Chapter 13

AAA/FMCS UPDATE: A VIEW FROM THE TOP

I. Some of the Critical Issues Facing Labor-Management Arbitration Today

William K. Slate II*

I am pleased to be here. The National Academy and the labor-management caseload it has so ably served in multitudinous ways are both hugely significant elements—indeed fundamental components of who we are as an entity—past, present and future.

On a very personal note, while I obviously preside over an organization in a management capacity, my *equanimity* came out of growing up in a home where only the Bible preceded collective bargaining in importance, and where collective bargaining was followed in significance by the U.S. Constitution. My father was a long-time member of IBEW and my mother was even a longer-term member of the Teamsters. I walked my first, *of many*, picket lines at age five, so the importance of labor/management issues was imprinted on my DNA at a very early time.

Before turning to the primary focus of this session, namely "Some of the Critical Issues Facing Labor-Management Arbitration Today," I would like to quickly and briefly mention a half a dozen matters of information related to *our shared work*.

Case Statistics

First, to look at some case numbers for 2003. A total of 14,003 labor cases were filed with the AAA in 2003 and that number was up about 6 percent over the previous year. This happily reversed a trend of labor cases being relatively flat or slightly down for the previous 3-year period. Thus far this year, through the first quarter, 4,424 new cases have been filed.

*President, American Arbitration Association, New York, New York.

That growth in numbers we believe is a segue to the second matter that I would mention and that is the valued and continuing good work of the National Labor-Management Task Force, which is chaired by Jon Hiatt of the AFL-CIO, Joan Parker, Academy Member, and Andrea Christensen, representing management perspectives. As many of you will recall, I established the National Labor-Management Task Force about five years ago, and we believe that its advice and good works have contributed to the growth in labor case filings and that their recommendations have enabled the AAA to be more responsive to the needs of the broader community. The Task Force meets in person once a year and during the course of the year its four working committees are engaged in multiple initiatives, one of which will result in redacted online labor awards in the fall. Of course we also have in place a number of regional labor-management advisory groups around the country and I'm just advised that the one in New York, which has been moribund in recent times, is about to be re-invigorated.

Measures of Satisfaction

Third, I want to mention to you the results of an arbitration-client satisfaction study that comes out of a case-ending survey mailed to parties. This study covers the periods 2002, 2003, and through January 2004. The surveys were distributed nationally to users of the AAA's services, and were mailed back to an outside firm (Clarke, Martire and Bartolomeo). I want to underscore that the analysis of this arbitration-client satisfaction study is undertaken for the purpose of looking at *overall trends* of *client satisfaction* with respect to institutional administrative services and the services of arbitrators *as a group*. It does not, and I reiterate, track individual arbitrators. We do not look at, analyze, or collect that kind of data. We are interested, again, in overall trends of satisfaction in the arbitration process—that is the objective of the analysis. The study I here reference was based on almost 11,000 completed surveys and looked at both commercial and labor arbitrations. And by the way, this is an internal document for purposes of permitting us to work on areas in which we need improvement. This is not data that we publish, so I share it with you here and not with any sense of confidentiality per se, but it's never been shared with anyone before today and you'll not see this data publicly posted. I believe you might take some satisfaction in hearing that while arbitrators in commercial cases received an "excellent" or "very good" rating

from 7 out of 10 users, arbitrators in labor cases received an "excellent" or "very good" rating from 8 out of 10 users. The inescapable bottom line here is that your users like you more than commercial users like their arbitrators. As a group you are rated highly on fairness, objectivity, efficiency, and knowledge.

I would note with some pleasure as well that satisfaction with case management as delivered by the AAA was up slightly in the labor case area in 2003—a trend we intend to work on and to have continue.

