

## APPENDIX C

### REPORT OF THE COMMITTEE ON ETHICS

MAY 1, 1953

Almost two years have elapsed since a Code of Ethics and Procedural Standards for Labor-Management Arbitration was promulgated jointly by the American Arbitration Association and the National Academy of Arbitrators. The text of the Code was published by the Bernheimer Arbitration Education Fund in pamphlet form, and appears also in Volume 15, of the Labor Arbitration Reports, at Page 961.

The Code has received the approval of the Federal Mediation and Conciliation Service, and various state agencies concerned with arbitration of labor disputes. It stands today as the most accepted norm for appraisal of the ethical conduct of arbitrators and arbitration litigants in the labor field.

While much time and effort were expended by many persons in the formulation of the Code, it was understood by some if not all of those participating that the bare publication of a set of precepts would by no means suffice to answer all the problems, existence of which gave rise to the effort. Particularly from among the attorneys who participated or who were consulted, there were expressions emphasizing the necessity of interpreting the Code in the light of specific factual situations and reappraising from time to time the propositions as stated.

The National Academy of Arbitrators has charged its standing Committee on Ethics with the responsibility of considering questions of interpretation of the Code, and for making recommendations, if any are deemed advisable, for modifications of it. To date, only a very few live questions as to the application of the Code to particular fact situations have been brought to the attention of the Ethics Committee, and of these only one

was regarded as warranting the formulation of an opinion, which has been released as Ethics Opinion No. 1.

The Committee's method of dealing with such questions is this: (1) From the material submitted by the person or organization requesting the opinion, the Chairman prepares a concise statement of the facts and questions raised and forwards them to each member of the Committee for preliminary comment. (2) Members of the Committee return their comments to the Chairman. (3) The entire file is assigned to one member (or more if they reside in the same locality) for preparation of a tentative opinion (4) which is then sent to members for concurrence or dissent. (5) The opinion is reviewed by the Board of Governors before issuance. Where doubtful or difficult questions are involved, the opinion will probably be delayed pending a full meeting of the Committee. There are time limits for each step which allow about ninety days between the presentation of the case by the Chairman and completion of the opinion by the Committee in normal situations.

The opinions of the Committee are rendered upon assumed or predicated facts; not upon evidence or investigations. For that reason among others they are formulated without designation of any actual persons or organizations who may be involved. Indeed, it is possible that consideration will be given to purely hypothetical situations, where in the Committee's opinion it will result in clarification of a canon.

By and large, the men who function as arbitrators in the Labor-Management field possess high ideals of personal integrity and it may not reasonably be anticipated that their conduct will engender many complaints of improper behavior. Even less likely is it to be expected that any such complaints can be justified on grounds more serious than simple misunderstanding. Nevertheless, in the interest of a practical realization of these ideals and the advancement of greater understanding, it is worthwhile that some system be made available whereby the Code of Ethics can be vitalized and brought closer to the realities of labor arbitration. Therein lies the need and justification

for the continuing existence and activities of the Ethics Committee.

Philip G. Marshall, Russell A. Smith, Benjamin Aaron, Whitley P. McCoy, William E. Simkin, Ralph T. Seward, David L. Cole, Harry H. Platt, Edward L. Cushman, Gabriel N. Alexander, Chairman.

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### ETHICS OPINION NO. 1

The Committee has been asked to give its opinion on the ethics of an arbitrator's conduct, described as follows:

An arbitrator agreed to serve at a rate of \$50.00 for a one day hearing and \$50.00 for the preparation of his award. When he arrived at the hearing, he stated that he believed the fee arranged was too low and in view of the fees paid to other arbitrators, he should be allowed \$100.00 a day with a minimum of \$300.00. The parties thereupon agreed to an increase of \$200.00.

At the outset, let it be emphasized that our opinion is directed exclusively to the statement of facts set forth above. We do not know whether this statement accurately and fairly describes the actual conduct of any arbitrator. We have not heard evidence. We do not know the nature of the original "agreement" as to the arbitrator's fees, or the nature of the discussions prior to the hearing, or how the question of a revision of fees came to be raised or many other facts which would have to be known in order to make a fair judgment on the conduct of the actual arbitrator involved.

On the facts as stated, however, we have no hesitation in expressing our opinion. We do not believe that the conduct described was proper or consistent with the Code of Ethics of the Academy.

Part II, Section 1 (b), of the Code states, in part, that:

"A fee previously fixed by the parties or by schedule should not be altered during the proceeding or after the award is delivered."

The reasons for this rule are obvious. Though the parties have a technical right to reject a proposed increase in fees, an exercise of that right might cause them great embarrassment. Selection of an arbitrator is a grant of power. Once that power has been granted, either party might well hesitate to displease its possessor, lest in so doing it prejudiced its case before him. Any attempt by an arbtrator to use the power which the parties have given him as a lever to raise his fees would be clearly unethical. In the opinion of the Committee, it would be well to avoid even the apearance of such conduct.

#### COMMITTEE ON ETHICS

Gabriel N. Alexander, Chairman

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#### ETHICS OPINION NO. 2 \*

The Committee has been asked to give its opinion on the ethical obligations of an arbitrator under the folowing circumstances:

An arbitrator served in dispute No. 1 between a national company and a local union in one of its plants. So far as he knew, his award in that case was not published. Subsequently, he was asked to serve as arbitrator in dispute No. 2 between the same company and another local union affiliated with another international in a different plant. After accepting the appointment, he learned that the issue to be arbitrated appeared to be identical with that in dispute No. 1, and that the union appar-

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\* Issued on February 15, 1955.

ently did not know of his participation as arbitrator in the earlier case.

- (a) Under these circumstances, was the arbitrator under an ethical obligation to disclose to the union the facts concerning dispute No. 1?
- (b) Would a different ethical standard apply if the award in dispute No. 1 had been published, or if the local involved in dispute No. 2 was affiliated with the same international as the local involved in dispute No. 1?

Canon 3 of the Code of Ethics makes it "incumbent upon the arbitrator at the time of his selection to disclose to the parties any circumstances, associations or relationships that might reasonably raise any doubt as to his impartiality or his technical qualification for the particular case." Thus, the question presented is whether the circumstances related above "might reasonably raise" a doubt as to the arbitrator's impartiality. In the judgment of the Committee they do not.

It should be noted, initially, that it is virtually impossible for an arbitrator to know, prior to the actual submission of a case, whether it is in fact identical with one he has previously decided. Even when an issue is fundamentally the same as others he has determined before, the arbitrator usually finds that each new case has some unique, distinguishing feature that requires special consideration.

In any event, the fact that an arbitrator has issued a prior decision on a similar or identical case has by itself no necessary significance. The decisive ethical question for the arbitrator is not whether he has considered a similar issue before, but whether he is still open to persuasion either way. If the arbitrator feels free to revise his prior decision, no disclosure would seem necessary; but if for any reason the arbitrator feels bound by a prior decision, then he should certainly disclose that fact.

In conclusion, it may be stated that parties to an arbitration are entitled to an honest, rather than an uninformed, decision.

A contrary conclusion would lead to the disqualification of arbitrators solely on the basis of their experience.

#### COMMITTEE ON ETHICS

Harry H. Platt, Chairman; Benjamin Aaron, Gabriel N. Alexander, David L. Cole, Edward L. Cushman, Philip G. Marshall, Whitley P. McCoy, William E. Simkin, Russell A. Smith.