture. Members of this very individualistic profession can do their own calculus, but I cannot let this moment pass without offering my own conclusion. You can, and no doubt will, in our time-honored tradition, "accept it for what it's worth."

For both negative and positive reasons, I believe that we must move quickly and decisively toward becoming a National Academy of Labor and Employment Arbitrators. The negative reasons should be obvious. Following our traditional course will lead to slow extinction. Continued shrinkage in our labor arbitration field and in our membership figures will force the Academy into irrelevance if not dissolution in the new century. Spawning a new organization might allow us to leave a legacy, but it will not prolong our institutional existence. If we are to survive, we must thrive, and we can thrive only by seizing the opportunities presented by the nation's new legal, economic, and social climate.

The positive reasons, however, are both more attractive and more persuasive. Over the course of our existence, we have accumulated a wealth of moral and intellectual capital. We have learned how to preserve the decisionmaker's neutrality, to conduct hearings, to solve evidentiary problems, to ferret out hidden facts, to judge credibility, to apply ethical rules, to interpret contracts and statutes, and to educate ourselves about new problems. Other types of decisionmakers—administrative law judges, retired judges, commercial arbitrators, and so on—also possess many of these skills. Only we, however, have applied them for so many years to the peculiar context of the workplace. These are exactly the skills needed for successful and fair employment arbitration. There is no comparable group of employment arbitrators, nor could there be without many years of development. Without such a professional association, employment arbitrators and employment arbitration will never reach their highest possible level of development.

The Academy's impact even on an organization to which we give birth would likely be short and weak. Any separate professional

association will quickly go its own way. If we truly believe that we have something unique to contribute to the world of employment arbitration, we must plan to make our contribution through the Academy.

In short, we should serve employment arbitration as we have served labor arbitration, for the mutual benefit of America's workers and their employers. If *we* do not do so, someone else will—and that someone else will not do it so well. We should expand, in other words, primarily for the *public* interest, not our *self*-interest.

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 the membership, time and time again, to debate and decide exceedingly painful questions. We will have to determine not merely *where we are going,* but *who we are*.

I reach this conclusion not out of any dissatisfaction with the Academy or with labor arbitration. To the contrary, the Academy and its members have exceeded even the high expectations I had when I joined; the Academy has proven by far to be my most important professional association. Employment arbitration largely lacks the long-term commitments and the continuing struggle toward distributive justice offered by labor arbitration; given my choice, I would remain fully occupied as a labor arbitrator, as some others have already determined to do.

Rather, my conclusion comes precisely because I have come to love and respect the National Academy of Arbitrators, for all its varied personalities and for all its institutional quirks. Because of that love and respect, it would pain me beyond words to see this organization slip into a backwater of irrelevancy or be supplanted by an upstart organization. I would far rather see the Academy regain the vitality that marked its youth, and recognize and seize its chance to play as big a role in the employment relationship of the 21st century as it did in the very different labor relationship of the 20th century.

The Means

Assuming we want to become a National Academy of Labor and Employment Arbitrators, how would we get from here to there? By

way of conclusion, let me sketch out some of our necessary next steps.

We are already taking the first and most important step. Our current and future presidents have appointed a broadly representative and highly qualified Special Committee on the Academy's Future under the able leadership of George Fleischli. That body will examine the most general issues of direction and speed. No doubt the Fleischli Committee will engage in extended discussion with the membership through public forums and dedicated sessions at our annual and Fall meetings. If the committee decides that we need not change our direction, no further Academy action would be required. If the committee concludes that spawning a new organization would be preferable to reforming the present one, little would be required beyond Board or membership approval and some initial organizational efforts. All the serious questions (membership, ethics, objectives, and so on) would be for the new academy to decide.

If the Fleischli Committee decides that expansion is desirable, however, the Academy would have to devote a major part of its attention to implementing the recommendations. The second step should then be the presentation of a policy directive to the membership for discussion and vote. The members themselves must decide whether to expand or contract. Reforming an organization this successful and this staid cannot be done without the enthusiastic support of a substantial majority of the membership. Any attempt at "top-down" restructuring would at best give credence to those common grumblings about the autocratic rule of an old guard. At worst it would fail, and with it any chance of keeping the Academy vibrant.

Membership approval of the principle of expansion would then necessitate the hardest work of all, making the many difficult changes in our structure, governing documents, and operations that expansion will demand. This effort will require close coordination with those we seek to attract. It would be frustrating in the extreme to give a party that no one attended. We should therefore establish a task force that includes several distinguished nonmember employment arbitrators to explore the changes we will have to make.[47]

---

[47]We should consider carefully whether to include labor and management representatives in this effort. Inclusion of union representatives might seem like a fair way to avoid the impression that we are fostering antiunion tactics, but I fear the plan might backfire. We can predict with near certainty what their reaction will be. If we have already decided

Within the Academy itself, there will have to be separate investigations of the most vexatious details: by the membership committee, of how we would change our requirements for admission to accommodate employment arbitrators with advocacy connections; by the Committee on Professional Responsibility and Grievances, of how we would need to change the Code provisions dealing with neutrality, advertising, and disclosure; by the program, continuing education, and continuing regional education committees, of how we could best serve the needs and wants of a newly constituted and increasingly diverse membership; and by the legal representation committee, of the practical and financial issues presented by a need to protect employment arbitrators. The Academy will also need a separate committee to consider changes in our governing structures to facilitate and ensure the full representation of employment arbitrators in leadership positions. The nonmember employment arbitrators on our task force would have to work closely with those committees to craft specific recommendations. Finally, the membership will again have to vote on those recommendations.

Even with the most vigorous leadership and membership efforts, it will be years rather than months before we reach our objective. Naturally we must continue to study the prospects for our traditional work and for its new alternative. As in our arbitration cases, we can never have too much evidence. But we cannot afford to let our desire for more information serve as an excuse for inaction. However difficult the journey, however problematic its end, we must now begin. To express the urgency of the matter, I can do no better here than repeat what President Sinicropi told us in 1992: "We cannot postpone for a moment engaging and beginning to resolve the important issues that the future presents for our profession and the National Academy of Arbitrators."[48]

---

to proceed, we would then seem to be ignoring the opinions we sought. If union representatives did participate, they would be likely either to try to derail the initiative or to shape it in ways that would make it unacceptable to nonunion employers and unappealing to employment arbitrators. The time for consultation with client groups is before we make up our mind, not after.

If we exclude union representatives from implementation decisions, we should of course exclude management representatives. If there are no management representatives, there should be no plaintiffs' representatives, either. Exclusion of these groups from formal participation should not prevent informal consultation such as meetings with all interested parties. Our committees will need all the help they can get.

[48]Sinicropi, *supra* note 28, at 3.