CHAPTER II

THE NATIONAL ACADEMY AFTER TWELVE YEARS: A SYMPOSIUM

What I Expect of the Academy

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I suppose it's no secret, but I may as well set the record straight at the outset—I have been a member of the Academy for a grand total of one year. This means that it was just a short time ago that it was the Academy which was telling me what was expected. And I certainly remember the exam: the requested tabulation of the precise number of cases I had handled—broken down, even, by the kinds of issues presented (as if Arbitrators always know what the issue is that they are deciding); the assumed lack of my technical proficiency; the way you questioned my character; the doubts you evinced as to my impartiality; and then, the rather odd assumption that an endorsing member knew more about me than I did myself. And the thing you didn't let me in on was that sharp poker-playing is the one requirement that really matters. That one I had to find out about the hard way.

Just the same, I won't look at my assignment today as an opportunity for revenge. My assignment gives me license to talk about more than "sweet nothings." But I'll try to be rational and objective about it.

As a matter of fact, I've exercised the proper deference toward the elders in this organization. For I consulted several of the senior and eminent members to get their view on what I should expect

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from my membership in the Academy. Uniformly they told me—"business." I applaud their realism. And if I thought the objective needed any elaboration, I'd make it my entire theme.

The assignment of the topic "What I Expect of the Academy" implies an invitation to talk, not only of the expectations which have fully materialized, but also of some areas where the Academy has perhaps fallen down. And when the assignment is given to a new member, I would think that the intention is to get a look at the Academy from the vantage point of someone who is not well familiar with its background and activities—to get a sort of independent appraisal. That puts me in the role of a consultant—sometimes referred to as a person who identifies problems without solving them. This makes things easier for me, but I think it's the legitimate approach. In all seriousness, however, I want to state at once that I do not assume that my remarks will be in the nature of eye-openers. On the contrary, I am very much aware that the Academy has long grappled with all sorts of policy questions—that the difficulty has not been one of lack of recognition, but one of implementation. I proceed simply on the assumption that you want an expression from new members as to whether the Academy is all they expected it to be.

Let me try to reconstruct what some of my expectations were before I was admitted to membership in the Academy. I was certainly among those who considered membership in the Academy as one of their cherished aspirations. Of the many industrial-relations organizations which have sprung up, I saw the Academy as the elite professional organization. I had gathered, based on the handful of arbitrators I had originally met, that the one organization which had attracted the real aces in the field was the Academy. Here were assembled the people I looked up to, and whose role in crisis situations, both as leaders of reason and as pathfinders, I had come to admire. I regarded the Academy as a group of people who not only had a great deal of influence, but who brought a great deal of good influence. Moreover, I had gathered that association with Academy members would mean a lot of personal satisfaction. Most assuredly, the Academy was, to me, not just another organization to join. The prospect of becoming one of its members was never a matter of mere formality or obligation. In every real sense of the word, it was an honor.

As people conditioned to the technique of the bouquet in advance of the knife, you may be anticipating a big "but" at this stage. None is as yet coming. In the respects so far mentioned, my expectations were completely confirmed. I have met many people

whom I have wanted to meet; it is a matter of pride and joy to be associated with them; I am learning through my exposure to them. One of the things I expected from membership in the Academy was the fun at convention time. There has been no disappointment on this score. And I want to state that I was very much impressed last year by the spirit of welcome which you extended to new members—I think you went out of your way to avert any feelings of inferior or conditional membership.

Another of my hopes was to have a chance to mingle among top arbitrators—to learn, through formal as well as informal discussions, of their techniques and approaches; to soak up some of the lessons from their experiences; to get exposed to contrary viewpoints on similar issues. All this has materialized. If I but use it wisely, I believe my membership in the Academy can serve to improve my professional competence.

One of the purposes laid down in the Academy's constitution is: "to encourage friendly association among members of the profession." It was not until I wrote this speech that I became aware of the fact that this purpose had been expressly set forth in the constitution. But the hope of forming friendships with other arbitrators was certainly one of my biggest reasons for applying for membership. Even if awe wanes to a certain extent—the inevitable result of familiarity—it is good to give and receive in friendship with fellow arbitrators. This is one of the areas where my expectations, before becoming a member, were high; and it is indeed not an area where anticipation was greater than realization.

In short—despite all that money I lost at the poker table last year—I deeply value my Academy membership. You may have compromised your standards of admission—frankly, when I received the questionnaire last year, I didn't think I'd ever make it. But, merely because I am now a member, I'm not going to be deterred from continuing to believe that the Academy has enrolled the country's top arbitrators. Membership in it lends prestige, pride, and a great deal of satisfaction and joy.

I'm now ready with my "but." I have talked so far in terms of the "within" characteristics of the Academy—of the programs and associations by and among member-arbitrators. I hold no reservations on this score. There is also, however, the Academy's outward role—i.e., its role vis-a-vis labor and management and the public at large. I had expected, when my application for membership was in, that the Academy also served as a channel for expression on important policy questions. Even as relatively "green" arbitrators, we new

members do run into questions—questions which suggest that there are disturbing and troublesome problems which need dealing with. We have not been members long enough to know whether it is for the Academy to declare itself on this or that policy question. But one of our expectations was that the Academy would act as the spokesman of the arbitration profession. Perhaps we expected too much. But, if true, we are wondering why there is not room for the Academy to wield more influence. The questions we have may be good, bad, or silly. We don't know, and we certainly don't have the answers. But we do have the impression—somewhat contrary to our expectations—that the Academy is not the positive force that it ought to be. And we would like to know whether we are legitimately raising some questions in this regard.

Let me first speak in general terms. It seems to me that much of the Academy's orientation stems from the days when arbitration was still an institution to be developed and fostered. It was founded at a time when arbitration as the acceptable method of resolving industrial disputes was still very much in question. Arbitration itself being a controversial subject, I suppose that restraint and caution were the likely answers to questions having to do with the external role of the Academy.

