IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 42148 and 42641

CITY OF NORTH LAS VEGAS

Appellant,

vs.

MICHAEL THOMAS

Respondent,

CITY OF NORTH LAS VEGAS

Appellant,

vs.

JOHN ARMSTRONG

Respondent,

Appeal from Orders to Vacate an Arbitration Award
Eighth Judicial District Court, Clark County
The Honorable Michelle Leavitt, District Judge
The Honorable Jessie Walsh, District Judge

AMICUS CURIAE BRIEF

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I. Interest of Amicus Curiae

The National Academy of Arbitrators (Athe Academy@) is a non-profit professional and honorary organization of approximately 600 arbitrators, founded in 1947. The Academy believes that arbitration as a dispute resolution method is a valuable and effective alternative to the judicial system in labor-management disputes. Article II, Section 1 of its Constitution sets forth the purposes that have directed the organization throughout its history:

> To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service, . . . to promote the study and understanding of the arbitration of labor management and employment disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions and learned societies interested in labor-management and employment relations, and to do any and all things which shall be appropriate in the furtherance of these purposes.

The Academy adopted the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* referred to in the preceding paragraph in 1951. The Academy=s Ethics Committee has enforced the *Code*=s provisions since its enactment, hearing grievances concerning alleged violations of the *Code* by members and promulgating *Formal Advisory Opinions*.

The Academy views the issues presented in this matter as having great importance not just to citizens of Nevada but also to citizens in other states, and the impact of this Court=s decision will extend beyond the decisions involving Mr. Thomas and Mr. Armstrong. Because this Court=s decision may affect the viability of arbitration as an alternative to the judicial system and influence other cases where parties to an arbitration seek to vacate the award, we submit that involvement by amicus curiae is warranted.

Although this constitutes the first application of the Academy to intervene before this Honorable Court, the NAA has a substantial record of *amicus curiae* intervention in the Supreme Court of the United States. Cases in which the NAA has been granted status to intervene in the Supreme Court in recent years include the following:

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)

Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001)
Eastern Associated Coal Corporation v. Mine Workers, 531 U.S. 57 (2000)
Wright v. Universal Maritime Service Corp., 525 U.S. 83 (1998)
Paperworkers v. Misco Inc., 484 U.S. 29 (1987)
AT&T Technologies Inc. v. Communications Workers, 475 U.S. 643 (1986).

I. Introduction

The National Academy of Arbitrators (the AAcademy@) Amicus Curiae Brief will address whether Arbitrator Matthew Goldberg had a duty to disclose to the Respondents his participation on a panel of rotating neutral arbitrators for the City of Las Vegas and Las Vegas Metropolitan Police Department (AMetro Panel@). This brief will not argue that Arbitrator Goldberg disclosed his participation on the Metro Panel or that the parties waived any need to do so, only that no disclosure was required under Nevada law or the rules governing the arbitration. For the purposes of this brief, only evident partiality of a neutral arbitrator under '38.145(1)(b) will be addressed.

The Respondents argue that the unfavorable arbitration awards against them should be vacated under Nev. Rev. Stat. '38.145 and Nevada common law for a number of reasons. As explained below, because Nevada had no rule governing an arbitrator=s duty to disclose, the duty is governed by the parties= chosen method of dispute resolution.[1] Furthermore, the

[1] Nev. Rev. Stat. §38.227(1), which became effective after the onset of these arbitration proceedings, is essentially the same as the "reasonable impression of partiality" test used by most courts. Accordingly, as this

Academy argues disclosure under the present facts would not be required under any of the current evident partiality tests being used in other jurisdictions.

The use of arbitration as an alternative to resolving disputes in the judicial system will be severely diminished if the district courts= decisions to vacate these arbitration awards are not overturned. A decision to vacate will not only affect the usefulness of arbitration in Nevada, but in every jurisdiction across the United States. This Court must review the district courts= rulings below *de novo*, see Camacho v. State, 119 Nev. 395, 75 P.3d 370, 373 (2003) (legal questions reviewed de novo), and such review can only lead to the conclusion that the district courts= decisions must be reversed and the arbitration awards= affirmed.

