CHAPTER 7

REMINISCENCES

I. INTRODUCTION

HOWARD S. BLOCK*

The fireside chat is now an Academy tradition that gives us an opportunity to become better acquainted with and learn from some of our greatest members. It began in 1991 with John Dunlop[1] and continued in successive years with Robben Fleming,[2] Willard Wirtz,[3] Jean McKelvey,[4] Benjamin Aaron,[5] David Feller,[6]

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*President, National Academy of Arbitrators, 1990, Tustin, California.

[1]Honorary Life Member, National Academy of Arbitrators; Lamont University Professor Emeritus, Harvard University; U.S. Secretary of Labor, 1975–76. *See* Dunlop, *The Neutral in Industrial Relations Revisited*, Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 26.

[2]President (1966) and Honorary Life Member, National Academy of Arbitrators; President Emeritus, University of Michigan. *See* Fleming, *Reminiscences: Honorary Life Members*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 307.

[3]Honorary Life Member, National Academy of Arbitrators; U.S. Secretary of Labor, 1962–69. *See* Wirtz, *Reminiscences: Honorary Life Members*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 319.

[4]President, National Academy of Arbitrators, 1970. *See* McKelvey, *Reminiscences and Honors*, 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), 291.

[5]President, National Academy of Arbitrators, 1962; Professor Emeritus, University of California, Los Angeles, California. *See* Aaron, *Reminiscences and Honors*, 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), 304.

[6]President, National Academy of Arbitrators, 1992; Professor Emeritus, University of California, Berkeley, California. *See* Feller, *How the* Trilogy *Was Made*, in Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 327.

George Shultz,[7] Alex Elson,[8] Alan Gold,[9] Archibald Cox,[10] William Murphy,[11] and Clark Kerr.[12] It is noteworthy that they are all distinguished arbitrators, but none was a full-time arbitrator. In most cases, their principal activities were in education at the university level and in government. They discussed their experiences in the larger world but had little to say about arbitration.

Today we have a full-time arbitrator who has achieved national prominence as both an arbitrator-practitioner for close to half a century and a scholar who has tackled some of the most elusive subjects that we confront on a daily basis, such as decisionmaking, opinion writing, credibility, the role of law in arbitration, past practice, and many others. Most Academy members have seen only the serious side of Dick Mittenthal, the side that presents scholarly papers. Dick also has a fine sense of humor. For example, he introduced his 1979 presidential address, titled "Joys of Being an Arbitrator," with the following observation:

> Twenty-six years ago on a bright Sunday afternoon my wife and I were wed in Detroit. The wedding dinner was held in the old Sheraton Cadillac Hotel. Upon arriving there I stopped and purchased the Sunday *New York Times* as had been my habit. I placed the paper beneath the banquet table. When the moment came to leave the party, I completely forgot my cherished *Times*. Not until I reached the elevator did I remember. I rushed back to the banquet room, retrieved the

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[7]Honorary Life Member, National Academy of Arbitrators; former U.S. Secretary of State, Secretary of Labor, and Secretary of the Treasury. *See* Shultz, *Fireside Chat: Seeking Resolution: From Labor Relations to International Diplomacy*, in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 274.

[8]Honorary Life Member, National Academy of Arbitrators. *See* Elson, *Fireside Chat*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 283.

[9]Honorary Life Member, National Academy of Arbitrators; Chief Justice, Superior Court of Quebec, 1983–92. *See* Gold, *Fireside Chat: "Ever Paddling Madly Underneath,"* in Arbitration 1996: At the Crossroads, Proceedings of the 49th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1991), 342.

[10]Honorary Life Member, National Academy of Arbitrators; Professor Emeritus, Harvard Law School, Cambridge, Massachusetts. *See* Cox, *Fireside Chat*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), 208.

[11]Former President, National Academy of Arbitrators; Henry Brandis Professor Emeritus, University of North Carolina School of Law. *See* Murphy, *Fireside Chat*, in Arbitration 1998: The Changing World of Dispute Resolution, Proceedings of the 51st Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 1999), 162.

[12]Honorary Life Member, National Academy of Arbitrators; former President and Professor Emeritus, University of California, Berkeley. *See* Kerr, *Fireside Chat*, in Arbitration 2000: Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2001), 240.