If this is a correct assumption, then I think it is not impertinent to observe that arbitration is today no longer in the experimental stage. And with that change in environment, my expectation would be that the Academy's role ought to progress to a more forceful one. It should serve not only as a means for association by its members, but also as the body which the public may consider and use as the spokesman for arbitration. Has the time not come, my question is, where the Academy should stand ready to concern itself with and to declare itself on questions of policy? I am not, of course, referring to the full range of collective-bargaining policy questions. But there are questions on arbitration, in its relationship to collective bargaining, which seem to me to warrant Academy attention. As I said earlier, you may long since have grappled with the underlying issues concerning the Academy's proper function and role. And there is nothing pro forma about it when I say that I do not know what the answers are. But, as one of your new members, I do throw out the view that the Academy perhaps should move on to an outward orientation—one which would permit it to become a stronger and more influential professional organization than it now is.

Let me move on to some concrete areas.

I stand by my statement that arbitration has won such wide

acceptance that its usefulness in the administration of labor agreements is no longer a matter of controversy. Yet, there have been developments in the recent past which point the way to danger. One concerns the matter of non-compliance with an award. I don't mean to suggest that this happens frequently or that a trend is in the making. But it does happen, and I think there is no escaping the conclusion that any resort to non-compliance—even in answer to a bad decision—is detrimental to the institution of arbitration. And in its ultimate effect, it undermines the collective-bargaining system itself.

And so I raise the question: should the Academy remain silent on an issue of this sort? The individual arbitrator, whose own award is involved, is obviously not in a position to enter the non-compliance controversy. Nor can other arbitrators as individuals—for their intervention as individuals would be neither proper nor effective. But it seems to me that the Academy, as the organization representing the arbitration profession as a whole, should make its views known. It surely has every right to speak out—for the matter of non-compliance jeopardizes the very process it seeks to foster and maintain. What I'm wondering is whether it doesn't have an obligation to do so.

I suppose there are those who would argue that it is simply not the proper function of arbitrators to become embroiled in the question of the enforcement of an award. But to take a stand on the issue of non-compliance, it seems to me, is not to violate the canon of impartiality. It is not a matter of taking sides between two warring parties. Rather, it is a matter of concern for the damage which is wrought to the system of collective bargaining. Where there are moves underfoot which—by compromising the process of arbitration—jeopardize the collective-bargaining system itself, shouldn't the Academy come forward and speak out? It is the organ through which we speak; and to let it remain silent is in a very real sense to abdicate responsible citizenship.

My impression is that the recent past has also seen an increasing tendency by companies to contest arbitrability. I am referring, of course, not to the raising of an arbitrability issue before an arbitrator, but to an outright refusal to arbitrate. There have been a number of highly questionable judicial holdings on this score. If this is a trend, arbitration is in trouble. Again, it is not a matter of "taking on" a company which is resisting arbitration. The concern is that the resistance to arbitrate issues which ought to be taken before an arbitrator is bound to make the unions take another

look at arbitration as the appropriate substitute for the strike weapon. Such development—I don't see how we can get away from it—is a matter of profound concern to the Academy. Should not the public have before it the Academy view on a question such as the meaning of an "agreement to arbitrate"?

You will recall that in last year's meeting, David Feller, referring to what he considered the horror of a judicial decision on arbitrability and his intention to appeal it, suggested that the Academy make use of the device of the *amicus* brief.* I don't think he was being facetious. As a first step at least, shouldn't the suggestion come under active consideration by an appropriate committee of the Academy?

Most recently, there has been a great deal of talk about compulsory arbitration. Some of the talk has been loose and uninformed. The commentators, concerned with sound public policy but not very enlightened on some of the consequences of compulsory arbitration, have not hesitated to advance their opinions. The same goes for Congressmen. Is there something the Academy could, and should, do in this area? After all, there is as much concentration of knowledge on arbitration within the Academy as anywhere else. Would it not be appropriate to make this knowledge available? Is it not entirely within the Academy's function to make clear the nature of arbitration, to identify the pitfalls of compulsory arbitration—in short, to promote clarity? Given a state of fuzziness on important arbitration issues, it seems wrong to me to let so much talent lie in idleness.

I want to turn for a moment to the role of the Academy as an overseer of its members. Recognizing that this is a delicate area, I nevertheless note that even we new members run into disturbing questions—pertaining to such things as excessive charges, solicitation, self-aggrandizement, etc. The difficulty we have in running into questions of this sort is that we have no answer—other than to resort to shoulder-shrugging. We can point out that the Academy's constitution deals with the matter of abuses—to quote from it here: "To establish and foster the highest standards of integrity . . . among those engaged in the arbitration of industrial disputes . . . to adopt and encourage the acceptance of and adherence to canons of ethics to govern the conduct of arbitrators . . . ." But we do not think we are in a position to tell anyone that the Academy has established the means by which to effectuate these objectives. This

* Editor's Note: See *Arbitration and the Law* (Washington: BNA Incorporated, 1959), pp. 14-23.

troubles us—because we do not like to have to admit that the stated objectives are no more than a declaration of intent. Such admission must be accompanied by a loss of pride in the Academy.

Here again, I assume that the matter of the Academy's role on unethical conduct by its members has been thoroughly studied in the past. And I assume, further, that seasoned minds concluded that an essentially passive role was the wisest course. We new members don't presume to tell you that it is the wrong course. But it does raise the nagging question as to whether the Academy's orientation is one of a club or one of an influential professional organization. If it is a professional organization, I, for one, would expect to have my professional affairs scrutinized by an arm of the governing body. The question I am raising is whether the time has possibly come for the Academy to take another look at its role in this regard. Should it not keep searching for appropriate mechanics for the enforcement of its own standards?

Finally, though this subject was treated yesterday—and I'll be a bit repetitious here—I would like to comment on the area of the Academy's relationship to the appointing agencies. I do it in response to the fact that here is an area where one of your new members had a rather strong reaction in last year's meeting. I think, frankly, that it is quite wrong for the Academy to act as a channel for the transmission of complaints relating to a dearth of assignments for this or that arbitrator. I think it is wrong for the Academy to do this because I don't think we have a legitimate basis for protesting to the appointing agencies on this score. The simple reason is that we are not the appointing agencies' clients. Their clients are labor and management, and I don't think that we can properly presume to impose our judgment as to which arbitrator is the most suitable for appointment in any particular case. If their appointments do not result in an even spreading of the work, we nevertheless have to accept—even if not necessarily true—that the appointing agencies are acting in the best interest of labor and management. A contrary stand by the Academy, I believe, will result in loss of prestige and stature.