II. Issue Presented

Whether previous or current service as a neutral arbitrator for a particular employer or union is a relationship requiring disclosure under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the ACode@), absent some personal relationship or other special circumstance mandating disclosure.

III. Under NRS '38.145(1) the Courts ability to review an arbitrator=s decision is limited.

Nevada adopted the Uniform Arbitration Act of 1955 (Athe Act@) in 1960, and since then has strongly encouraged the use of arbitration as a means to solve disputes. See NRS '38.015 through NRS '38.205. The purpose of the Act was to prevent the intervention of the judiciary into the merits of disputes when the parties contractually agreed to arbitration. Lane-

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brief will demonstrate, Arbitrator Goldberg would not be required by law to disclose his participation on the Metro Panel under 38.227(1).

Tahoe, Inc. v. Kindred Constr. Co., 91 Nev. 385 388, 536 P.2d 491, 493 (1975).

In recognition of this strong public policy in favor of arbitration, Nevada courts recognize only five ways for an arbitration award to be disturbed. Graber v. Comstock Bank, 111 Nev. 1421, 1427-28, 905 P.2d 1112, 1115-16 (1995). The first four of those grounds are enumerated in NRS '38.145, which allow for an arbitration award to be vacated if:

(1) the award was procured by corruption, fraud or other undue means;
(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct substantially prejudicing the rights of any party;
(3) the arbitrators exceeded their powers;
(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of NRS '38.075, as to the prejudice substantially the rights of a party. NRS '38.145(1).

The fifth and only common law means to vacate an award is where the arbitrator manifestly disregards the law. Graber, 111 Nev. 1421, 1427-28.

Under this strong policy, arbitrators are given wide latitude to interpret labor contracts. Reynolds Elec. V. United Bhd., 81 Nev. 199, 208, 401 P.2d 60, 65 (1965) (stating that Awhen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.@) In addition, the decisions of the arbitrators are entitled to deference from the courts Ain light of the[ir] special qualificationsYfor resolving labor disputes by virtue of their knowledge of the customs and practices of a particular factory or particular industry.@ City of Boulder City v. Local Union No. 14, 101 Nev. 117, 119, 694 P.2d 498, 500 (1985). The Nevada Supreme Court has rejected plenary review of such decisions because such a standard Awould make meaningless the provisions that the arbitrator=s

decision is final, for in reality it would almost never be final.@ Id. (quoting United States Steelworkers of Am. V. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960)). The Academy asks the Court to be cognizant of this strong public policy and the negative effect a decision to vacate the arbitration awards, only on the basis of Respondents= baseless allegations, would have on this policy.

As stated in the introduction, the Academy=s brief addresses the duty to disclose issue. Therefore, the appropriate grounds for review would be under NRS '38.145(1)(b). Under the Aevident partiality@ clause in the Uniform Arbitration Act it is important to note that there can be two distinct types of claims: (1) a non-disclosure claim, where the arbitrator failed to disclose information that gives rise to the allegation of bias in favor of one party; and (2) an actual bias claim, where it is alleged that the arbitrator=s decision was the product of impropriety. See Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996).[2] The distinction between the two is important because they carry differing burdens of proof, with the actual bias case requiring more proof. Id. However, in either case the Respondent carries the burden to prove that evident partiality exists. See Sheet Metal Workers Int=l Ass=n Local Union #420 v. Kinney Air Conditioning Co., 756 742, 745 (9th Cir. 1985).

IV. Respondents have failed to show that Arbitrator Goldberg=s non-disclosure constitutes Aevident partiality@ under NRS '38.145(1)(b).

Neither Nevada statues nor Nevada common law has interpreted the NRS '38.145(1)(b) Aevident partiality@ as including a disclosure requirement. Therefore, whether Arbitrator Goldberg was required to disclose his participation on the Metro Panel is a case of

[2] The same two claims are also recognized by courts interpreting the Federal Arbitration Act. See 9 U.S.C. §10(a)(2).

first impression. To determine whether Arbitrator Goldberg was evidently partial, the Court must look to requirements under the parties= chosen method of dispute resolution, the Federal Mediation and Conciliation Services (AFMCS@) rules. Woods, 78 F.3d at 429, quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (A[P]arties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen@); Goss Golden W. Sheet Metal, Inc. v. Sheet Metal Workers Int=l Union, Local 104, 933 F.2d 759, 765 (9th Cir. 1991)(Same); See also Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (held arbitrator=s non-disclosure of fact constituted evident partiality because the parties= agreed upon method, the NASD arbitrations rules, required disclosure). Because the arbitration proceedings were governed by FMCS arbitration rules, Arbitrator Goldberg=s duty to disclose is governed by those same rules. The Academy believes this will prove to be the first and only place the Court needs to look to answer the Aevident partiality@ issue.