Times, and left with the paper under my arm. I was puzzled by the laughter I had apparently provoked. My father I later learned had the presence of mind to sum up the situation. He noted my odd behavior, walked over to my mother-in-law, and said, "Don't worry—he's a fast reader!"[13]

Now Dick and I will have a chat, and when we conclude we'll invite questions from the audience.

II. FIRESIDE CHAT

RICHARD MITTENTHAL*

Howard Block: Well, Dick, to start from the beginning, how did a chemistry major wind up in law school?

Richard Mittenthal: I graduated with a degree in chemistry from Cornell University, briefly worked as a chemist, but quickly discovered that was not the right occupation for me. I still had the benefit of the GI Bill of Rights. I wasn't anxious to go out into the large work-a-day world, and I decided at the last moment to enter law school. For a large number of students at the time, law school was a dumping ground for those of us who didn't know what to do with our lives. It was mere happenstance that prompted my going to law school. That is when I became interested in labor law.

I suspect I was among the very first group of students in the country that took a labor arbitration course. That course was taught by Mannie Stein.[1] We worked from a casebook written by two professors from Yale University—Harry Shulman and Neil Chamberlain. Of course, I took several courses in labor law as well.

After graduating, I couldn't find a job in a management or union law firm. I decided the best way of entering the field was to go to Washington and get a job with the National Labor Relations Board. I worked for Board Member Ivar Peterson for several years.

Howard Block: Tell us about some of the other people and some of the events that influenced you to become an arbitrator.

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[13]Mittenthal, *Presidential Address: Joys of Being an Arbitrator,* in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1980), 1.

*President, National Academy of Arbitrators, 1978, Novi, Michigan.

[1]Emanuel Stein, former Professor of Economics, New York University.

Richard Mittenthal: I had no idea of becoming an arbitrator. Harry Platt,[2] who was a very successful arbitrator in Detroit, had just been named umpire between Republic Steel and the Steelworkers and was overwhelmed with cases. He needed help. Apparently he had heard of me through my wife's family and offered me a job as his apprentice. Without knowing much about arbitration, I decided to try it. Even though I had only spent 2 to 3 years at the NLRB, I knew I did not want to be a career civil servant. So I went to Detroit and began my career as an arbitrator at age 27.

Howard Block: Was your youth a problem?

Richard Mittenthal: It certainly was. I was not only 27, but my wife keeps telling me I looked more like I was 17. I dressed conservatively—dark suits, black shoes, and so on. I tried to appear somber. I used my wife's premature gray hair as an opportunity to demonstrate that I must be older than I appeared. On my own cases, before I could identify myself in the hearing room, the parties sometimes assumed I was a court reporter, a hotel catering employee, or an American Arbitration Association representative. It was, on a few occasions, embarrassing.

On Harry's cases, however, the parties experienced no such surprise. They had been forewarned about my age. Harry threw me into the process from the very beginning of our relationship. His attitude was "sink or swim." I went to steel mills in Ohio, Illinois, and Alabama, heard the cases, made decisions, and wrote draft opinions. Harry reviewed my work and, more often than not, issued the opinion and award with only minor corrections. I was an arbitrator even though my name, initially at least, did not appear in any of these awards. And, of course, I prepared draft opinions on cases Harry heard. There, however, I had the benefit of his gut instincts, which he had written down in a few sentences before handing me the file. The Code of Ethics did not contain any express restrictions on the use of an apprentice by his or her arbitrator-employer.

Howard Block: How did you become so successful so fast?

Richard Mittenthal: Well, I would like to say something about those early years. Harry wasn't a teacher. He never really talked to me about the principles of arbitration or about the decisions I wrote for him. I learned by doing and I learned by reading a great many arbitration awards in basic steel. Because the steel companies

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[2]President, National Academy of Arbitrators, 1958.

engaged in industrywide bargaining and had fairly uniform collective bargaining agreements, a so-called steel jurisprudence had developed. That sounds too fancy, but the fact of the matter is that the steel arbitrators had to be aware of one another's decisions. Hence, I read the decisions of the then major steel arbitrators, among others, Harry Platt of course, Sylvester Garrett,[3] Ralph Seward,[4] Dave Cole,[5] and Gabe Alexander.[6] They were very impressive men; they wrote thoughtful, compelling opinions. I'm not the arbitrator who should be here today. One of those fellows should have been chosen for the fireside chat years ago.