I think we do have legitimate quarrels with the appointing agencies, but I think they lie elsewhere. In connection with the current emphasis on the reduction of the cost of arbitration, certain proposals have been advanced—some of them endorsed and even "pushed" by one or another of the appointing agencies. For example, there is talk of the elimination of a written opinion; of "bench" rulings; of prohibiting the use of written briefs—mind you, not of

the parties themselves relinquishing the use of briefs, but of the arbitrator commanding it. There is talk, in short, of streamlined procedures to be imposed by the arbitrator himself. Here, there is an area which does not merely have to do with our pocketbooks. Proposals of this sort go to the process and quality of arbitration. And so, again, I raise the question of whether we do not have every right and obligation to make ourselves heard on questions of this sort. And again, I ask as a new member, would not maximum influence be produced if the Academy were the spokesman?

I hope I've not fallen prey to the trap of initial enthusiasm. I don't mean to advocate action for the sake of action. I don't want the Academy to become an aggressive public-relations institution; I don't want it to jump in on every question that might conceivably affect arbitration; I don't want it to act in terms of jeolous prerogatives. But I think I speak for most new members when I say that we wonder whether the Academy has not been a bit too passive. For the good of labor arbitration, we wonder, shouldn't the Academy's voice become one that speaks out?

Arbitration—A Profession?

WILLIAM N. LOUCKS*

After twelve years of existence it is not only proper but imperative that we do some soul-searching on the question of whether the Academy has or has not satisfactorily progressed toward the goals set by our founders. I believe these goals can be epitomized in a single word—that the arbitration of labor disputes should become a profession in the very best sense in which law, medicine, the ministry and teaching are professions. That goal has been held before us over the years. It is stated succinctly in the first of the Academy's purposes as set forth in our Constitution as follows: "To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of industrial disputes on a professional basis."

As the context for what I have to say, I should like to set down two propositions, dogmatically stated because I believe neither is open to debate.

First: The greatest single need in our democratic, private enterprise, politico-economic system is the following: That more people

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individually, and more organized groups of people, must rapidly develop keen and controlling senses of responsibility for advancing socially desirable goals lying outside their own immediate personal or group interests—and, indeed, goals sometimes diverging from their narrow immediate interests. Our great personal, group, and national need as we approach the closing decades of the twentieth century is for a sense of purpose lying outside of and beyond our daily struggle for personal or group aggrandizement—a sense of purpose whose reality and strength will overpower individualistic, narrow, day-to-day, mundane profit-making and personal income-increasing desires. This point need not be belabored after our recent experiences with an almost disastrous conflict between the Union and Employers in our steel industry, and with the television industry's debasing exploitation of the public. We desperately need a national sense of purpose which will be so communicated as to measurably influence the aims, goals, and activities of individuals and the organized groups through which they pool their strengths and efforts. Russia has one and we do not. Theirs is imposed by the Communist Party by direct and indirect controls exercised over all subordinate groupings of people or interests. Ours must be voluntarily formulated, with either affirmative or tacit acceptance by leaders in every phase of our political, economic, and social structure. For each grouping of people or of interests in our society there is now a vast unfilled need for some sense of purpose lying beyond mere acquisition of wealth—some sense of what function our group is expected to and can perform in the total job of making effective our politico-economic system, with its long and deeply cherished values, to constantly enhance human security in a troubled world, and to enhance economic stability and growth of those elements of living which yield sound ultimate human happiness. Philosophical, and unrealistic, you say? Yes, but unquestionably vital and basic to the survival and health of our democratic and liberalistic institutions.

Second: We, as members of the Academy of Arbitrators, occupy an acutely strategic position vis-à-vis these needs. The injection of social purpose into our national life will come only through pressures exercised by powerful organized groups; it will come only through understanding, influence, and example-setting by individuals who are well educated, accustomed to objective evaluation of facts, able to see future results of present action, and who have the moral strengths and self-discipline to conform individual action to goals lying outside themselves. We immediately think of the classic professions of law, medicine, the ministry, and teaching as having striven fairly

successfully to meet these tests. My point is that our own group—we arbitrators—by the very nature of our activities, stand high if not at the top of these so-called professional groups in the opportunities we have to achieve these ends, and hence in the responsibilities we have for driving toward them. If the great need today, philosophically, is for a guiding sense of purpose outside ourselves, outside our small group, the practical road to the discovery of such purposes and to their successful implementation involves: (1) The ascertaining, among or between individuals and groups, of common interests which are real but invisible to the untrained naked eye; and (2) where there is no discoverable common ground, the architecting of compromises permitting conflicting interests to live and achieve together in mutually satisfactory ways. These are the practical problems of the world, the nation, the industry, the union, the city, and so on and on. The degree to which we solve them will measure the degree to which we create influential senses of purpose in the large, and this, in turn, will measure the degree to which we shall be able to protect, preserve, and enhance those values which we of the Western World have in the past protected by the sacrifice of life itself.

I hope that, at this point, the next thing I am going to say is already obvious to you. It is that this discovery of common ground between opposing interests, this construction of compromises permitting the mutually beneficial blending of opposing forces, is the very stuff out of which the arbitrator's daily work is made. Aside from the members of the legal profession who are also members of the judiciary, this cannot be said of any of the customarily recognized professions, or of any other occupational activity I can think of except, possibly, membership in our legislatures. It is my point that we, as arbitrators, are operating in an area of human affairs, and are constantly coping with patterns of forces, which, in a manner not similarly true for any other group of persons, places us very close to the current necessities of the world in which we live.