A. Disclosure under the FMCS rules is governed by the Code of Professional Responsibility for Arbitrators of Labor B Management Disputes.

The Federal Mediation and Conciliation Service (FMCS) arbitration rules define an arbitrator=s duty to disclose narrowly. Instead of drafting and adopting broad rules of disclosure as have been adopted by the National Association of Securities Dealers (ANASD@) and the American Arbitration Association (AAAA@) for commercial arbitration, the FMCS references the Code of Professional Responsibility for Arbitrators of Labor B Management Disputes (ACode@). National Academy of Arbitrators et al., Code of Professional Responsibility for Arbitrators of Labor B Management Disputes, (1974)

The Code was officially adopted in 1951 by the AAA, the FMCS and the Academy. [3] See

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, http//www.naarb.org. Even though the Academy=s Ethics Committee began investigating Code violations immediately, it did not issue its first formal ruling until 1953 in *Opinion No. 1* on the ethics of arbitrator fees. The Code was revised in 1974 by the same three groups. The original and continuing purpose of the Code was to adopt a Abasic cannon of ethics@ for arbitrators that embodied the concepts of Adecency, integrity and fair play.@ Gladys W. Gruenberg et al., The National Academy of Arbitrators: Fifty Years in the World of Work, 45-50, BNA Books 1997, 1997. It was noted by those adopting the Code that the Aarbitration process is capable of infinite variety,@ and that it was necessary to adopt a code that would not Ainhibit the possibility of varying the process to fit the present and future needs@ of the parties. Id. The Code was designed to meet all dispute-resolution situations, and was not to Adeny or narrow@ the right of the parties to have Awhatever type of proceedings they desire.@ Id. It is this flexibility to adapt to the needs of the time that the Academy feels the Code embodies, and that flexibility is threatened by the case at hand.

The Code applies to voluntary arbitration of labor management grievance disputes. Code at 3. The standards set forth in the Code are designed to guide the impartial third party to the dispute. Id. at 3. The Code does not attempt to draw rigid lines of ethics and good practice. Id. at 4. Because one of the primary purposes of the drafters was flexibility the Code does not have any bright line rules for disclosure. The Code instead looks to the facts and circumstances of each particular case when determining the gravity of the alleged misconduct and the extent to which the ethical standards have been violated. Id. at 4.

B. Arbitrator Goldberg had no duty to disclose his Metro Panel membership under the FMCS and the Code.

The disclosure rules under the Code for impartial labor arbitrators reflect the context in which labor-management arbitration is conducted. The advocates who represent the parties in labor arbitration are specialists in the field of labor relations and have frequent interactions with each other and with impartial arbitrators who practice in the field. In addition to numerous communications at the collective bargaining table and in grievance proceedings, these representatives have frequent contacts with each other through continuing education activities, labor and employment sections of bar associations, and attendance at meetings and programs of professionals in the field sponsored by organizations such as the Industrial Relations Research Association, the National Academy of Arbitrators, the Federal Mediation and Conciliation Service, and the American Arbitration Association. Sharing information about the characteristics of individual labor arbitrators at these meetings and through management and labor clearinghouses set up for this purpose is an aspect of this network of colleagues. See M. Trotta, Arbitration of Labor-Management Disputes, 74 (1974). Thus, unlike the situation in commercial arbitration, where parties and their representatives often have engaged in only a singe transaction, labor arbitration involves a community of players who can readily learn whatever they wish to learn about the other participants.

Code section 2(B) governs the required disclosure of the neutral arbitrator. Only subsections 3 and 4 of 2(B) are relevant to the facts and case at hand.[4] Under neither Section 2(B)(3) nor 2(B)(4) was any disclosure regarding the Metro Panel mandated in this case.