Howard Block: But you're the only one we have today.

Richard Mittenthal: That may be true. I sit on their shoulders. They are the fellows that did much of the major work in the early years. The next generation of arbitrators, the new kids on the block who came along, relied on what they had done. I was one of the new kids, along with Mickey McDermott,[7] Rolf Valtin,[8] Bill Fallon,[9] Tom Roberts,[10] Arnie Zack,[11] and others. We viewed ourselves as a second generation, but in fact we were there in the mid to late 1950s, and most of our predecessors had only been doing this work since the mid 1940s.

So we really came along soon after arbitration had become widely accepted. I want to say something about our forebears because of my great admiration for them. Harry Platt was the ultimate pragmatist, always tuned through his inner ear to the parties' needs with an unerring instinct for what was appropriate, what was workable. Ralph Seward wrote with exquisite grace and precision. I think he was in many ways perhaps the best arbitration craftsman we've ever seen. Syl Garrett was a different story. He was one of the few arbitrators at that time who had substantial collective bargaining experience. He'd been a major bargainer in the glass industry, and it was out of that experience as well as his enormous skills that he was able in his awards to relate the question before him to a larger collective bargaining framework in a way that made arbitration truly an extension of the collective bargaining process.

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[3]President, National Academy of Arbitrators, 1963.
[4]President, National Academy of Arbitrators, 1947–49.
[5]President, National Academy of Arbitrators, 1951.
[6]Gabriel N. Alexander, President, National Academy of Arbitrators, 1961.
[7]Clare B. McDermott, President, National Academy of Arbitrators, 1979.
[8]President, National Academy of Arbitrators, 1975.
[9]William J. Fallon, President, National Academy of Arbitrators, 1985.
[10]Thomas T. Roberts, President, National Academy of Arbitrators, 1988.
[11]Arnold M. Zack, President, National Academy of Arbitrators, 1994.

Howard Block: Apparently you had many great teachers.

Richard Mittenthal: Yes. These were my "teething rings"; these are the men whose work I studied, and I think I profited immensely from that.

Howard Block: I guess that made it a lot easier for you to get started than most arbitrators would have today.

Richard Mittenthal: I'm convinced of that. You have to understand that I regard myself as a kind of "hot house flower." By that I mean, I never worked for labor or management, I never engaged in the practice of law, and I never became a true academic, although I taught courses in labor law and arbitration. I have regrets about that because I've come to the conclusion that no one should seek to become an arbitrator without first having some meaningful collective bargaining experience. I think that is essential.

Howard Block: You had a remarkable number of major umpireships and an incredible longevity in most of them. Tell us what you learned about the umpireships.

Richard Mittenthal: Well, there were other things I wanted to talk about. I really became successful very early, but I think it was due to a bunch of factors that had very little to do with my ability. Harry was a cheerleader for me. He asked the parties that he knew to give me a chance. That made a difference. In addition, the labor movement in 1954 was still expanding. Arbitration agreements had just been written into many agreements. Unions were aggressive and testing the significance of the new restrictions they had negotiated with management. Most important of all, there were not enough arbitrators. At that time, the Academy was seriously interested in training new arbitrators, and there was a period of time where we devoted a good deal of effort in that direction. So a good part of my success I'm convinced was being in the right place at the right time. I was there when the process really took off and the parties were looking for people with my background and experience.

Howard Block: How did you get all those umpireships?

Richard Mittenthal: Well, the first one came in 1957. It was hard for me to believe, because I was still wet behind the ears. I had decided many cases, but not many in my own name. I certainly could not have been considered an experienced arbitrator. But Dana Corporation in Toledo—a large auto parts manufacturing company—and the United Auto Workers called, put me through some interviews, and offered me the umpireship. I'm very proud of

my longevity. I remained on that job for 42 years before they finally caught up with me. More interesting, I attribute a lot of my longevity to the nature of the contract I had with the parties. I didn't realize I was doing something good for myself when I negotiated this contract, but the contract—and I don't think they do this any more—was open ended. There was no fixed termination date. Because of that, the parties didn't have to sit down every 2 or 3 years and ask themselves, Do we want this guy around? In order to get rid of me, they would have to have a substantial problem with me, something they were really unhappy about. That apparently didn't happen. At least they didn't feel strongly enough about the things they disliked about my decisionmaking, so I went on and on and on. The open-ended contract in effect gave me something akin to the "just cause" protection enjoyed by employees under a collective bargaining agreement. After that I had umpireships in basic steel, autos, auto parts, construction equipment, submarines, and so on. I don't know how many there were, but I suspect a good 25 or more. I also had to learn about getting fired. I felt crushed the first time it happened, but over the years I came to accept such disappointments with relative equanimity.