In going to just a slightly deeper level of statistical analysis, the trend of satisfaction with respect to labor cases grew in this regard: in 2002, 38 percent of users rated as "high" their satisfaction with the overall arbitration process, that is arbitrators plus case administration. That number grew to 40 percent in 2003. Again, going back to 2002, 48 percent of users rated their satisfaction with the overall arbitration process as "medium" and that number was 57 percent in 2003. Perhaps importantly, in 2002, 14 percent of users rated their overall satisfaction level with the arbitration process as "low," but in 2003 that number dropped to just 3 percent, so as a shared endeavor, i.e., the role of the arbitrators and the role of case administration, we share a trend of growing satisfaction on the part of the users and that's something we can all be pleased about. In just briefly breaking out that number for satisfaction with case managers in 2002, 77 percent rated their satisfaction level as "high" and in 2003 that "high" satisfaction level grew to 81 percent.

Again, we use these trends and levels of specificity that the surveys address to move in on areas that need attention.

Training

Next, a word about training. There is a committee of the National Labor-Management Task Force (the Training and Education Committee) that is a pipeline for training-related suggestions and concerns. We have received very positive responses to the interactive one-day program entitled Labor Arbitrator II: Advance Case Management Issues. And those of you who have taken this program know that it consists of six interactive exercises covering such topics as disclosure and ethics, advanced discovery and motions, due process/just cause issues, evidence, external law and remedies, and post-hearing and post-award issues. Each program is facilitated by two trainers who include an arbitrator member of the National Academy and a staff trainer from the AAA. Six such

classes were held in conjunction with the fall meeting of NAA in Colorado in 2003 and I'm advised that at least two programs will be offered at the fall meeting of the Academy in Texas.

National Lecture Series

Now, I tell you with some enthusiasm about a planned national lecture series in celebration of the impending 80th anniversary of the Federal Arbitration Act. The FAA will be 80 years old in February 2005. Both in celebration of that important event and as an opportunity to educate lawyers, public policy makers, and judges about the history and contributions of the Act, we have developed a four-part national lecture series co-chaired by AAA Board Members Janet Reno and Bill Webster, which will commence in New York in October of this year with an opening lecture by John Feerick, introduced by remarks from Chief Judge Judith Kaye, Chief Judge of New York State, which was the first state to enact an arbitration statute, and which in fact preceded the FAA. Subsequent lectures will be held in Washington in February 2005, in Dublin, Ireland in May 2005, and conclude with the fourth lecture in September 2005 in a locale with a major labor-management caseload that will explore the intersection of the FAA and the field of labor. Prof. Ted St. Antoine, known to you all and a current member of my Board of Directors, has kindly helped me think through just how such a lecture might, in part, be structured, and it might be to invoke some thoughts expressed at an earlier time by Dave Feller, questioning whether the FAA ought to apply to collective bargaining dispositions that parenthetically might put further restrictions on judicial review of labor arbitrations and in the process that we maintain the spirit of section 301 of the Taft Hartley Act. In any event, one important leg of the four-legged stool of the national lecture series will focus on labor-related issues. Each member of the Academy will receive an announcement of the dates and locations of each of the four FAA lectures.

The FTC Investigation

Lastly, under this heading of "matters of interest," I would mention in a summary way a few facts concerning the FTC investigation of the AAA as related to its status as signatory to the National Academy's Code of Professional Responsibility. The FTC principally focused on and made inquiries into the structure of the AAA,

our status as a membership organization, and the relationship between the AAA and our neutrals.

We took a strong position on the threshold issue of the FTC's *jurisdiction* over the AAA. Because of some significant differences in the governance structure of the AAA and the Academy, we were able to assert a number of jurisdictional arguments that may not have been available to the Academy. For example, we spent some considerable energies explaining that membership on one of AAA's panel of arbitrators was not the same as membership in the AAA as an organization. As regards to membership, all of you know that we also dispensed with membership and now our former members are subscribers to our publications and so we were able to take the additional position that our structure had changed so that membership in the AAA, at the time of the FTC's inquiry, was exclusively limited to those individuals who serve on our Board, on a voluntary basis, and without any compensation.

I note with deep appreciation that the AAA received tremendous support from many members of the Academy, who communicated their understanding that membership on the AAA's roster of neutrals had no relation whatsoever to any membership they may or may not have had in the AAA as an organization. Ultimately, after a series of many exchanges, we were notified in late 2003 that the FTC was *not* going to pursue the investigation of the AAA and to date we have not heard from them further.