The second part of Section 2(B)(3) states Aprior to the acceptance of an appointment, an arbitrator must disclose to the parties or the administrative agency involved any close or personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator=s impartiality.@

Code at 8. This section of the Code is directed towards the possibility that one of an arbitrator=s many personal relationships may have some connection to the arbitration. As subsection (a) of 2(B)(3) acknowledges, arbitrators are often engaged in many different activities business, professional, and personal. But, subsection 2(B)(3) also recognizes that disclosure is not necessary unless some feature of the relationship might reasonably appear to impair impartiality. Code at 8. The Academy believes that an arbitrator=s previous or current work as a neutral arbitrator for non-parties, who have no involvement in the arbitration in question, can not reasonably appear to impair impartiality.[5] Thus, there is no violation of either subsection 2(B)(3), which governs the arbitrator=s pre-acceptance duty to disclose, or subsection 2(B)(4), which governs the arbitrator=s continuing duty to disclose during the pendency of the proceedings.

In fact, in *NAA Formal Advisory Opinion No. 22*, adopted May 26, 1991, the Academy directly answers the question of disclosure presented in this case. The purpose of Opinion 22 is to give guidance with respect to the Code, in other words, to be an ethics document.

The facts of *Opinion 22* are that an Arbitrator was appointed to hear a discharge case between an Employer and Union A. Before and during the discharge case, the Arbitrator served as an expedited arbitrator for the Employer and Union B. Biographical information provided to Union A did not refer to the arbitrator=s position as an expedited arbitrator with the Employer or Union B, nor did the arbitrator disclose this fact to Union A at any time. During the arbitration proceeding involving Union A, the Arbitrator was offered a position as a non-expedited arbitrator by the Employer. The compensation for this arbitration work could have been up to $40,000 per year. The Arbitrator did not disclose the discussion to Union A.

Two weeks after the offer, the Arbitrator issued a decision in favor of the Employer. The Arbitrator subsequently accepted the position as a non-expedited arbitrator.

The main proposition of *Opinion 22*=s is that:

> Previous or current service as a neutral arbitrator for a particular employer and/or union is not a relationship requiring disclosure under the Code. Absent some personal relationship or other special circumstance mandating disclosure such service is not a AcircumstanceYwhich might reasonably raise a question as to the arbitrator=s impartiality. *Opinion 22*, at 2.

Thus, under the facts of *Opinion 22* an Arbitrator=s failure to disclose his original position as an expedited arbitrator for the Employer and Union B does not violate Code 2(B)(3). However, *Opinion 22* recognizes that the job offer to the Arbitrator by the Employer is a circumstance which might Areasonably raise a question as to the arbitrators impartiality,@ whether or not the offer was accepted. Thus, the Arbitrator=s failure to disclose violates subsection 2(B)(4) of the Code, which governs disclosure of circumstances after acceptance of the appointment.

Arbitrator Goldberg=s participation in the Metro Panel falls under Opinion 22. Both have essentially the same fact pattern. However, a different conclusion must be reached with regard to Arbitrator Goldberg=s non-disclosure after an inspection of the facts. First, Arbitrator Goldberg was appointed by both parties to the Metro Panel, management and union, and is not an employee of either party. Nor was Arbitrator Goldberg a police officer, contrary to an erroneous finding of Judge Jessie Walsh, or a member of an association of such officers. See Tr. at 31. Second, the appointment to the Metro Panel reflected the parties= recognition of Arbitrator Goldberg=s integrity and impartiality. Third, unlike *Opinion 22*, where the Employer is involved in both arbitrations, there is no common party to either of Respondents= arbitration proceedings and the Metro Panel. On one side we have the City of

Las Vegas and its police union, and on the other we have the City of North Las Vegas and its police union. There are two separate employers and two separate unions.[6] Therefore, the facts of this case fall under *Opinion 22*=s main proposition as enumerated above---Arbitrator Goldberg=s service on the Metro Panel is not a Acircumstance . . . which might reasonably raise a question as to the arbitrator=s impartiality.@