From this point of departure we could follow up any one of three lines of thought: First, I might seek to impress upon you the high nature of our calling, philosophically considered, to the end of inflating our egos. This is unnecessary for our egos are already well developed. Secondly, I might picture the role of arbitration and arbitrators expanding into new areas of resolution of broad gauge differences between the segments of society, between agriculture and the rest of the economy, between the railway industry and the trucking industry, between states in matters of inter-state conflicts of interest, or between conflicting national interests. While,

either of these lines of thought, particularly the second, could lead on to interesting and challenging questions, neither will be followed here. Rather, I seek your indulgence for the consideration of another set of questions. These will be approached on a much more restricted basis than are the implications of some of the foregoing contextual considerations.

For the remainder of our discussion I propose the following theme: In the context which we have set for arbitration and the arbitrator, what is there which you and I can and should do to conform our daily activities to those purposes which arbitration should be serving? How can we, acting both as individuals and through our Academy organization, develop a keen sense of purpose lying outside and beyond our own personal immediate acquisitive desires? I emphasize "as individuals" because our Academy as an organization cannot have an effective sense of social purpose to be served unless we as individuals have and serve such purpose in our daily activities. I mean more than pious, insincere protestations of righteousness. Our society is already overburdened with organizations whose slogans of service to high-sounding social purposes are mere facades behind which action serves narrow, selfish, crass, sometimes anti-social ends. I suppose that the best broad answer to our question is that which the founders of the Academy gave: To build arbitration into a profession. However, this *per se* is meaningless; it too can degenerate into a slogan. The real question is, what do we mean by a profession when, as an organization, we set this as our goal? To what specific types of action on the part of each of us does membership commit us? From what specific types of action does membership preclude us? I do not mean because of fear that we as individuals shall be apprehended by an Ethics Committee, for frankly, a profession cannot be built that way. I mean by truly feeling a sense of obligation to do or not to do certain things because we have become organic parts of this organization which, as an entity, seeks to promote the achievement of professional status in the truest and best sense of that term. It is to these questions we shall here devote some thought.

We must ask: What are the distinguishing characteristics of a fully professionalized activity? By what criteria do we include law as a profession and exclude banking, include the physician but exclude the manufacturer of pharmaceuticals, include the teacher but exclude the publisher of textbooks? Possibly there are four: (1) Clearly marked out and thoroughly planned educational paths to entrance into the activity—so concrete that the client will be

suspicious of claimed competency unless it has come by these paths. (2) A clear and generally agreed upon function to perform, which function is necessary to the organic well-being of our society. (3) Organizationally, the possession of an established means for practitioners to exchange problems and ideas, and, above all, to form some consensus of what it is right and what it is wrong for a practitioner to do in a host of complicated sets of circumstances. (4) A membership composed solely of those who are willing and anxious to follow an enlightened consensus on what activities and acts are permissible, demanded, or precluded to the practitioner—basically without fear of organized sanction against the individual. It is by these four criteria that I believe we must measure our progress toward a profession of arbitration. Note that there is no criterion directly or indirectly involving income. This is not to say that we must make our services available at a niggardly price. This is not to say that persons should not consider probable earnings in this occupational field, relative to others, before they decide to enter it. It is to say that the function must come first; it must be uppermost at all times; to it all other matters must remain secondary.

With these criteria of a profession in mind, let us quickly check off some of our progress and our failures with respect to the first three and linger a bit over the fourth. First, *education:* We have not progressed very far in this direction. While courses dealing directly with or pertaining to labor arbitration are offered in some universities, there are no clearly marked educational routes generally recognized as preparatory for entering a profession of arbitration. Comparing our field with either the law, medicine, the ministry, or teaching we still have a long way to go in this regard, and we probably should be devoting more attention to it over future years. Second, our *function:* This is clearly established all-round. It is simply the resolution of issues on which companies and unions in pairs are in disagreement. It presently is just as much a part of keeping our economy going and raising it to new standards of efficiency as is the work of the engineer, the industrial manager, the union business agent, or any other of the essential ingredients of our operating economy. Our function is entirely clear and we need spend no more time on it. Third, *organization:* Here we are equipped not only adequately but admirably with the machinery through which we can exchange thoughts, develop viewpoints, keep our function adapted to new needs in our economy, and so on. The only apparent difficulties may be willingness of each of us to permit a small number

of persons to carry the load of organizational work, and our neglect of regional group activities. The latter, if we look to law, medicine, the ministry, or teaching for guidance, must be regarded as vitally important to a healthy and forceful national organization. Parenthetically, here I might say that regional meetings are excellent occasions for frank consideration of some of the ethical and professional aspects of our work as arbitrators. It is seriously disturbing to learn that some Academy members do not attend their regional meetings for the stated reason that the discussions center almost solely on how fees can be raised and the acquisitive aspects of arbitration work promoted. A good criterion for regional discussion meetings might be this: Would we be proud or ashamed to have our union and industry friends know the subjects we discuss?

So much for the three criteria; what about the fourth? Here (as we arbitrators say), "in my opinion" lie the real vital determinants of whether we shall approach our goal of a profession as our behavioral patterns and traditions mature. You and I are willing to call law or medicine or the ministry or teaching a profession and to accord each high prestige in our society only so long as we are sure that the practitioners in the field predominantly place service or function, and not income, first. Only so long as we believe that physicians predominantly respond to the call to diagnose and cure first, hoping and taking measures to collect secondly, will you and I accord that occupation the dignity of a profession. Only so long as lawyers predominantly represent and prosecute the interests of their clients with integrity, not violating well recognized bounds of behavior to win a case, will we recognize law as a profession. Only so long as ministers predominantly are known to give spiritual leadership to their congregations will the ministry be a profession.

It is precisely the same for arbitration, except that the classic professions already have status and must take care not to lose it, whereas we are still striving to achieve that status. The concern of the classic professions is to see that established emphases upon function, service, and codes of behavior are not chiseled away—our concern is to see that more and more emphasis is put upon performance of function, that more and more we build, through our individual behavior as arbitrators, those codes of right and wrong which keep our efforts focused on performance of function. These become personal matters of import for each of us individually. As soon as we offer our services in an arbitration capacity we assume responsibilities to the cause of arbitration *per se*. While we as individuals may not recognize this in our first arbitration work, we most assuredly cannot be innocent of it,

once we become members of the Academy. From then on we cannot avoid our personal obligations to contribute toward the ends and goals of the Academy—that is, toward the professionalizing of arbitration work. Any member who is not with us in this respect is against us, and should assuage his conscience by withdrawing from membership. This is frighteningly true in the sense that a single Academy member who diverts the focus of his efforts from function to acquisition and reveals this fact by behavior or attitude can depreciate the standing of arbitration profession-wise more than can be counterbalanced by a score of sincere professionally-oriented arbitrators working in the other direction.