Critical Issues

Now, permit me to turn to my assessment of some of the critical issues facing labor-management arbitration today. Under that heading I will reference:

1. disclosures;
2. the reality of increased litigation;
3. concerns about time and costs;
4. a few recent cases;
5. the growing use of ODR, and;
6. a word about class-action arbitrations.

Disclosure

This is *the* area of attack on arbitration practice today, and while it is largely confined to the commercial side, there is no reason to suspect it will stay there. It is clearly prevalent in employment

arbitration cases. Allegations of a failure to disclose is the initiative *de jour* by which to move to have a matter set aside, delayed, or to have an arbitrator removed, and sadly, some of those positions are well-taken and courts have so found.

Increased Litigation

Disclosure litigation is but a piece of the growth of litigation generally against neutrals and institutional providers. Four years ago our outside fees for retained counsel was less than $300,000 annually. Again, that is for the retention of outside counsel in addition to our four full-time in-house legal department lawyers. Last year we spent more than $1 million for outside counsel fees defending the arbitral process, neutrals, and the institution. We virtually always prevail (thank goodness), but lawsuits must be answered—including one much-publicized and ongoing in California where it is suggested that the Association should be liable for not knowing the personal life experience of some 20 years earlier of a named arbitrator, and thus it is suggested that we should not have put that arbitrator's name on a list among others for a given case.

As the prevalence of arbitration has widened, litigation has caught up with it bringing many combat-style practices, which are increasingly omnipresent. We train neutrals and underscore transparency in disclosure practices, but this is a movement that we believe will clearly grow before it ever subsides.

Time and Costs

The third critical issue involves concerns expressed by the parties about "time and costs" in arbitrations. Yes, time and cost are sometimes related to litigation, but most often "time and costs" concerns of the parties are related to the elements of progress or lack thereof in a given case. This is a cause of worry increasingly voiced by parties *across* our arbitration caseloads including labor-management cases.

To move to a greater level of specificity in these regards, I contacted one of our Board Members, Jon Hiatt, whom many of you know is the General Counsel of the AFL-CIO. In a letter to him in early April I related my pleasure at being invited to appear before you today, and I asked him if there were any issues that I might bring to your attention in my remarks. Jon thoughtfully polled a number of his General Counsel peers in other unions (he

assured me that the comments assembled and articulated by him could be for attribution) and while I reiterate that our overall concerns are not confined to labor-management cases, I give you the language now verbatim from Jon Hiatt's letter, which specifically addresses labor-management cases. "I hate to say it, but if there is a simple message these days that probably best reflects the *overwhelming* sentiment among the Union-side arbitration practitioners, it is 'issue your awards faster and charge less.' Related to this is the constant refrain I hear that arbitrators are too frequently allowing employers to game the process by scheduling multi-day hearings months apart, enabling unacceptable delays." Finally, Jon says, once again, related to the others, is that the arbitrators "need to be much more *assertive* in controlling overzealous advocates (on both sides, to be fair) from presenting repetitive, duplicative evidence and again, unnecessarily delaying these cases."

Once again, these are *not* new issues, but the trend of voiced concerns is growing—in some instances feeding mediation, and in some instances a return to trial court options.

Some Important Cases

Now, briefest comments respecting a few cases, in this instance, all employment cases at the request of the NAA President because of the interests that members of this Academy have in "its many twists and turns."

The first case I will reference came out of the Sixth Circuit and its opinion mentions with favor AAA and FMCS in the same sentence. In *Wendy McMullen v. Meijer, Inc.*,[1] the court found that an employer's control over the pool of arbitrators allowed it to create circumstances that could result in a biased arbitration proceeding. The Sixth Circuit overturned the trial court's decision and held that the employer's control over the pool of arbitrators allowed it to create the type of symbiotic relationship that could result in a biased proceeding. The court noted that the risk of bias inherent in the employer's procedure was demonstrated by the fact that the company used the same group of 5–7 arbitrators in each arbitration in which it participated in Michigan. The court further held that the employer's exclusive control over the arbitration pool was especially troubling because the company could have easily used a

[1]337 F.3d 697 (6th Cir. 2003).

third party, such as the *AAA* or *FMCS* to select the pool of arbitrators.