Furthermore, Respondents reliance on Arbitrator Goldberg=s biographical sketch as proof of a broad disclosure requirement is misplaced. The FMCS biographical sketch is not, and never has been, intended to be a disclosure document. Its purpose is to show the arbitrator=s experience and expertise in the field of arbitration. In addition, neither the AAA nor the FMCS requires arbitrators to provide a complete summary of all previous or current appointments. Indeed, the Academy's members have had to delete permanent panel information to meet the space constraints imposed by the FMCS. There is no timing requirement for biographical updates made by the arbitrators. In fact, the agencies prefer to have biographical updates no more than twice in one year; but again this is not a requirement. Therefore, no weight should be given to the fact that Arbitrator Goldberg=s biography at the time of appointment to the Respondents= arbitrations did not mention his work for Metro; or that even after Respondents= cases ended, his biography did not mention his participation on the Metro Panel.

C. Because Respondent has failed to show a duty to disclose, a finding of evident partiality can not be made under NRS '38.145(1)(b).

In light of the statute=s silence, Respondent must show under the rules of the appointing agency (here <u>*Code*</u> Section 2B3 and 4) that Arbitrator Goldberg failed to disclose a circumstance Athat might reasonably raise a question as to the arbitrator=s impartiality@ in

order to find evident partiality under NRS '38.145(1)(b). As argued above, under the Code Arbitrator Goldberg had no duty to disclose his participation on the Metro Panel. Without a duty to disclose, a failure to disclose can not be found. Therefore, under NRS '38.145(1)(b) evident partiality can not be found in Respondents= cases.

VI. Even if the Court finds that the FMCS and the Code do not govern the duty to disclose, the facts in this case do not establish Aevident partiality.@

As mentioned in the arguments above, both the Nevada statute and common law are silent as to a disclosure requirement, and do not specify what must be shown to prove evident partiality under NRS '38.145(1)(b). Therefore, if the Court somehow finds the FMCS and Code do not govern, the Court must look to other jurisdictions for guidance on this matter. The standards used by courts to determine whether evident partiality is present in a particular case fall across a spectrum. Lee Korland, What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act, 53 Case W. Res. L. Rev. 815, 834 (2003) (noting the many different tests are used to determine if evident partiality has been proven by the party seeking to vacate). Some tests use the Aappearance of bias@, other tests require a demonstration of actual bias, and others fall in between requiring a Areasonable impression of partiality.@[7]

A. The Court should adopt the Areasonable impression of partiality@ test for determining whether evident partiality is present.

The Academy believes that the Areasonable impression of partiality@ test is the best method for determining when a non-disclosure constitutes evident partiality. All of the tests being used today have some foundation in the United States Supreme Court case

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968).

1. Discussion of Commonwealth Coatings.

Commonwealth Coatings is the seminal case on evident partiality. The Court vacated an arbitration award based on an undisclosed prior business relationship between a neutral arbitrator and the victorious party in the matter. The arbitrator had served as an engineering consultant for the party and had been paid about $12,000 over several years. The arbitrator had not worked for the party within the previous year, but the arbitrator had rendered services on the projects at the center of the arbitration dispute. Id. at 146-48. Justice Black, writing for the majority, sought to make arbitrators adhere to the same ethical standards as judges.[8] Justice Black felt that arbitrators should Adisclose to the parties any dealings that might create an impression of possible bias.@ Id. at 146-150. Justice Black=s majority opinion held an arbitrator Anot only must be unbiased but also must avoid even the appearance of bias.@ Id. at 150.

Arguably, the more important opinion in Commonwealth Coatings is Justice White=s concurring opinion. Justice White stated Athe Court does not decide today that the arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed or any judges.@ Id. at 150. Justice White argued that to be disqualified based on an undisclosed relationship, the relationship must be more than a trivial one. Id. at 150. Justice White continued, AIt is enough for present purposes to hold, as the Court does, that where the rbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.@ Id. at 151-52. Justice White=s concurring opinion, which did not expressly adopt the majority=s low threshold Amere appearance of bias@ standard,

has been used by courts to formulate a middle ground between the Amere appearance of bias@ standard and proving actual bias standard. The middle ground Areasonable impression of partiality@ test has been widely adopted by federal and state courts across the country.[9]