Howard Block: But what were those relationships? Formal? Informal? Were they all the same?

Richard Mittenthal: No. There were all very different. Let me just say something about the positive side of being an umpire. You learn the intimate details, the inner workings of an enterprise—not only the manufacturing processes, but also the company's underlying economic problems, the union's political issues, the history of the parties' relationship, the power struggles, the personal characteristics of the parties' spokesmen, and so on. Such background information helped me better understand some of the arbitration cases. It made for a much richer canvas.

There were difficulties. It took time to learn that the umpire's role is a limited one. I'm a romantic. I wanted to believe, in the early years at least, that as an umpire I had become part of a family and was somehow more than a technician, more than a hired hand for a particular task. That of course was sheer nonsense. The temptation, after a number of years on the job, was to overreach. More than once I tried to be something more to the parties than their umpire.

One such experience involved the Steelworkers and Youngstown Sheet & Tube, one of three steel companies that later became LTV Steel. At Indiana Harbor, the largest of its mills, there

were no fewer than 1,000 grievances on the docket year after year. I was appalled, but I said nothing for a long time. After 9 years on the job, I called this matter to the attention of high officials of the corporation and the international union, although they no doubt were aware of the problem. I suggested a meeting to discuss the mill's grievance procedure. My reward for attempting to be a Good Samaritan was a notice of termination. The company appreciated my arbitration work but made plain that it did not appreciate my airing its deficiencies. The message was clear: Umpires are hired to arbitrate disputes, nothing more. This painful lesson taught me, in dramatic fashion, the importance of self-restraint.

Let me say something further though about longevity. Longevity obviously depends in part on the number and nature of the cases you hear. If you handle five discharge grievances a year, you're likely to be more secure than someone who handles 25 contracting-out cases a year. There is also a certain rhythm to the challenges. Periodically, once every year or two, I was confronted by a large hurdle—a close and difficult case with potentially serious consequences as to back pay or basic management rights. It's like a steeplechase race at a track meet with hurdles in your path every few hundred yards to test your leaping ability. The umpire's ability to clear such hurdles, with the least possible damage to the parties, has much to do with how long you'll hold the job.

One's longevity can also be enhanced by the presence of high-level party representatives who really believe in the arbitration process and the need for some degree of continuity in the umpire's office. These people protect umpires from irate local union presidents or plant managers who want them fired. They calm the inevitable angry voices. One such figure was Ben Fischer, head of the Steelworkers' arbitration department for many years. He understood the importance of nurturing arbitration in basic steel, of objective evaluation of the umpire's work, and of preventing fits of pique from prematurely ending an umpire's tenure. I'm sure I profited from Ben's intervention, although I was never privy to the details. There were management people as well who performed that function.

What this suggests is that the level of sophistication of the parties has something to do with the success of any umpire. The more sophisticated they are, the more likely they are to be open to persuasion. Reasonable opinions are likely to be accepted even in the face of strong disagreement. But no matter how sensible your rulings may be, no matter how good your relationship with the

parties seems to be, you can be brought down by a single highly placed person.

For instance, after some 4,000 decisions over 20 years as the "permanent neutral" for Anheuser-Busch and the Teamsters, the top executive of the company chose to remove me. Why that happened, I do not know. My relationship with plant and corporate labor relations seemed excellent. But, over the years, an umpire's rulings disappoint and aggravate many people. Any one of them with sufficient clout within his or her organization can cause the umpire to be sacked. The miracle is that, notwithstanding the vulnerability, some of us retain our umpireships for a good many years.

Howard Block: While you're on that subject, why don't you tell us about the informal relationship you had at Anheuser-Busch.