The second case comes out of the Supreme Court of New Jersey in *Leodori v. Cigna Corp.*[2] There the court said that without a signature on an arbitration agreement, or some other unmistakable indication that the employee had agreed to arbitrate his claims, the arbitration agreement was not enforceable. In rendering its decision, the court offered some additional hints to aid employers in crafting enforceable pre-dispute arbitration agreements. For example, the court stated that although it need not list every imaginable statute by name, the agreement should nonetheless provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. The court further noted that any waiver of rights provision should reflect the employee's general understanding of the types of claims included in the waiver.

The third case comes out of the Third Circuit, *Maryann Spinetti v. Service Corporation International.*[3] This case found that an arbitration agreement was illegal and void where it required the employee and employer to pay their own attorneys' fees and one-half the cost of the arbitration. Ms. Spinetti had argued that she was denied the opportunity to vindicate her statutory rights because of the expense of the arbitration. The District Court *and* then the Court of Appeals found that the provisions at issue did violate the law, for the reasons suggested by Spinetti. The courts concluded, however, that because the fee and cost provisions did not make up the "essence" of the contract under Pennsylvania law, they could be severed from the rest of the agreement. The remaining provisions of the arbitration agreement therefore remained enforceable. As a result the courts dismissed Spinetti's federal court complaint.

The last case I will reference came out of the Ninth Circuit, *EEOC v. Luce.*[4] In this decision, with the court sitting en banc, the court enforced an arbitration agreement that governed Title VII Employment Discrimination Claims and overruled a prior Ninth Circuit case, *Duffield v. Robertson Stephens & Co.*,[5] which had held that Title VII claims were not subject to arbitration agreements. In *Duffield*, the Ninth Circuit had concluded that "the primary pur-

[2]814 A.2d 1098 (N.J. 2003).
[3]324 F.3d 212 (3d Cir. 2003).
[4]345 F.3d 742 (9th Cir. 2003).
[5]144 F.3d 1182, 1193 (9th Cir. 1998).

pose" of the Civil Rights Act of 1991 was to "strengthen existing protections and remedies available to employees under Title VII" and that purpose was fundamentally at odds with compulsory arbitration agreements. Upon re-examination the majority found that *Duffield*'s presumption that arbitration is less capable than the judicial process of enforcing the protections afforded in the substantive law to would-be complainants is inconsistent with the Supreme Court's endorsement of arbitration in *Gilmer*.

In addition, the Ninth Circuit recognized the Supreme Court's opinion in *Waffle House*.[6] In *Waffle House*, the Supreme Court explicitly stated that the presence of an employer-employee arbitration agreement would not preclude the EEOC from perusing judicial remedies, and allowing compulsory arbitration agreements would not entirely eliminate the judicial protections afforded to employees under Title VII.

I conclude this brief discussion of recent cases by saying that there is a significant amount of litigation taking place in the employment area with opinions being reported on a daily basis. It appears to focus substantially on the enforceability of arbitration agreements based on allegations of corporate overreaching in arbitration agreements. That overreaching has included employers attempting to place limitations on or preclude remedies, statutes of limitation, and another frequently issue raised in litigation related to excessive forum fees charged to the employee.

Online Dispute Resolution (ODR)

In the past almost three years we have had well over 2,000 cases filed online through the AAA online dispute resolution capacity known as Web File. These cases run the gamut from construction to intellectual property to, yes, employment disputes. Although the system has the capacity for parties to file cases, answer, submit documents, have a protected hearing in a chat room, and issue an award, to date no one has utilized the full capacity of the system. Rather, parties pick and choose from the menu of possibilities, and most often the system is utilized to file and answer cases or to occasionally but increasingly submit documents online. The Web File system is currently undergoing a major enhancement overhaul and by the end of this calendar year we will be promoting it in ways that it has not been marketed in the past. In fact, to date, we

[6]EEOC v. Waffle House, 534 U.S. 279 (2002).

have *never* marketed the availability of Web File, yet parties, as I stated earlier, in over 2,000 cases have found their way to it and opened new cases on it. It appears to us inevitable that, not withstanding the challenges of online communication, it is highly likely that online dispute resolution will in time replace many face-to-face conflict hearings, and where it *does not*, it will increasingly be used to *compliment* the face-to-face process. A number of private cyberspace entities exist for the resolution of workplace conflicts. And while I don't believe any of them are overwhelmed with business at the present time, we see this movement as inevitable and, dare we say it, somewhat generational. Our Web File system and those being developed by others accommodate both employment mediations and arbitrations, and by this time next year labor cases will clearly be available for filing and the full menu on Web File.

