absence of guideposts, and the potential for role confusion, it works because the most critical role—that of labor relations leviathan—is filled by a group of competent, scrupulous professionals. Your willingness to think about these problems, while sun, sand, and surf beckon, is testament to the conscientiousness with which you assume this responsibility. I thank you for the honor of having been invited to share my thoughts with you and welcome your comments.

II. EMPLOYER-PROMULGATED ARBITRATION

A. ALAN WALT*

In recent years various systems have been devised by employers to provide hearings before impartial arbitrators on grievances submitted by employees who do not have union representation. In some systems for nonunion employees, the employer alone selects either a permanent arbitrator or a neutral hearing officer. Other systems allow the grievant to choose the arbitrator from a list either preselected by the employer or obtained from an appointing agency. Under the latter system the employee may select any name on the list or may be required, together with the employer, to follow the selection procedure mandated by the rules of the appointing agency.

For use in nonunion arbitration cases, the American Arbitration Association (AAA) has adopted Model Employment Arbitration Procedures, under which the AAA is authorized to appoint a single "neutral arbitrator from its panel of arbitrators, with expertise in the employment field, who shall hear and determine the case promptly." In the Detroit office, for example, all nonunion arbitrator appointments have been made from supplied lists and have not resulted from AAA unilateral appointment. Nationally, the AAA administered 513 nonunion employment cases in 1989, most of which arose under individual agreements to arbitrate or were part of executive employment contracts.

The Federal Mediation and Conciliation Service (FMCS) supplies panels of arbitrators in cases where "the request arises outside a collective bargaining agreement" only when the five following questions are answered in the affirmative:

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1. Is the grievance and arbitration procedure spelled out in a personnel manual or an employee handbook?
2. Do employees have access to the grievance and arbitration procedure as a matter of right?
3. Do employees have a voice in the arbitrator's selection?
4. Do employees have a right to a representative of their choice in the grievance and arbitration process?
5. Is the arbitrator's award binding and enforceable?

The Committee on Professional Responsibility and Grievances recently had occasion to consider whether the Code of Professional Responsibility extends to arbitrators who elect to accept appointment under employer-promulgated arbitration systems for nonrepresented employees. Examination of the Preamble reveals that the Code was not intended to apply to nonunion arbitration, at least in cases which "are not the product of voluntary agreement." However, the Preamble does recognize that certain other procedures, "primarily but not exclusively applicable in the public sector," such as fact finding, impasse panels, and boards of inquiry, are "substantially indistinguishable from voluntary procedures." The Preamble continues by stating that the term arbitrator is "intended to apply to any impartial person . . . who serves in a labor-management dispute procedure in which there is *conferred authority* to decide issues or to make formal recommendations" (emphasis added).

I do not believe that an employee who is not represented by a bargaining agent, but who is required to accept arbitration as the only means of redress for a dispute arising out of the employment relationship with the employer, can be said to have agreed voluntarily to the process or that the arbitrator acts in these cases as the result of "conferred authority," even when the employee has signed an agreement accepting the employer-provided arbitration system.

If, however, it is assumed that a nonunion employee arbitration system is the result of "voluntary agreement" and "conferred authority," then I believe that the Code of Professional Responsibility does apply to the selected arbitrator. If the arbitrator's selection is the result of either the employer's unilateral choice or is made from a narrow preselected list furnished by the employer to the grievant (whether or not that list is composed of Academy members or AAA or FMCS panelists), a violation of the Code may well exist. Part 1.A.1 of the Code establishes impartiality as an essential personal qualification of

an arbitrator, while Part 1.C.1 mandates that the arbitrator "uphold the dignity and integrity of the office."

Where the arbitrator is selected solely by the employer or where a grievant's choice is narrowly limited to a preselected list supplied by the employer, that appointment is tainted with partiality within the meaning of Part 1.A.1, based solely on the fact that the grievant possesses no real say in the matter. Surely the result of that selection process diminishes the "dignity and integrity" of the arbitral office within the meaning of Part 1.C.1 of the Code.