Richard Mittenthal: In many ways, that was the most interesting job I've had. It involved a 5-person board that met once a month, usually in Florida by the ocean for 3 days. We heard 15 to 30 cases at each session. It was done largely through affidavits, exhibits, and prehearing statements. Apart from occasional questions, I had nothing to do with the hearing. After a case had been presented, the spokesmen would leave and the four partisan members of the board would discuss the matter. This was the first time that I had been privy to something like a prearbitration grievance meeting. It was fascinating to hear how they went about trying to resolve their differences. They taught me, just as I hoped my rulings taught them. Given the closeness and continuity, I was more than an arbitrator. I served at times as a mediator, a consultant, a counselor, and a hand-holder. So I played a number of roles that I had never played before. When the partisan members deadlocked, I made the decision. There were a great many deadlocks.

Howard Block: Those were bench decisions?

Richard Mittenthal: Yes. I'd never done that before either. I'd always had the benefit of study time. Instant decisions were a new experience made even more demanding by the need to explain the decision at the same time it was delivered. Like most arbitrators, I was accustomed to listening to what was said to make sure I understood the dispute. Here, I also had to listen for the purpose of deciding the dispute inasmuch as I never knew which cases would be settled at the board's executive session and which would be deadlocked.

After years of this kind of decisionmaking, I came to believe that a great many grievances could be handled through bench deci-

sions without any appreciable increase in the amount of arbitral error. Of course, the arbitration process has gone in the opposite direction—more formality, more delays, and so on. Although this system was a joy, bench decisions placed a greater strain on me, and I was always dog-tired by the end of the 3-day session.

By far, the most formal system I worked in was the national level panel for the U.S. Postal Service and the National Association of Letter Carriers and the American Postal Workers Union. An arbitration hearing can be conducted in various ways. It may resemble a bar room, a tea room, a living room, or a courtroom. These parties at the national level seem to have embraced the courtroom scenario. There were motions, briefs, reply briefs, endless exhibits, and occasional batteries of lawyers. Perhaps that was the appropriate scenario, given the complexity of the issues and the serious consequences of most awards. Often the potential liability ran into many millions of dollars; other times, far-reaching questions of postal administration were at stake.

In a typical nonpostal case, some 70 percent of the time I left the hearing with a strong sense of how the dispute should be resolved. In my postal cases, not once did I leave the hearing with a clear sense of what I should do. That suggests how close and how well-argued these cases were. Every case was an adventure, full of uncertainty and challenge. I look back on close to 20 years in that relationship with fondness, because the difficulties I faced helped me enlarge my skills and made me a better arbitrator.

Howard Block: There are amusing incidents that happened to you as well. Let's take a minute and talk about those. There's one where I think Joyce was at an Anheuser-Busch hearing with you.

Richard Mittenthal: My contract was about to be renewed, or so I thought. I met the parties at a Washington hotel after 3 days of hearings. My wife had joined me on this trip. We were packed and ready to return to Detroit. They suggested she leave the room and I said, "She knows all about my practice, why doesn't she stay?" They seemed uncomfortable with the idea, but she stayed. Shortly after the meeting began they gave me my walking papers. Talk about firsts—this had to be the first time, perhaps the only time, an arbitrator has been discharged in the presence of his wife.

Howard Block: There was one occasion when you lost your legendary cool. Do you recall that one?

Richard Mittenthal: I was the umpire between Doehler Jarvis Division of National Lead and the United Auto Workers. The

director of industrial relations had been a thorn in my side. Every time he lost a case, he would get me on the phone and argue with me. I really grew to dislike him. We were at a hearing once, and he behaved in what I felt was a monstrous way. He was cross-examining a grievant who was crying, and he was badgering her unnecessarily. He refused to back off when I cautioned him about his behavior. I became angry. It was the first and only time I lost my self-control and said things to him that were quite inexcusable.

I called a recess. When I came back to the hearing room, I apologized for my behavior and told him I was resigning as umpire and would finish the case but that I could no longer deal with him and therefore I shouldn't be the arbitrator.

The postscript, however, was strange. About 2 or 3 years later, the guy was either discharged or quit. I don't know what happened, but the parties invited me to return, which I did. Then, about 5 or 10 years later, to my astonishment, this man who caused me so much pain and trouble showed up as a member of the Academy. And we made up.