Class Action Arbitrations

And as I come to the coda of these remarks, I will mention the phenomena of class action arbitrations. Some of you heard a discussion in Ted St. Antoine's program yesterday afternoon about class actions. This development within the arbitral process occurred mercurially during calendar year 2003, and I describe this under the banner "sometimes you get what you *don't* ask for," because we never stepped out and lobbied for this direction.

Almost spontaneously during last year a number of state and federal courts began divesting themselves of all jurisdiction in a number of consumer and employment class action cases. When class action attorneys appeared with clients in hand, who had arbitration clauses in *individual* contracts, seeking a class action, a number of judges simply referred them to an arbitration institution since the parties were in fact asking for a class action, and their clients were contractually bound in individual arbitration clauses. Then last summer the Supreme Court handed down the landmark decision in *Green Tree Financial Corp. v. Bazzle*[7] that opened the door to class actions within the arbitration context where a clause did not specifically preclude that a class action in arbitration be held. We quickly convened an *inclusive* advisory group of plaintiff's attorneys, corporate attorneys, and others to develop a supplementary set of class action arbitration rules. Those rules fairly mirror Federal Rule 23, but for the first time in a set of arbitration rules

[7]539 U.S. 444, 123 S. Ct. 2402 (2003).

there are two instances when the process pauses for 30 days to give parties an opportunity to go to court. One is when the decision is made to form a class and the second time is when the class is actually formed and thus people outside the class can challenge it in court (in terms of who is in or out of the class).

Presently we have at the AAA 19 class actions arbitrations pending and, by the way, all of these may be viewed on our Web site as we have determined that the public policy implications of class actions dictate that everything that happens from the initial filing onward goes up on our Web site immediately. Two of the pending class actions involve employment disputes and a significant number of the remaining cases, but not all, involve consumer matters. There are also some interesting other kinds of cases, as well, such as one involving a franchise dispute, another a breach of a partnership agreement, and one class action involving the nonpayment of a physician's fees versus a health plan.

Again, this is a direction, i.e., class action arbitrations, that emerged and matured in the course of about 12 months. We are doing our very best to do it well, even though I think there is a distinct possibility that as a phenomena it may be short lived. My sense, without knowing, is that many companies are now rushing to write clauses that preclude class actions in arbitration, which I believe the Supreme Court could find to be void as against public policy in some case sometime in the future. If that occurs, all of this may end up back in the courts where it all began.

II. THE VIEW FROM THE FMCS

PETER HURTGEN*

It is somewhat intimidating to speak to this audience and it reminds me of a story of a man from Johnstown, Pennsylvania, who died, went to heaven, and was interviewed at the gates by an angel telling him that entrance requires that he identify some significant, worthwhile, notable achievement from his life. His account would be presented to a panel that would judge and assess whether that

*Director, Federal Mediation and Conciliation Service, Washington, DC.

qualified for entrance into heaven. This fellow thought and said that he just had an ordinary life, married, raised a family—nothing significant happened to him personally or professionally. The angel asked him to take a moment, think, and try to come up with something. So he thought and he thought and he said the only thing he could think of that was of significance is that he lived through the Johnstown flood. The angel said, "Is that it? Is that what you're going to go with?" He said, "That's all I have." The angel said, "I just want you to know that Noah is on the panel."

There is a room full of Noahs here for me, many of whom I have known and recognize as stalwarts and eminent practitioners of arbitration; many of whom I appeared before as a young person and as an older person, always as an advocate. I started my experience with picket lines, seeking injunctions for the most part. I did speak to you two years ago, and I thank you for having me again.