So, I put it directly to you, let each of us figuratively put himself into a dark closet and do some reflective, hard thinking. In which cases have I, over the past year or more, acted most like the member of a dignified functional profession? In which cases did I act more like a money grabber? Why do I act one way in some circumstances and another way in other circumstances? In my arbitration activities, do I live by any self-imposed code of conduct? If I do, how vivid and inviolate are the "must do's," and the "must not do's" in that code? How does my code compare with what I imagine are the codes of those arbitrators who I feel have achieved a truly professional level of activity? How often do I render less than my full function; act less carefully than I should; charge what the traffic will bear rather than a fair and reasonable amount; conform my decision to what I feel will get me invited back for another case rather than to the closely analyzed merits of the parties' presentations? How often do I fail to ask for clarification of a point because I fear one or the other of the parties will take offense; fail to give reasonably prompt service in order that I may carry a more lucrative case load; yield a marginal case to the party who has most often lost with me in the past? How often do I follow any of these obviously wrong courses just because I know or imagine that Joe Doakes does, and I believe he made more money last year through arbitration than I did? I am troubled when an arbitrator remarks that he is trying desperately to get his case load up to a certain desired level during the current year. Precisely what methods does he intend to employ to that end? I am troubled when an arbitrator says that he is using all his ingenuity to find reasons for deciding an issue for the union, or for the company, as the case may be. Why? Why doesn't the decision emerge from careful, objective analysis of all of the facts and arguments put in by the respective parties? If it is a close case, why isn't the decision that for which the arbitrator feels he can write the better substantive opinion? When working toward a decision in a

given case, do I sneak into my considerations the question of what this decision will do to me—or do I keep my attention focused solely and exclusively on the parties' presentations and their collective bargaining interests? Am I willing to refuse to accept appointment where I have good reason to believe that my services as arbitrator are to be used for some purpose ulterior to the *bona fide* purposes of arbitration—possibly for the purpose of union-company collusion to rub out an independent spirit in the local union? Do I regard it as more advantageous to be known favorably by unions than by companies because a given international union may be the source of many potential appointments, whereas a given industrial firm will not be? In all of these matters it is our own individual and personal sets of values that finally govern our attitudes and our practices.

Such questions are only illustrative. Each of us can easily find a score or more additional comparable questions in the details of special circumstance and specific cases handled. I have mentioned only some of those which are common to all of our work. Such questions are intimately personal. No one will ask them of us, nor can we answer them honestly to other people. They are matters between us and ourselves. There is an obligation bearing in on each of us demanding that we as individuals examine and continuously reexamine ourselves on these matters just as physicians, lawyers, ministers or teachers pursue continuous self-examination if they operate at professional levels of activity. The overwhelming obligation to do this stems from our obligations as individuals to perform our professional function, to assume and meet the responsibilities which are inherent in the very nature of the activity in which we engage. These obligations and responsibilities are formalized in Academy membership. Our Board of Directors in the very nature of things simply cannot effectively impose such obligations and responsibilities on us. Either we assume and meet them by imposing them upon ourselves—individually and personally—or they are not assumed and met. Let us be quite frank. He who cannot or will not impose them upon himself, or lacks the self-discipline to enforce them upon himself, is a member of this Academy in name only, and possibly should in all honesty and fairness withdraw from membership in an organization the epitome of whose purposes is to foster the professionalizing of arbitration.

An understandable reaction to what I have been saying may be as follows: To preach this sort of thing may be well and good for him who has another source of income independent of arbitration work, and who therefore can afford to live by a high code, keep his sights set on function, and so on, regardless of the net effect upon a purely

supplemental source of income. But, how about the man who counts on arbitration as the source of all or nearly all of his yearly income? This is a fair question. To it I believe there are three answers: (1) In the professions of law, medicine, the ministry, and teaching by far the great majority of the practitioners depend upon that activity as the sole or nearly sole source of income. Whatever professional status has there been attained—and I believe it must be regarded as far in excess of our own—was achieved under this income situation. (2) When a man chooses to seek activity in the arbitration field he knows that his ability to operate as an arbitrator depends upon acceptability by the parties, and that his acceptability is expendable so far as particular companies and particular unions are concerned. To be blunt about it, this risk is voluntarily assumed when one enters arbitration work and, if one proves unable or unwilling to run this risk, he should get out of arbitration activities. The mere existence of this risk must never be permitted to serve as the justification for loose codes of behavior, for seeking to win popularity with parties, or for shading in any degree our responsibility for fully meeting the functional demands of our work. (3) In my own opinion, it is the full-time arbitrators who have set the highest standards of professional conduct in arbitration operations, and who have come the closest to complete adherence to them. I greatly fear that the personal soul-searching I have been urging will, if we are honest with ourselves, yield more unsavory revelations, by and large, on the part of those of us to whom arbitration is a source of supplemental income than on the part of full-time arbitrators.