Howard Block: You had one interesting encounter with a court reporter. Tell us about that.

Richard Mittenthal: Many years ago, somewhere in the Midwest at a 2-day hearing, I had dinner with the court reporter. She offered to share her bed for the night. I expressed my appreciation but begged off on the ground that the pleasure I would realize from accepting the offer would soon be overcome by the guilt I would later experience. Within a few hours, however, I realized my response should have been, "Consistent with good arbitral practice, I'll give you my answer in 60 days." When I told this tale in my presidential address, I treated my afterthought as if those were the words I spoke to the court reporter. It was a better story that way.

Howard Block: To what extent is your wife, Joyce, involved in your arbitration career?

Richard Mittenthal: There have been many moments when I felt blocked, when I've been unhappy about my inability to cope with cases or about being fired from an umpireship. I think my wife's extraordinary serenity has been a beacon of light for me and has helped pull me through many difficult moments. In addition to that, I often ask her to read my decisions because she's a terribly bright woman. I'm not interested in her reaction to the technical aspects of the case but rather whether the overall decision makes sense. Will a lay reader understand in a general way what it is I'm

trying to say? If she tells me she doesn't understand it, then there's something wrong and I go back and do something about it. So I do rely on her. She's been a great force in my life.

Howard Block: Let's turn to some of the wonderful work you've done, some of the papers you've done. In 1961, you delivered a paper to the Academy on past practice that is probably the most quoted paper in Academy history,[12] quoted up to the present time. How did you happen to write that paper on past practice?

Richard Mittenthal: I owe that to Ben Aaron, who was program chair for the Santa Monica meeting in 1960. I didn't understand why he would ask a relatively new member who was just getting acquainted with the world of arbitration to do this paper. Ben himself had written a paper on past practice a few years earlier. I still don't understand why I was asked to do it.

In any event, I was delighted with the opportunity, and I spent countless days on the paper. I had absolutely no idea that I'd produced something of worth. That's not false modesty. I just found it difficult at that point in my life to evaluate the quality of the paper. It went over very big; I was amazed. For the next 10 years or so, arbitrators sent me copies of awards they'd written that relied on that paper. So it was a source of great satisfaction that I had been a resource for so many people. Years later I received a copy of a collective bargaining agreement that actually stated that any dispute about past practice would be resolved on the basis of this article.

Howard Block: Dick, you've written on some of the subjects that we grapple with every day, like decisionmaking, opinion writing, and conducting a hearing. I wonder if you would just take a few moments and give us some of your thoughts on things that you've learned over the years on those subjects.

Richard Mittenthal: Let me talk about the lessons I've learned from my arbitration practice. I'm not suggesting that my experience is that unique, but there are some special ways in which I approached the job. I'd like to share some of that with you.

First of all, there are many aspects to listening. One listens to understand; one listens to what's not being said. To really enhance the experience, one listens to decide. I was always surprised in my

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[12]Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30.

early days, after I returned home and studied the case, at how often I would find gaps, that is, unasked questions or unproduced evidence. But when I started to learn to listen to decide, I was able occasionally to divine what the missing pieces were at the hearing. I could then, when appropriate, ask questions that ought to have been asked and request information that ought to have been provided. That was an important lesson.

At the beginning of my career, I needed a quick orientation about the subject matter of the case before me. The hornbooks, the Elkouris'[13] in particular, served that purpose—a neat principle followed by several exceptions. I soon realized that I needed a deeper understanding of contract language. One must try to grasp the underlying basis for the principle, the purpose behind a contract clause. The effort, often fruitless, should be made. There are tools available—for instance, *The Impact of Collective Bargaining Upon Management*,[14] a book by three famous Harvard professors,[15] an impressive effort to explain the forces that mold every provision of a collective agreement. It is this type of material that can help with an arbitrator's education.

For years I began to study a case and write an opinion only after the briefs arrived. I found myself, in contract interpretation cases at least, focusing largely on the competing interpretations urged by the parties. This was somewhat limiting. I discovered that by starting work on the case before the briefs arrived, I was freer in terms of the way I thought about interpretive issues. I was more likely to explore the contract language—turning things inside out, upside down, and testing the limits of the interpretive possibilities. None of this prevented me from correcting my tentative conclusion after the briefs arrived. And I often did. But this early consideration of contract issues helped improve my skills in contract interpretation.