Frankly, you are the only group I can quickly recall that I have spoken to both as Chairman of the National Labor Relations Board and now as the Director of Federal Mediation. The FMCS is, of course, not a household word in this country. In fact, when I went home and told my wife that the White House asked if I would be willing to move over and serve as the FMCS Director rather than as Chairman of the NLRB, she asked me what the FMCS was. I explained what it was and she said, "You're not going to do that, are you?" I told her that I would and that I thought it would prove to be interesting. She then asked me about the next step in my meteoric career, and I told her that the Rural Electrification Program was looking for somebody.

When I was Chair of the NLRB, I continually got requests to talk about facets of labor law. The groups I get now see the words mediation and conciliation in my title and ask me to talk about diplomacy, reconciliation, and peace. They seem often to say that they do not know what the FMCS does, but they know that it gives grants. Within one week after being appointed Director, I was asked by the Center for the Study of Mind and Human Interaction to talk to them. I did, and I told them a little about the FMCS. They asked for a grant, I said no, and I never heard from them again. Then I got a call from a group called Peace Now—a breakfast briefing. I did it. Within a week or two I got a call from Peace Tomorrow, wanting a little luncheon speech. I declined because I could see what was developing here—I would have gotten a call later from Peace Sometime for a dinner speech or something

followed by Peace Never for a nightcap. Peace Never would be lawyers. So I've cut back on my speeches because so many of the requests came from people who did not have a clue about what we do at the FMCS. You do, fortunately.

I'm going to talk only a little about our arbitration services because I don't know that much about them. Since I got to this agency, I have occupied myself pretty much exclusively to the management of the agency and with involving myself in a number of mediations. Vella Traynam, our Director of Arbitration Services, is here and she can provide answers and expertise with respect to that program. In case you came here for some statistics: in fiscal year 2003 we issued about 19,000 panels and appointed almost 9,000 arbitrators. Those arbitrators decided 2,746 cases. Seventy-eight percent of the cases involved private sector disputes. I do not dispute repeated criticisms about tardiness in awards, dilatory tactics by employers, and arbitrations that take too long, but I believe that these represent only a small number of our total caseload. Our statistics do not indicate that there is a systemic institutional problem with arbitration being too long or too delayed.

I think that the institution of labor arbitration is healthy, striving, and is as critical and important in our system of labor management regulation and practice as it has ever been. I should say before I wander off into something else how appreciative we are at the FMCS for the programs that we share with the National Academy. You are providing a mentor program to arbitrators who come onto our roster who could use the help and the experience and none of you have complained seriously about helping with this effort. We thank you.

I will tell you that being a neutral, being in the middle, as all of you arbitrators have been for your professional lives, is the hardest thing I've ever done. Neutral is a word that I sometimes quibble with because I don't believe that many of us are from Mars and most of us have points of view and biases that have come out of a labor or management background. There's no way we avoid that. What is hard and what you have to do as a mediator and/or arbitrator is to balance, show respect and understanding, and give credence to the positions, reasons, and the interests of both sides. For somebody such as me who spent 31 years as an advocate, that is a very stiff challenge.

Grievance Mediation

When I was a member of the Board, I did what I could to give work to you—mostly through *Collyer* cases. My colleagues on the Board didn't always agree with me with regard to the operation and application of the *Collyer/Spielberg* doctrine but, as I have said previously and as I have published, I feel strongly that more cases ought to be *Collyerized* and I did what I could to give you work. Since I've gotten to the FMCS, I'm doing my best to take it away from you.

We have targeted grievance mediation. That, of course, means you don't get the case if we can successfully mediate it. In a significant pilot program, the parties to a large areawide construction collective bargaining agreement involving all of the building trades unions and Parsons, a very large international construction and engineering firm, have entered into a project labor agreement covering the New Orleans, Biloxi, the Gulfport area, where there is a multi-year program to build a new Navy shipyard, under contract of course to the United States government. The project labor agreement covers the vast construction that has to be undertaken in order to put these shipyards into shape so they can build the new Navy shipyard. We are talking about 10 years worth of construction in the shipyard and tens of thousands of employees over that period of time. And in this project labor agreement, step three is mediation with a mediator from the FMCS. We are trying to induce the parties, wherever they are willing to do so, to formalize the use of our mediators in grievance mediation. While your costs and the time taken in hearings and analysis and deliberation are not the core problems in arbitration, the reality is that the process, taken as a whole, can be very costly and time-consuming. We can avoid these problems if we are able to resolve more of these cases through mediation.