2. AReasonable impression of partiality@ test is an objective one.

Under the Areasonable impression of partiality@ test, the key question is Awhether such an impression of possible bias is created in the eyes of the hypothetical reasonable person.@ Apusento Garden (Guam) Inc. v. Superior Court of Guam, 94 F.3d 1346 (9th Cir. 1996) (noting the 9th Circuit uses a similar test as the one expounded in Britz, Inc. v. Alfa-Laval Food & Dairy Co., 34 Cal.App.4th 1085, 40 Cal.Rptr.2d 700, 711 (1995)). Federal courts require the arbitrator=s alleged partiality must be shown through facts that are Adirect, definite and capable of demonstration rather than remote, uncertain and speculative.@ See Middlesex Mut. Ins. Co v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982); Anderson, Inc. v. Horton Farms, Inc., 166 F.3d 308 (6th Cir. 1998).

3. Application of Areasonable impression of partiality@ test.

The United States Ninth Circuit Court of Appeals uses the Areasonable impression of partiality@ test. The Ninth Circuit explained its rationale in Schmitz, 20 F.3d 1043 (9th Cir. 1994), where it found the arbitrator=s failure to investigate and disclose his law firm=s representation of the parent company of a party to the arbitration showed a Areasonable impression of partiality.@ The Schmitz Court held that the arbitrator had a duty to investigate, based on the requirements of the NASD Code governing the arbitration in question. Id. The Schmitz Court decided not to expressly follow the Commonwealth Coatings opinions; rather, it viewed the case as raising an issue of first impression. Id. at 1046.

The Schmitz Court started off by noting the differences between judges and

arbitrators. Id. at 1046-47. First, Aexpert arbitrators will nearly always, of necessity, have numerous contacts within their field of expertise.@ Id. Second, since in arbitration the remedy is disclosure and not recusal, the Schmitz Court felt the disclosure standard for arbitrators is different from that of judges and that the Areasonable impression of partiality@ formulation is the best expression of the Commonwealth Coatings court=s holding. Id. at 1047.

The Schmitz Court also addressed how the agreed upon method of arbitration could affect the need for disclosure. Id. at 1048-49. The Court noted that Ain many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest that he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires the disclosure no such imputation can arise.@ Id. at 1048. The Court went on to say that AIf the parties are to be judges of the arbitrators= partiality, duties to investigate and disclose conflicts must be enforced, even if later a court finds that no actual bias was present.@ Id. at 1049; See Close v. Motorists Mut. Ins. Co., 21 Ohio App.3d 228, 486 N.E.2d 1275, 1278-79 (1985). This language is important, because the Ninth Circuit acknowledges the rules of arbitration chosen by the parties to determine whether disclosure was required.[10] In Schmitz the NASD arbitration rules required both investigation and disclosure. As already demonstrated, an analysis of the *Code* shows unequivocally in Respondents= cases that disclosure was not required.

4. Arbitrator Goldberg=s non-disclosure does not create a Areasonable impression of partiality@.
5.

When viewed through the eyes of a reasonable person the facts of Respondents= cases do not create an impression of possible bias. As discussed above, Arbitrator Goldberg was appointed by both parties to the Metro Panel, management and union, and is not an employee

of either party. Appointment to the Metro Panel reflected the parties= recognition of Arbitrator Goldberg=s integrity and impartiality. There was no guarantee Arbitrator Goldberg would receive work and thus pay from Metro. Finally, there is no common party to both arbitration proceedings. On one side are the City of Las Vegas and its police union, and on the other are the City of North Las Vegas and its police union. These are two separate employers and two separate unions. Hence, no inference of bias should be drawn against either party to the instant proceedings. Some examples of arbitration awards vacated based on evident partiality are: Middlesex Mutual Insurance Co v. Levine, 675 F.2d 1197 (11th Cir. 1982)(where an arbitrator had an ongoing legal dispute with a party to the arbitration); Schmitz, (where the arbitrator=s law firm had represented the parent company of a party to the arbitration); HSMV Corp v. ADI Ltd., 72 F.Supp. 2d 1122, 1127-1130 (C.D. Cal. 1999)(where the arbitrator=s law firm represented a party); Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984)(where the arbitrator=s father was a high ranking officer in the international union, and the local chapter was a party to the dispute); Wages v. Smith Barney Harris Uphum & Co, 937 P.2d 715 (Az. 1997)(where the arbitrator's failure to disclose his prior representation of other claimants against brokerage firm=s predecessor created a reasonable impression of partiality); Beebe Medical Center, Inc. v. Insight Health Services Corp., 751 A.2d 426 (Del. Chancery 1999)(law firm=s simultaneous representation of arbitrator and party to arbitration created a reasonable impression of bias); Albion Public Schools v. Albion Education Association/MEA/NEA, 130 Mich.App.698, 344 N.W.2d 55 (1984)(arbitrator=s failure to disclose previous employment as a chairman of committee of the teachers union created a reasonable impression of bias that warranted vacation of award); and Olson v. Merrill Lynch,