In passing, I would comment on this third point just enough to note that this may result from many full-time arbitrators holding one or more permanent umpireships. Those of us who have held any permanent umpireship over a period of years, I believe, have a keen sense of the greater pressures which stem from such relationships than result from the casual relationships with parties which characterize ad hoc arbitration assignments. It is when one sits with the same union and the same company through scores and scores of arbitration cases that he gains a concrete and deep sense of the real need which he is filling in the interest of stable and smooth plant operations and the collective bargaining process. It is then that he most fully senses the fact that, for the parties themselves, the search is for an impartial resolution of a disputed issue with the wins and losses unscored, the fact that being right as often as humanly possible on the basis of the available evidence is a greater factor in acceptability to the parties than is being partial to the right party at the right time. It is these experiences which drive home the necessity of working to

strict codes, of having absolute "do's" and "don'ts" which are never violated despite the immediate temptation to adopt an expedient or pragmatic way out of a given tight spot. I believe that the knowledge in an ad hoc case that we may never encounter these particular parties again courts carelessness in analyzing facts and arguments, less grueling effort to reach the right answer, less care about the fairness of our fee charge, a more cavalier attitude toward what may be a really deep-seated troublesome issue for the parties, and so on. It seems only human that we treat the person with whom we have a passing relationship on a somewhat different plane than we do the person with whom we have frequent contact. From the standpoint of seeking and achieving professionalization of arbitration work, it may be that the most remains to be done, and the greatest obstacles to doing it lie, in ad hoc arbitration which comprises possibly some eighty per cent of all labor arbitration. Hence, one of our problems as individual arbitrators is to handle ourselves in ad hoc cases just as much as possible as we do in permanent umpireships. The limitations on doing this are obvious, and need not be detailed here. However, such limitations do not exclude many "do's" and "don'ts" which are just as valid in the ad hoc case as they are in the permanent umpireship—provided we have a will to live by them in the former as well as the latter. I believe it would be fair to say that whether the arbitration of labor disputes ever achieves the status of the classic professions depends more upon what we as individuals do in ad hoc cases than on what permanent umpires are pretty much pressured into doing by the very circumstances inherent in the permanent umpireship. My own concerns about failure to achieve professional status lie predominantly in the ad hoc field.

It would be unrealistic if I were to close this paper without frank recognition of the special difficulties which we, as contrasted with lawyers, physicians, ministers and teachers, face when we set ourselves to achieve professional status. Each of the classic professions has a well established educational path which must be followed before practice occurs, and law and medicine have licensing systems which at least purport to guarantee minimum competency before practicing. In arbitration there is no recognized requisite educational path and no licensing. One need know nothing substantively about arbitration before he hangs out his shingle, and acceptability to the parties takes the place of licensing. Clearly marked educational paths may develop, and membership in our Academy may come to be a partial substitute for licensure. If so, such developments will take a long time. Meanwhile the need for arbitration services seems to be growing even beyond its current level. Hence, other means will have to fill this breach and

these, I submit, must spring essentially from conforming our personal modes of behavior, practices, and approaches to those we know are above criticism from the functional point of view.

In this paper I have stressed the role of the individual arbitrator in this process of lifting arbitration to a professional status. I have taken this grass roots approach for two reasons: (1) Each of us is obligated to do a great deal personally along lines I have tried to suggest if we as a group ever are to achieve a professional status; and (2) if each of us personally did what we know deep down within us we should do in these respects, a giant stride toward professionalization could quickly be taken without the cumbersomeness of organized effort. However, I would be dishonest if I did not confess that, in my opinion, we individuals will not give the needed weight and attention to these personal obligations unless there is some organized and persistent reminder and stimulus coming from our Academy. Hence, I call for an immediate revivifying of our Ethics Committee. While preparing these thoughts for presentation I made inquiry as to what this Committee has done during its lifetime. I received a one word answer: "Nothing." This is intolerable if we are serious about this matter of professionalization. If the Committee has seen fit not to open its facilities to complaints against individuals, it should be dealing with ethical aspects of arbitration in broader terms. There are numerous ways in which it could stimulate and assist arbitrators, individually or in groups, to visualize and reflect upon ethical or professional aspects of their activities. Why has it not been engaging in such potentially fruitful activities?

There is one other thing which our Academy can do immediately to emphasize the professional status we seek. While it may appear to be mechanical and *pro forma,* it nevertheless is essential. In 1957 a blue-ribbon Special Committee was appointed to review the aims and purposes of the Academy and to make recommendations with respect to future policies and objectives. This Committee reported that "if the Academy is to fulfill its highest potentialities, we should place greater emphasis on certain attitudes, activities and objectives than we have in the past. First and foremost—and coloring our entire report—is our belief that we must deepen our sense of dedication to the role which arbitration should properly play in industrial life. At a time when democracy is on trial throughout the world we must constantly be aware of the larger aspects of our function in the collective bargaining process. . . . We must always be aware that our own expressed and implied attitudes, acts and behavior, at the hearing and elsewhere, may have a real influence, for good or otherwise, in a collective bargaining

situation over and above a 'business' basis of appraisal." The Committee, "as one way of implementing these objectives," recommended

> "That the Board of Governors be directed to draft an appropriate statement of professional dedication to be signed by each applicant for membership in the Academy and to be signed by existing members."

So far as I know, this recommendation still is unimplemented a year or more later. It is my feeling that our Board of Directors should proceed immediately to implement it.

Innumerable facets of the fundamental points stressed in this paper need amplification and evaluation. I trust that the discussion panel will develop some of them. I do not see how anyone can disagree with the proposition that, as a group having a professional function to perform, we must, individually and personally, place our every act, attitude, contact, and approach on the highest possible functional level—letting compensation, case load, and all other matters occupy lower levels. It is my hope that our Academy will utilize every facility it commands to stimulate and assist us toward a new dedication to this end.

Discussion—

JEAN T. MCKELVEY*

The central theme of both the papers we have heard this morning is the same—a challenge to the Academy to dedicate itself to the advancement of arbitration rather than to the advancement of arbitrators. Valtin summons us to assume a more active external role in supporting the institution of arbitration against outside interference, to build a collective defense against malpractice, judicial nullification and legislative intervention. Loucks urges individual reform, a re-examination of our consciences and modes of behavior, a searching self-analysis of our motives and rationalizations.

Since the Chairman has given the panel members a rather broad submission, and since we are therefore free *not* to answer all the questions posed by the speakers, I shall concern myself with a different segment of the Academy's program, but one which was touched upon by Loucks and exemplified by Valtin; namely, the role of the Academy in the area of education, research and training.

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In addition to the Constitutional objectives cited by our speakers, it should be noted that the Academy was formed in part "to promote the study and understanding of the arbitration of industrial disputes." Over the years this mandate has been interpreted to include two functions: 1) the dissemination of knowledge about the arbitration process; and 2) the education and training of new members of the profession. It is my contention today that the Academy has performed nobly in the first area; but has done little or nothing, as Loucks pointed out, in the second.