The FMCS is attempting to do more grievance mediation, hopefully to reduce litigation in court as well as, in many cases, before you. The principal initiative that I've undertaken in that respect is a program that I've called DYADS and I apologize again if some of you have heard me speak about this. A dyad is, in the lexicon of organizational development, a pair of independent actors or entities working as a team. It is also an acronym for Dynamic Adaptive Dispute System. The independent pairs are an employer and a union and the goal of the DYADS is to reduce the

strain and cost of labor disputes to the economy. That is still our core mission: the FMCS does not make substantive judgments and involve itself in arbitration. We provide a roster, and that's as far as it goes. I should say that it is a much less expensive roster than the AAA. But if we are to reduce or attend to the economic harm of collective disputes, perhaps the greatest harm to our economy from labor and employment issues is not from those headline-grabbing controversies, but from the millions of pin pricks that come about every year in individual employee claims. And if these disputes are not resolvable pursuant to a collective bargaining agreement, there's only one place to go. If there is any cause of action at all, they're going to go to a court. We all know the tremendous costs and problems with litigation of individual employee rights. Unless it's a claim that has got Cadillac value, that is a claim with a tremendous upside in terms of the dollar recovery, that employee isn't going to get a lawyer to take his or her case and in our system, you're not going to progress very far without a lawyer.

Where does that take you? Organizations would benefit by some dispute system but there isn't one that we can just pick off the shelf and say this is *the* internal employee dispute resolution system. There isn't one and it would be a mistake, for the FMCS or any other entity, to promulgate one. Organizations have different cultures, different missions, and they are surrounded by different elements of regulation depending on the industry they're in, their size, etc. We've got to find a way to have these organizations develop their own adaptive dispute system. We believe that the employees and the employer have to work together on this issue. And the FMCS has established a pilot program at the Akron Medical Center in Ohio to do so.

Akron

The Akron Center is a large medical complex with 6,000 employees, 3,000 of whom are organized, split evenly between the Ohio Nurses Association, who represent the nursing professional and technical employees, and the Steel Workers, who represent the dietary, housekeeping, and maintenance personnel. Then there are 3,000 unrepresented employees. They have established a group of 20 employees—five from management, five from each union, and five from the unrepresented employees—with the

facilitation and conciliation with our people. They have been working for months to create their own DYADS.

III. PANEL DISCUSSION

Chair:	Timothy J. Heinsz, NAA Member, Columbia, Missouri
Panelist:	William K. Slate II, President, American Arbitration Association, New York, New York
Panelist:	Peter Hurtgen, Director, Federal Mediation and Conciliation Service, Washington, DC

From the Floor: I do have a question but I want to start with a point of personal privilege. When the three of us who were on the Board of Inquiry into the West Coast Dock strikes went to San Francisco to do our job, we talked with Peter Hurtgen. He was very constrained in what he could tell us or what we could ask him because he was actively involved in mediating that dispute at the time. Within the limits of what he could do to help us, however, he was extraordinarily helpful and I don't think I've ever properly thanked him for that and I would like to do so at this time. Now here's my question to Peter. I'm fascinated by your DYADS program. I wonder if you've sought the assistance of the EEOC given the significant component of discrimination cases that will be addressed by that process and if you have sought the partnership of the EEOC, has it materialized?

Hurtgen: I've had discussions with the EEOC on a few occasions. They're interested and I'm aware of their mediation program that has, I think, been fairly successful. However, before we progress further, I think we will have to secure some evidence and some achievement by our DYADS programs in a few places. We've been talking but it's just preliminary at this point.

From the Floor: I work for the Department of Defense and we currently have an ADR system with binding mediation. However, under the new DOD personnel system, we'll lose all that. We go to a management-selected panel for all disputes. Do you think that's right?