In a footnote to its opinion in *Teachers (AFT) Local 1 (Chicago) v. Hudson*,[1] the Supreme Court questioned the validity of an arbitrator selection process which lacks participation by an affected party. Although the case is in the public sector and involves a first amendment issue regarding apportionment of nonmember service fees to a union, the Court observed that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, *so long as the arbitrator's selection did not represent the Union's unrestricted choice.*"[2] Regardless of the constitutional issue and the fact that *Hudson* arose in the public sector, footnote 21 may well portend a more general legal conclusion that any case in which an arbitrator's selection represents an employer's "unrestricted choice" lacks an essential ingredient of due process.

Assuming that the Code of Professional Responsibility does not extend to the arbitral selection process in nonunion employee grievances, is it not a violation of the Academy's Statement of Policy Relative to Membership when the arbitrator's appointment is determined solely by the employer? The Policy prohibits any member of the Academy from serving "partisan interests as advocate or consultant before labor or management in labor-management relations." Regardless of our abiding conviction that arbitrators act with the highest degree of impartiality and integrity, does not selection through a process that excludes real participation by a grievant result at least in the appearance that the arbitrator ultimately serves as an "advocate or consultant" for management? Courts may conclude that where an award is rendered by an arbitrator selected solely by the

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[1]475 U.S. 292, 121 LRRM 2793 (1986).
[2]*Id.*, 121 LRRM at 2799 n.21 (emphasis added).

employer, the employee lacks the essential due-process right to an impartial decision maker.[3]

While an arbitrator-selection process providing both the employer and the grievant with equal input probably passes legal muster, I believe that the increasing use of arbitration for nonunion employee grievances requires the focused attention of the National Academy of Arbitrators because our members in large part will be called upon to hear and decide these grievances.

B. William E. Rentfro*

As members of the Academy, we are professionals who have historically been retained and compensated by employers and unions jointly to serve as impartial decision makers under a grievance-arbitration system contained in a collective bargaining agreement. As neutrals we are prohibited by the Constitution of the Academy from "serving partisan interests as advocate or consultant for Labor or Management in labor management relations."

Our system of grievance arbitration has been very successful. The industrial due process achieved by it has long been an integral part of the collective bargaining agreement—the "union contract." We are all familiar with companies that have unilaterally instituted some sort of grievance-settlement plan in a nonunion setting. Relatively few have attempted to provide for arbitration as we know it.

The topic we are discussing today arises out of a notable increase in the number of employers establishing grievance-arbitration schemes without benefit of a union or a union contract. The topic is perhaps more timely than we thought. For example, the current issue of the *Labor Lawyer* contains an interesting article on "Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies." The article is authored by two labor lawyers specializing in labor law on behalf of management. The opening sentence of the article states:

> With increasing frequency, non-union employers are establishing some form of "alternative dispute resolution" (ADR), a generic term

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[3]*Cf. Vander Toorn v. Grand Rapids*, 132 Mich. App. 590, 348 N.W.2d 697 (1984), *Graham v. Scissor-Tail*, 28 Cal.3d 807, 623 P.2d 165, 171 Cal. Rptr. 604, 106 LRRM 2914 (1981), *In re Cross & Brown Co.*, 4 A.D.2d 501, 167 N.Y.S.2d 573 (1957).

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> encompassing various internal methods to resolve employment disputes. The reasons for establishment of the system vary, including union avoidance, a desire to improve employee relations, and a desire to limit employment-related claims filed with government agencies or courts.[1]

It is interesting to note that "union avoidance" heads the list of suggested reasons for nonunion employers establishing these systems. Indeed, isn't it possible that in many cases another suggested reason—"a desire to improve employee relations"—goes hand in hand with the underlying reason—"union avoidance"?

It must be recognized that, at this time, the dramatic increase in wrongful discharge litigation, based on public policy and contract theories, seeking jury verdict and punitive damages, has led to a sense of urgency on the part of employers and their legal advisors in unilaterally adopting arbitration plans to avoid such risks. Thus, it is not surprising that one section of the 43rd National Conference on Labor at New York University to be held in June 1990 features a presentation entitled, "Arbitration of Non-Union Workplace Disputes: Avoiding Litigation and Improving Workplace Relations." It should be apparent that arbitrators will be called upon more and more to lend their neutral expertise to assist employers in providing for arbitration in nonunion workplace disputes.