As a profession I think we can justifiably lay claim to being a learned profession, measured not by the number of degrees we possess, but by our contributions to the advancement of knowledge. The *Proceedings* of our annual meetings, while not yet constituting a five-foot shelf, but rather a modest five-and-a-half inches, contain a wealth of material on procedural problems, substantive issues and arbitration systems, most of it the product of the research efforts and experiences of our own members. In addition, we have sponsored the preparation of bibliographies, stimulated the study of umpire systems in mass production industries, and made a modest start towards instituting a clearing house for research projects and ideas.

Naturally, there is more to do. We need to pass along to the universities ideas for further investigation which arise from our own practice. We need to prod our author-umpires to finish their assignments before they pass from the scene, if you will pardon a lugubrious note. We need to give more thought to the preservation of our individual archives and assist these universities to whose custodianship we entrust our papers to establish the conditions for their use by scholars. On the whole, however, I think we may be justifiably proud of our contributions to education and to learning.

But I take it that our assignment today is not one of measuring how far we have come, but rather, as interpreted by both our speakers, that of asking where we are going, or more precisely, where we should be going in the years that lie ahead. And this brings me to the second aspect of our educational activities. I agree with Loucks that as an Academy we have done little, beyond giving lip-service, to the needs for training new members of our profession. Ten years ago the Research and Education Committee, then under the chairmanship of Charles Killingsworth, observed: "Any profession worthy of the name devotes a great deal of attention to the training of practitioners in the field. If arbitration is to be recognized as a profession, we must give adequate attention to training for this profession." The report went on to recommend that the Academy make training for arbitration "one of

its major concerns." At the time, however, the committee was not ready to propose a program of action.[1]

A decade later Loucks comments that so far as education—his first criterion of a profession—is concerned: "We have not progressed very far in this direction," that "we still have a long way to go in this regard, and we probably should be devoting more attention to it over future years."

In the intervening years between 1950 and 1960 there was only one report which dealt with this problem—that of Lloyd Bailer's Subcommittee on Training—submitted to the Academy in 1955. This report urged that a study be made of the extent to which the various designating agencies made use of interns, suggested that arbitration courses be encouraged, and stressed the desirability of providing one or two apprenticeships in umpire situations.[2] To the best of my knowledge this report, like others mentioned this morning, has been gathering dust so far as Academy interest, support and attention are concerned. I think it has been several years since any of the regional meetings have devoted any attention to training. Certainly, it was not a subject on the agenda of any of the regional meetings this past year. As Chairman of the parent committee for a number of years, I must assume responsibility for this course of inaction, but I am frank to confess that one reason for our committee's lack of progress was the opinion of so many of our members that arbitration cannot be taught; that arbitrators are born, not made; that arbitration is a unique profession which rests upon "acceptability" rather than upon formal training.

I welcome the opportunity to express my strong dissent from these facile and perhaps self-serving assumptions. Why cannot arbitration be taught—both in terms of substance, and in terms of skills such as analysis, reasoning, logic and writing? Does the acceptability we stress distinguish us in some mysterious way from lawyers, doctors, or even teachers? No diploma guarantees anyone in any profession a job or an income. It is true that most of us are self-educated in arbitration. Yet certainly our training in the various formal disciplines of law, sociology and economics must have advanced us in our careers as arbitrators; otherwise one would find it hard to explain the reason for so high a degree of education as is evidenced in the self-surveys we have

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[1] *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), Appendix D, pp. 170-175.

[2] *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), Appendix E, pp. 230-234.

conducted.[3] And certainly the War Labor Board and the other government agencies served as a far-flung post-graduate campus for many of us.

The truth, of course, is that arbitration is being taught today, and perhaps on a wider scale than we may realize. Some weeks ago Jim Hill expressed a sense of surprise, and even shock, on learning that Cornell will offer three different courses in arbitration this next semester. The question is not whether arbitration should be taught, but how it should be taught. This is a question to which I would like to address myself, because I believe that members of the Academy, and the Academy itself, have an opportunity to make a contribution to the formal training of arbitrators.

In one sense we are fortunate that education in and for arbitration is still in an embryonic stage. This gives us a chance to experiment and to avoid the stale molds of customs which have encrusted so many of our traditional curricula. Re-reading Jerome Frank's essay on "Legal Education," with its strictures against law schools and its eloquent plea for lawyer-schools,[4] I was impressed with the analogy it suggested for the education of arbitrators. In stressing experience, rather than education, as the qualifying prerequisite for our own profession, we have perhaps posed a false antithesis. For as Frank points out, education and experience should reinforce one another. If we were to adapt Frank's ideal training for lawyers to the needs of our own profession, we should combine formal education with practice. What does this mean? Students should study an arbitration case in its entirety—the briefs and the transcripts, not merely the award. They should stage mock arbitrations, practice argument and write opinions. Like Frank's ideal law students they should attend arbitration hearings and court sessions involving arbitration cases. The day may come when we can take advantage of closed-circuit television to bring the arbitration hearing to the classroom. Best of all, through the efforts of so many of you professional arbitrators, who have been willing to be arbitration professors in residence for a term or two, students can work with the leaders in the field.

But all this you will say is not enough. How do these fledglings get a chance to try their wings? How can they really become arbitrators?

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[3] See the "Survey of the Arbitration Profession in 1952," in *The Profession of Labor Arbitration*, Appendix E, pp. 176-182; and the subsequent "Survey of Arbitration Work of Members of the Academy in 1957," in *Arbitration and the Law* (Washington: BNA Incorporated, 1959), Appendix E, pp. 185-190.

[4] Jerome Frank, *Courts on Trial* (Princeton, New Jersey: Princeton University Press, 1950), Chapter XVI: "Legal Education," pp. 225-246.

Here I have only a few modest suggestions. One is to note that some of the newer members of the Academy, like our first speaker this morning, have gained professional status by serving as interns, apprentices, assistants—call them what you will—with members of the Academy. This kind of post-graduate training, analogous to Supreme Court clerkships, is as yet unsystematized. What can the Academy do to promote a more organized effort in this direction? One way is to gather more information than is presently available on the extent to which assistants are being used by our members, the nature of their work, and the results of this training. Another, perhaps, is for the Academy to provide fellowship funds to enable qualified students to assist arbitrators during a summer or a term.