Hurtgen: My Deputy Director, my Deputy Chief of Staff, my general counsel, and I are going to be meeting in Washington on

the 7th of June with DOD and major unions involved in that problem and we're going to see what we can do to achieve balance and assist the parties in working those issues out. We've started that process already in our offices with the new Department of Homeland Security. It's too early to say anything other than we're getting good dialogue going. I attended and chaired the first session two weeks ago. We've got a whole series of dates set up in June and July to continue the mediation between the Department of Homeland Security and the three major unions representing those employees and hopefully we will be able to do something similar for the Department of Defense.

Slate: I'd just to like to weigh in. We haven't been invited to participate in that discussion, but in answer to your question do I think that's right—No, I think it's absolutely wrong. It's totally antithetical to the notion of a true neutral and in fact it's reflected in one of the cases I cited where a federal court looked at a system that was controlled by one side and said this is not a system that should stand and an arbitration coming out of that isn't one that a party should have to buy into. We certainly have a lot of experience in the private sector that suggests that anytime one party is controlling the panel it's not going to stand and it shouldn't.

From the Floor: The AAA has systematically closed down some of the labor arbitration offices around the country and consolidated them. We just lost ours in Chicago this year. My question to you is what is the AAA doing to market itself as a provider of labor management services particularly in the areas around the country where you've shut down?

Slate: Thank you for the question and I think I would see it differently. When we began the process of creating four case management centers around the country, we found and documented, to our satisfaction, that case administration could not be done well in 38 different places. The administration was uneven at best and we could never attain the quality that we needed. We experimented at first by having a case management center in Dallas and than later Atlanta, Fresno, and lastly in Providence. What we have found, and what people have told us, is that the quality of case administration over time has never been better. One of the reasons is personnel. We have a critical mass of personnel in one place and now people can have careers, they can move through the ranks. We decided that we were not going to close case management centers involving labor. We were going to have 13 labor offices maintained as separate entities. Our reorganization came out of the work of the

National Labor Management Task Force—so this was not an independent decision of the AAA alone. We determined that we needed a minimum of 500 cases to have a viable group of employees and staff to run an office.

Follow-up: I didn't ask about the closing. I asked about now what are you doing to market your labor management services where offices have been closed. I understand the theory behind your administration, and I may disagree with it, but it's done. The question we have is what are you doing to market what you used to do when you no longer have staff in the area?

Slate: Nothing would please us more than to have that minimum caseload so we could have a dedicated office. We are aggressively marketing. We have 36 business development people calling on businesses and unions to tell them about these services and hope they'll use them. I would say additionally, in response to something Peter has said lightly a couple of times, we do have a "list-only" method. You don't have to have the full administration if you don't want it. That's something else we market to unions and corporations and we'll continue to do that.

From the Floor: One compliment and one sort of announcement to the audience. I just want FMCS to know that Vella does a wonderful job. She's gotten into a number of really positive initiatives, she's been very helpful and supportive to the arbitrators, and we want to make sure FMCS knows what a great job that she's doing. The announcement is that one of the pleasant surprises with Vella is that most of us thought that there would never be a suitable replacement for Jewel Myers.

From the Floor: I'm getting back into arbitration panels—we have five or six unions and we use the FMCS for those panels. My problem concerns employment arbitration, which is covered by our lab policies. I've made some earnest efforts to contact some neutrals within the Bay Area and there's unfortunately a California law that provides much more disclosure requirements for employment arbitration than for labor arbitration. Accordingly, I've had a lot of difficulty trying to get a panel of AAA neutrals because a lot of them have declined because of those requirements. Have either of you (Bill or Peter) any suggestions?

Slate: It certainly has been a problem and those disclosure requirements are indeed quite onerous and we've had the same experience with people who are declining. We do have neutrals and some of them are Academy folks in California. They might not be in the specific geographic locale that's right on top of where you

are but we do have some good names and good people and I'd be pleased to share them with you.

Hurtgen: There's nothing I can say publicly on your question. I recognize the problem. Although California has some unique problems, there are issues throughout the country with regard to the use of labor arbitrators in non-labor contexts. The FMCS, because of our federal position and because of the statute that gives us our mission, has not drifted into arbitrations that do not involve a collective bargaining agreement.