Any discussion of today's topic must deal with a consideration of the motivation behind the unilateral establishment of "free" arbitration for nonrepresented employees. What about union avoidance? There is nothing new about employers exercising their prerogative to avoid unions. You may recall the Academy meeting four years ago in Philadelphia. Mary Jean Wolf, Staff Vice-President, Personnel, of Trans World Airlines, speaking on the topic "Trans World Airlines' Noncontract Grievance Procedure" opened with these words:

> Trans World Airlines' (TWA) grievance procedure for noncontract employees is more than 30 years old, having been initiated by the company as a way to discourage the unionization of the agent and clerical work force, a combined group of approximately 7,000 employees.[2]

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[1]Guidry and Huffman, *Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies*, 6 Lab. Law. 1 (1990).

[2]Wolf, *Novel Roles for Arbitration and the Arbitrator: I. Trans World Airlines' Noncontract Grievance Procedure*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1987), 27.

"[A]s a way to discourage the unionization of the . . . work force"—that's putting it pretty bluntly. You may recall the spirited discussion from the floor following Wolf's remarks. Some members argued that nonunion grievance-arbitration procedures unilaterally adopted by companies violate Section 8(a)(2) of the National Labor Relations Act.[3] It is argued, furthermore, that an arbitration plan in a nonunion workplace is a "labor organization . . . , or any agency or employee representation committee or plan, in which employees participate and which . . . deal[s] with employers concerning *grievances, labor disputes*, wages, rates of pay, hours of employment, or *conditions of work*."[4] This view holds that the Supreme Court's decision in *NLRB v. Cabot Carbon Co.*[5] supports this conclusion. The question has yet to be finally decided.

Our purpose today is to consider and stimulate discussion about possible ethical problems that may confront arbitrators if they participate in these schemes. What if the plan is fueled by union avoidance? For those who have not been exposed to these programs, let me give an example. A number of arbitrators have called to my attention a unilaterally adopted grievance-arbitration plan that is currently in effect and in which they have been asked to serve. The employer shall go nameless, as they say, "to protect the innocent." The following is excerpted from the Employee Handbook furnished to all employees:

> Employee Handbook
>
> Subject: Nonunion Status
>
> We are nonunion.
>
> At [our Company], we prefer to deal with each other directly rather than through a third party. [The Company] accepts its responsibility to provide good pay and good benefits and the best working conditions we can and it is our desire to continue this way.
>
> We feel it is not necessary for any of us to pay union dues to receive fair treatment and we believe that [our] employees want to think, speak and act for themselves.

The handbook covers the usual information on benefit plans, insurance, and safety. A large section reads like a union contract,

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[3]Cf. Morris, *EGAPs—Arbitration Plans for Nonunion Employees*, 14 Pepperdine L. Rev. 917, 934 (1987).

[4]29 U.S.C. §152(5) (emphasis added).

[5]360 U.S. 203, 44 LRRM 2204 (1959).

setting out a grievance procedure culminating in arbitration. Relevant provisions are:

1. The Company and the employee will attempt to mutually agree upon an arbitrator.
2. In the event the employee and the Company cannot mutually agree upon an arbitrator, one shall be selected from the Federal Mediation and Conciliation Services.
3. The decision of the arbitrator shall be final and binding upon both parties.
4. The arbitrator shall have no authority to alter, modify, change, add to or subtract from any provisions of this Handbook.
5. Expenses and fees incident to the services of the arbitrator shall be paid by [the Company].

This plan was recently examined and discussed by most of the Academy members in Region 14. Approximately half of those in attendance indicated that they had served as arbitrator for that company and the employees who had grieved. They stated that they would serve again if requested. The other half at the meeting indicated that they would not serve if requested.