Pierce, Fenner & Smith, 51 F.3d 157, 158 (8th Cir. 1995)(where the arbitrator had a substantial interest in company as high ranking official that had a business relationship with investment firm involved in the arbitration).

As the cases above show, the main reason arbitration awards are vacated under any of the evident partiality tests is because the arbitrator failed to disclose a direct financial or personal relationship, or other connection with a party involved in the arbitration. In this case, it is clear that Arbitrator Goldberg had neither a direct financial, personal, or other connection with any of the parties involved in Respondents= arbitration. In fact, the only relationship alleged is with a non-party that, contrary to Respondents= claims, has no connection to the arbitration in question.

As the cited cases above show, the determination as to whether an arbitration award should be vacated on the grounds of evident partiality is a factual inquiry. Houston Village Builders, Inc. v. Falbaum, 105 S.W.3d 28. In this case, the facts do not rise to the level required under Schmitz and other cases vacating awards under the Areasonable impression of partiality@ standard.

Respondents, when arguing before the Nevada District Courts, cited cases from Texas which use the Areasonable impression of partiality@ test. However, the Texas cases are distinguishable from the facts in Respondents= own cases and show that under the Texas standard of evident partiality Arbitrator Goldberg=s award should not be vacated by this Court.

The most applicable case Respondents cited was Burlington N.R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 637 (Tex. 1997). In Burlington, the Court held that the neutral arbitrator=s failure to disclose his acceptance of a substantial referral from the law firm of a

non-neutral co-arbitrator established evident partiality. Neutral Arbitrator George Beall, was selected by the two non-neutral arbitrators. During the selection process, Beall disclosed he had previously been retained as an expert witness by the law firm of the non-neutral arbitrator selected by Burlington. TUCO determined that Beall=s involvement was not substantial and would not affect Beall=s impartiality. During the course of the arbitration, the same law firm referred to Beall a client they could not represent because of a conflict of interest. The law firm was unaware that Beall was serving as an arbitrator with Burlington=s non-neutral arbitrator, and the non-neutral arbitrator was unaware of the referral. The litigation involved claims in excess of $1,000,000. At the end of the arbitration Beall and the non-neutral arbitrator ruled in favor of Burlington. TUCO appealed the award asserting a number of claims including evident partiality by Beall. Id. at 630-632.

After discussing in depth the varying standards used to evaluate evident partiality, the Supreme Court of Texas adopted a Areasonable impression of partiality@ standard. The Burlington Court declined to adopt a standard where evident partiality could only be found where the arbitrator failed to disclose a Adirect financial or business relationship with a party or its agent.@ Id. at 637. It did state though that Aa neutral arbitrator need not disclose relationships or connections that are trivial.@ Id. It held that because of the law firm=s involvement in the referral, Beall might have conveyed an impression of partiality to a reasonable person. Id. at 637. It did so despite the fact that neither Cole nor the law firm was aware of the other=s relationship. The Texas Court concluded that regardless of the facts, an objective observer could still reasonably believe that a person in Beall=s position, grateful for the referral, would be inclined to favor the law firm, and thus side with Cole in the arbitration proceedings. Id. at 637.