Finally, I came to appreciate after many years the vast discretion arbitrators possess and the importance of exercising that discretion wisely. There is no magic formula for achieving such wisdom, but the development of certain personal qualities helps put an arbitrator on the right path. What is necessary is self discipline,

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[13]Volz & Goggin, eds., Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997).

[14]Slichter, Livernash, & Healy, The Impact of Collective Bargaining Upon Management (Brookings Institute 1960).

[15]Sumner H. Slichter, E. Robert Livernash, and James J. Healy.

staying with a problem however long it may take, until you truly come to terms with it; self-restraint, recognizing the possibility of error and hence limiting the scope of an award to the extent possible; and self-criticism, distancing yourself from the work product so that the flaws and weaknesses become apparent. A true Zen Buddhist would probably be a great arbitrator.

Self-confidence is a valuable trait in anyone, including an arbitrator. But too much self-confidence interferes with the kind of doubt and skepticism that nourishes self-restraint. I did not have much self-confidence when I began my career. This was the spur that drove me, working ever harder to overcome the fear of failure. That I should have profited from my weakness is paradoxical.

One more final observation: All of us are engaged in the pursuit of truth, whatever that might mean. We never quite get there in our awards. We come close. We nibble around it, but the truth seems terribly elusive. In preparing for this talk, I came across a 1980 letter to me from Peter Seitz's[16] wife, Carla, in which she was reacting to a speech in which I had quoted the great jurist Learned Hand. Carla's elegant letter celebrating the pursuit of truth read as follows:

> Dear Richard,
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> I too have a story I cherish about Learned Hand, a story that at first would appear to contradict yours, but in reality completes it. May I share it with you?
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> Years and years ago, I was sitting next to him at a dinner party, flattered and at the same time awed by the proximity. In my awkward attempts at conversation, I said to him, "It must be wonderful when out of the maze of different opinions, conflicting statements and the like, all of a sudden, the truth emerges."
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> He looked at me with benevolence, put his arm around my shoulder, and said with a smile, "It never does my dear, it never does."
>
> The truth then doesn't but the answer does, which is short of perfection, but so full of humanity and understanding—and so comforting.

Howard Block: Well, Dick, in the last few minutes we have, I wish we could talk about all of your papers. I think you've presented

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[16]Peter Seitz was a noted arbitrator, a member of the National Academy of Arbitrators, and a frequent contributor to these Proceedings.

10 papers at our annual meetings, but there are a couple I selected because I think they are particularly important. One was in 1968, when there was a big battle raging between Bob Howlett[17] and Bernie Meltzer[18] about the role of law in arbitration.[19] I think you were right in the middle of that. Can you tell us about that paper and what was going on at that time?

Richard Mittenthal: That was the old problem of the extent to which an arbitrator should consider external law in making decisions. Archie Cox was the one who began it. Meltzer and Howlett came up with the conflicting views. I tried to get between them on a narrow point, but I was essentially agreeing with Meltzer. However, Meltzer was not prepared to accept my small disagreement and produced a penetrating rebuttal[20] that seemed sensible to me, although by then we were into theoretical areas that I had trouble understanding. I was prepared to surrender.

Others joined the debate at the Academy meetings. Ted St. Antoine,[21] Dave Feller,[22] and Ted Jones[23] come to mind. Then, after a lapse of several years, Mike Sovern, then dean of Columbia University Law School, was invited to give a paper on when arbitrators should follow federal law.[24] In the course of his speech, he returned to the very point on which I had disagreed with

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[17]Robert G. Howlett, former member, National Academy of Arbitrators; former Chair, Federal Service Impasses Panel. *See* Howlett, *The Arbitrator, the NLRB and the Courts*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 67.

[18]Bernard D. Meltzer, Edward H. Levi Distinguished Service Professor Emeritus, University of Chicago, Illinois. *See* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 1.

[19]Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 72.

[20]Meltzer, *A Rejoinder*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 58.

[21]Theodore St. Antoine, President, National Academy of Arbitrators, 1999; James E. & Sarah A. Degan Professor of Law Emeritus, University of Michigan Law School. *See* St. Antoine, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 75.