All unilateral plans handed to employees are not so obviously antiunion in motivation. Most arbitrators would have less of a problem if procedures guaranteeing fairness and due process were built in. There should be no problem of ethics if the plan is negotiated by an independent organization of employees, or if it is provided by statute or ordinance or resolution by some public agency or outside entity. Questions arise largely with respect to private sector plans.

A recent article in the *Labor Law Journal*[6] by Douglas McCabe of Georgetown School of Business Administration sets out the results of a study funded by the National Association of Manufacturers. Surprisingly, of 78 companies with up to 40,000 employees examined, only 6 provided for employee grievances to be resolved by arbitration. In most employer handbooks grievances are finally resolved by management. A brief look at the six plans providing for arbitration that are described in the article may be instructive:

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[6]McCabe, *Corporate Nonunion Grievance Arbitration Systems: A Procedural Analysis*, Labor Law Journal (July 1989) 432–37, published by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, Illinois, 60646 (reprinted with permission).

Company A

[A]n employee may invoke arbitration of her grievance only if it is that of having been discharged, and only if she has two years of seniority. . . . [A]rbitration is inapplicable if the cause of the discharge was violation of company rules regarding attendance and theft. The employee must submit a postmarked request for arbitration within 48 hours of the discharge.

Management requests the names of three arbitrators from a "recognized" arbitration association and selects one "at random" within two weeks. It is puzzling to this writer that an "at random" selection should take that length of time.

The arbitrator may direct that a transcript of the hearing be made . . . . Persons not "directly involved" with the employee's discharge may not attend the hearing. The employee may present evidence, summon witnesses, present the merits of her case, have access to her personnel file, and have a member of management assist in preparing her case. The arbitrator's fee is paid by management.

. . .

Company B

. . .

The arbitrator is selected by the employee from a list provided by the American Arbitration Association. Only the employee, his supervisor, and witnesses may attend the hearing. No written record is kept. . . .

The most critical feature is that the arbitrator's decision is limited to questions involving the "application or interpretation" of the company policy or practice at issue, with the arbitrator forbidden to judge the "reasonableness or propriety" of the policy or practice. As stated previously, the applicable policy or practice is one stipulated by the employees' handbook, which they tacitly agree to, regardless of "reasonableness or propriet[y]," and therefore such a feature is beyond the scope of the arbitrator.

The arbitrator's decision must be made within 30 days, in writing, mailed to the employee and management, and it shall not be divulged to anyone else. Management pays the arbitrator's fee. . . .

Company C

. . .

The arbitrator is selected jointly by the employee and management. If there is no agreement within 24 hours, management secures a list of five arbitrators "from an appropriate source." The employee deletes a name, then management does so, and then the employee deletes another. Management selects the arbitrator from the remaining two names. If management does not know any name on the list, it is obvious that the process is a "random" selection, with the only benefit being the employee's feeling that he has participated democratically in it, however meaningless it may be.

. . .

Company D

[A]rbitration is permitted only in "cases not involving determinations in the general conduct of the company's business." Arbitration is at the employee's request for an "impartial arbitrator" . . . . If the employee and management fail to agree on an arbitrator, the American Arbitration Association will designate one, and her fee is paid by management.

. . .

Company E

Arbitration . . . is available only to production and maintenance employees, and only if the grievance is their dismissal from the company. . . . [A] panel of "three community residents" determines if there is "reason for a full-scale hearing," meaning arbitration. The employee selects the arbitrators from a list of "nationally known arbitrators." . . . The company pays the arbitrator's fee, but the employee must pay the fee of any counsel she retains.

Company F

[P]ermits its employees to invoke arbitration of their grievances and ask a co-worker "or your supervisor" (apparently in cases in which the supervisor is not the cause of the grievance) to assist in presenting the employee's case. The company pays the arbitrator's fee, but if the employee loses the case, he must pay $25 toward the fee.[7]

Employer-promulgated arbitration for unrepresented employees comes in a variety of shapes and sizes. A number of the plans reviewed by McCabe give rise to problems that are troubling to most arbitrators. It is important for us to take a close look if we are bothered by the motivation behind the plan or by some feature or evident flaw that raises questions of fairness in the process.