After comparing the facts of the Burlington case and Respondents= cases, it is clear the Respondents cannot show a Areasonable impression of partiality.@ As stated before, and unlike Burlington, Respondents have not shown that Arbitrator Goldberg=s involvement in the Metro Panel had any connection, personal or financial, to a party in the Respondent=s arbitration. In Burlington the connection was in the form of the referral of a lucrative piece of litigation from the law firm of a non-neutral arbitrator who had a direct connection to a party in the arbitration proceedings. Because of the lucrative value of the referral and the non-neutral arbitrator=s selection, it is easy to see how a reasonable person might get the impression that Beall might be partial to Burlington. However, in Respondents= case no such impression can be formed because there is no such connection. First, Arbitrator Goldberg=s alleged improper connection, which Respondents believe might reasonably affect partiality, is not with a party to the arbitration. Rather, it is a proper connection of neutrality with union and management non-parties to the proceedings. Second, unlike the major litigation involving claims of over $1 million in Burlington, the connection in question here, if any, is trivial, and not of the type or substantiality that would give a reasonable person the impression of partiality.

B. Even if the Court chooses to adopt the Amere appearance of bias@ standard, the facts in this case do not meet that standard.

a.

The other main standard that some jurisdictions use to decide non-disclosure evident partiality cases is the Amere appearance of bias@ standard articulated in Justice Black=s Commonwealth Coatings majority opinion. But, the Amere appearance@ standard is by far the less frequently used of the two standards. Of the 36 states that have adopted the Uniform Arbitration Act, only one, Minnesota, uses the Amere appearance@ standard. In addition,

none has expressly adopted a Amere appearance@ standard, while eight have expressly adopted a Areasonable impression of partiality@ standard.[11] A survey of all of the cases in the 36 Uniform Arbitration Act jurisdictions reveals no cases with facts remotely resembling the facts in Respondents= cases being overturned under the Amere appearance@ standard, let alone the higher Areasonable impression@ standard.

The Academy notes that even under the Amere appearance of bias@ standard used by Minnesota to vacate an award because of evident partiality, the arbitrator in question must have more than a trivial connection, financially or personally, with a party to the arbitration. In Egan & Sons Co. v. Mears Park Development Co., 414 N.W.2d 785 (Minn. App. 1987), the Court vacated the arbitration award under the Amere appearance of bias@ standard of Aevident partiality,@ because the arbitrator failed to disclose that he was a former associate of a law firm which had provided substantial services to a party involved in the arbitration. The firm had lobbied in connection with the very project involved in the arbitration.. In Northwest Mechanical, Inc., v. Public Utilities Commission of City of Virginia, 283 N.W.2d 522 (Minn. 1979), the Court invalidated an arbitration award based on the neutral arbitrator=s previous legal work for the City and his business relationship with the company run by the non-neutral arbitrator=s son, as well as the non-neutral arbitrator=s previous work for a party. In both Egan & Sons and Northwest Medical, the party seeking to vacate the arbitration award provided the court with evidence of some tangible connection between the arbitrator in question and the opposing party. Under the facts in Respondents= cases, Arbitrator Goldberg had no connection to either party, let alone a trivial one with Respondents= opposing party.

VII. Conclusion

The Academy believes the law establishes that the Nevada Supreme Court should not vacate these two arbitration decisions based on Aevident partiality@ under NRS '38.145(1)(b). First, under the governing rules, the FMCS arbitration rules and the Code, Arbitrator Goldberg had no duty to disclose his participation on the Metro Panel. Thus, because Arbitrator Goldberg had no duty to disclose, the non-disclosure premise necessary to a finding of Aevident partiality@ is not present in either case. Second, even if the Court determines the arbitration rules as agreed upon by the parties do not govern, under either the Areasonable impression of bias@ standard or the Amere appearance of bias@ standard the Metro Panel had no connection to the Respondents= arbitration proceedings, and certainly did not constitute a financial or personal relationship significant enough to require disclosure. Hence, to sustain the decision in this case would depart dramatically from the well-established rules relating to bias and disclosure in a way that will harm the process of arbitration and the legitimate interests of all parties who rely on it.

Dated this 15th day of September, 2004.

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John R. Hawley, Esquire

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Calvin William Sharpe, Chair ABAC
National Academy of Arbitrators

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions inth event that the accompanying brief is not in conformity with the requirements of the Nevada Rules Appellate Procedure.

Dated this 15th day of September, 2004.

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John R. Hawley, Esquire

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Calvin William Sharpe, Chair ABAC
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CERTIFICATE OF SERVICE

I hereby certify that on the amicus brief addressed to the following:

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