Another method which might be tried—again borrowing from the law schools and even the medical schools—would be the sponsoring of arbitration clinics in some of our larger cities, perhaps with the help of the appointing agencies, which would provide arbitration at modest fees for clients unable to afford our services, and which would enable young arbitrators to gain experience. There are already a few in our ranks who gained a toehole in the door through just this kind of assignment by an appointing agency.

Above all, as members of a profession we need to rid ourselves of our Horatio Alger complex. Students are interested in becoming arbitrators. Already arbitration is a part of the curriculum in many of our schools. Like all disciplines it can be well or poorly taught. We now even have civil service examinations in New York State which qualify people for entry jobs into mediation and arbitration. The challenge to the Academy is that of lending its prestige, skill and knowledge to help develop, in Loucks' words, "clearly marked out and thoroughly planned educational paths to entrance into [arbitration] activity." If this means certification by a State or National Board, as it well may, then the Academy should begin to think seriously about the criteria, standards and qualifications governing the selection of new recruits to the profession. Other professions have met this challenge. Why should we be laggard?

Discussion—

ISRAEL BEN SCHEIBER*

Before proceeding with my remarks, I want to take advantage of this opportunity to pin a personal and symbolic orchid on Bill

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Loucks for what I regard as a masterly paper. I think it is one that each of us could adopt as his own personal code of ethics, and I think we are indebted to him for the time and thought that went into the preparation of that paper.

When I look at the title of the discussions today, particularly that of Rolf Valtin's, "What I Expect of the Academy," I cannot help thinking of the father whose daughter had been squired by the same fellow for a considerable length of time, and when the chap finally appeared to ask for her hand, he started his talk with the statement, "You know, Mr. Smith, I have been going with your daughter now for about eleven years," and the old man merely looked at him and said, "So, what do you want? A pension?"

I think what Rolf is asking of us isn't anything extreme, it isn't anything that should be difficult for the Academy to perform, and I think it is a good thing that he raised these points.

Bill Loucks' extensive catalogue of the sins we are capable of committing reminds me of what Father Brown said recently, that the arbitration process is one of infinite variety. Apparently our sins, too, are of an infinite variety.

However, Bill, in his appeal to our professional consciences, "to avoid shedding in any degree our responsibility for fully meeting the demands of our work," overlooks certain factors, one of which is the fact that conscience alone, though it keeps us from enjoying it, does not stop people from sinning. There are other factors which short-circuit conscience, and, unwittingly, may cause us to sin.

There is always the danger that we may become so involved with the day-to-day task that we may overlook what Bill calls "the innumerable facets of the fundamental points" which affect our thinking and the quality of our work.

For most of us, and especially for those who arbitrate on full time or nearly full time, a paradox exists which simply stated is, that the more we do, the busier we get, the less do we do in an important area of our work, and that is, the giving of our best thought to the problem before us. I don't know about you, but for me, plain solo thinking is about the toughest thing I can do and yet much of it must be done that way, in the very nature of our work. Beyond that, I strongly agree with Bill Loucks, that the regional meetings set up by the Academy can and do perform an important function, providing regular opportunities for the collective thinking through of our common problems. We therefore

need and must take time for this essential coming together and providing for more of these opportunities.

These past twelve years have been the important part of the period which began about twenty years ago and which, as Saul Wallen said recently, has marked the great break-through and advance in the use of arbitration as a means of promoting industrial peace. In that time arbitration has become a vital and constantly developing process and with all the shortcomings of which we have been guilty, it can fairly be said that the Academy has imparted a fermentation to that growth and has been closely concerned that that growth should reflect "the highest standards of integrity, competence, honor and character" among those engaged in the arbitration of industrial disputes.

I say this in spite of the fact that in both papers there is some indication that, while arbitration is expanding at the frontiers, there is need for improvement at the center. It is not my purpose to comment on the various areas for improvement suggested in the papers you have heard today, although I am in complete agreement with the suggestion that many of the problems raised by Bill and Rolf should be studied and evaluated more thooughtfully and intensively than I can do now.

Fortunately, there is not included among these problems, to the extent that it has been for many years, the perennial problem of the arbitrator's expendability. Presumably, in the course of the growth in prestige and influence of the Academy, there has been a corresponding growth in the acquisition by its members of the sweet elixir of acceptability.

Nor do I feel that it is necessary to dwell too long on what Bill Loucks has euphemistically referred to as the profit-making features of arbitration. While Bill points out the danger of becoming too much involved in such crude questions as to how fees can be raised, and other similar undignified matters, which he terms "the acquisitive aspect of arbitration," he does agree that we must not make our services available at niggardly prices.

As I look around I note that the professorial representation at this gathering is extremely high, so that you may be interested in a recent occurrence, when a proposal was brought before the legislature of a midwestern State to raise the salaries of the faculty of their small State Agricultural College. The farm bloc was solidly against the measure. They couldn't see why the State should pay those college professors $6,000 a year just for talking 12 or 15 hours a week. Faculty representatives made no headway with their argu-

ments, until one of them, who had had some farming experience, had an inspiration. He got up and said to the lawmakers, "Gentlemen, a college professor is a little like a bull. It's not the amount of time he spends; it's the importance of what he does." The professors got their raise.

It is true that we have not completed some of the tasks which we have begun, and it is true that there are many problems still requiring our very careful consideration. However, Rolf, with the clear, fresh vision of youth, has assured us that we are—and I quote his words of wisdom—the real aces in the field of arbitration, "an elite professional organization," and that it is "plain pleasant to be associated with Academy members."

So I, too, looking back through my years of association with this Academy, think of the story of the man who was looking for a good Church to attend and happened into a small one in which the congregation was reading aloud with the minister. They were saying, "We have left undone those things which we ought to have done and we have done those things which we ought not to have done," and the man dropped into his seat and sighed with relief, as he said to himself, "This is a good Church. Thank goodness, I've found my crowd at last."