[22]Feller, *The Role of Arbitration in State and National Labor Policy: Comment*, in Arbitration and the Public Interest, Proceedings of 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), 78.

[23]Jones, *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), 42.

[24]Sovern, *When Should Arbitrators Follow Federal Law?*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1970), 29.

Meltzer. He said I was right, but for the wrong reasons. It didn't matter to me. I was delighted, even though he spelled out the ways in which he felt I was mistaken. That debate lives on, although it seems less relevant in today's arbitration world.

Let me mention also my enjoyment in collaborating with Howard on two papers. One was titled "Arbitration and the Absent Employee: Absenteeism,"[25] an attempt to identify and analyze the many factors that enter into absentee discipline. The other was titled "The Ever Present Role of Arbitral Discretion,"[26] an attempt to explore how arbitrators use the large discretionary powers we possess.

Howard Block: Then in 1991 you dealt with the history of arbitration in a paper called "Whither Arbitration?"[27]

Richard Mittenthal: That was the debate between George Taylor[28] and J. Noble Braden.[29] I don't think they ever thought of it as a debate. That was an artificial device for me to dramatize two conflicting views of the proper role of the arbitrator. It was essentially the question of how arbitrators ought to act in construing the collective bargaining agreement. Taylor approached it from the standpoint of those early arbitrators who saw the agreement not so much as a contract but as a constitution. Braden viewed it strictly as a contract. It was inevitable, as I explained in the paper, why Braden's view would ultimately prevail as it has. I don't think anybody today seriously thinks of a collective bargaining agreement in constitutional terms.

Howard Block: Our time is just about up. I have one final question for you before we invite questions from the audience. Your 1979 presidential address is titled "The Joys of Being an Arbitrator." It's 22 years later, and is it still a joy to be an arbitrator?

Richard Mittenthal: Absolutely! I wouldn't be here if it weren't. People my age tend to retire, but I still love the work. I'm like a

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[25]Block & Mittenthal, *Arbitration and the Absent Employee: Absenteeism*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 77.

[26]Mittenthal & Block, *The Ever Present Role of Arbitral Discretion*, in Labor Arbitration Under Fire, eds. Stern & Najita (Cornell Univ. Press 1997), 231.

[27]Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 35.

[28]Charter member, National Academy of Arbitrators.

[29]*See generally* Gruenberg, Najita, & Nolan, The National Academy of Arbitrators: Fifty Years in the World of Work (BNA Books 1998), 52.

punch-drunk fighter. When the bell rings I go out and I'm ready to give my all.

Howard Block: We have a few minutes, if there are any questions.

David Vaughn: Once I was out at Dick's house and I was looking for the huge library and large den that I assumed had to be there to produce all of these insightful papers. I asked Dick how he did his research and analysis, and he gave me an answer that surprised me. I thought he might like to share it with us.

Richard Mittenthal: It's very strange, but I spent my whole life working in bed. Actually, I do all of my writing and reading and everything else on the bed I share with my wife. I know that's a little strange, but that's the way it is.

James Sherman: How do you feel about agreements the parties reach and then ask to be confirmed through an arbitrator's award?

Richard Mittenthal: I've had that experience. In 1989 or so, the International Association of Machinists went on strike against two railroads. The rail employer association viewed it as a strike against all the railroads and locked out the union nationwide. Congress intervened, passing a law that provided "last best offer" arbitration between the parties. I ended up as the arbitrator. When I saw their offers, it was obvious to me that neither party could possibly live with what the other was proposing. Their positions were extreme. A choice between last best offers in these circumstances made no sense whatever. So I decided that the only rational approach was to convince the parties not to carry out the arbitration process Congress had created.

Fortunately, after a few days they were convinced to return to the bargaining table. They reached an agreement and asked me to write an award justifying the conclusions they had reached without suggesting that these conclusions were the product of their agreement. I did so because Congress had also said that the parties could waive last best offer arbitration if they wished and proceed on some other basis. This taught me that there are, on rare occasions, impossible cases where the arbitrator should do everything within his or her power to avoid a decision. The Code of Professional Responsibility permits such agreed-upon awards in appropriate circumstances.[30]

Howard Block: Well, Dick, thank you very much.

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[30]Code of Professional Responsibility art. 6, § I (June 2000), available at <http://www.naarb.org/ethics.html>.