Some arbitrators may decline to serve. Some may want to inquire (to clarify their role and the rules of the game) before deciding to accept the appointment. In any event, if we do become involved we, as professionals with a code of ethics, must take care to ensure and protect the essentials of a fair hearing. We must be prepared, if necessary, to take an active role in seeking out the truth. The chances are pretty good at the outset that the unrepresented employee will be little match for the better trained and equipped spokesperson across the table. An Academy member, well qualified to address the issue, has commented on arbitration in a nonunion setting as follows:

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[7]*Id.* at 434–36.

> Still, the nonunion imitations are flawed. Even those that might be legal are flawed, for they lack the two most important ingredients which distinguish the union plans. They lack genuine employee participation, and they lack genuine neutrality in the arbitration process.[8]

In such a setting how can arbitrators level the playing field a bit and try to ensure fairness? Obviously, they are compelled to take a more active role, even at the risk of being viewed as advocates when asking questions that must be asked. Before accepting these cases, we may want to insist that the employer pay for a qualified advocate for the unrepresented employee. We must recognize that it is difficult to provide a completely fair hearing when presiding over a process in which an employee opposes a corporation. We are looking at difficult issues of research, discovery, and proof as well as advocacy. Can an arbitrator remain a neutral and at the same time play an active role in dealing with these issues?

At a minimum, employees should have an equal voice in selecting the arbitrator. They should be able to choose adequate representation. Basic due process rights to notice, time to prepare, and production of needed records and information should be protected. Reasonable standards should apply. The employer plan should not restrict the arbitrator in applying just cause standards and in fashioning a reasonable and binding decision. Too many plans equivocate in this area.

Payment of the arbitrator's fees by the employer can be another problem. It is less of a problem if essential elements of fairness are in place. It is normally no problem if negotiated by an employee group or association, or provided by statute, as is often the case in the public sector. An arbitrator may be perceived as an agent paid by the employer. The process calls for an impartial, binding decision, but only one party is paying the decision maker.

The issues we discuss today are bound to grow. We will be confronted with requests to arbitrate in nonunion settings more and more as employers heed the advice of counsel and unilaterally establish grievance arbitration. We will have to learn to interpret and apply the provisions of employee handbooks. It behooves our Academy to take a close look, to set some stand-

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[8]Morris, *supra* note 3, at 928.

ards, some guidelines, and come up with some sound advice for all of us.

C. SHYAM DAS*

As the cleanup hitter, I would like to touch on a few additional concerns, some of which may overlap what Alan Walt and Bill Rentfro have said, as well as to relate to you some of the views and experiences conveyed to me by a number of our colleagues. Let me say thank you to those who took the time and trouble to write to me.

At the outset let me say that I feel it is important, if I am to resolve a dispute as an arbitrator, that the participants are on as equal a footing as possible, given the realities of the employment relationship, and that both sides perceive the proceeding as fair and impartial.

The first question I would like to raise is: Who pays the arbitrator? Does that matter in terms of either the integrity of the process or what might be called the arbitrator's "comfort level"?

In arbitrations between employers and unions, usually both sides split the cost. Occasionally the arbitrator must seek the total fee from only the losing side. Besides a slight uneasy feeling that a losing party may be more reluctant to pay the entire fee instead of only half, the question of who pays does not raise any real problem from an ethical or professional point of view.

Is it or should it be different where there is no union, but only an employer and an individual employee? In many such instances the employer who has established an arbitration procedure has undertaken to pay the entire cost. Alan has stated:

> There does not appear to be any disagreement when considering the various procedures regarding the payment of arbitral fees: where a proper selection process is present, who pays the arbitrator's fees and expenses or how they are apportioned is immaterial. While it often may be difficult to obtain payment from the individual grievant, especially in a discharge case, that issue is distinct from legal and ethical considerations which may be present, depending on the employer's policies governing nonunion arbitration.[1]

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[1]Walt, *Employer-Promulgated Arbitration Systems Raise Questions*, The Chronicle (Oct. 1989), 2.

Another member put it this way to me: "The fact of being paid solely by the Employer I have considered to be a burden on the Employer, but not a problem for me."

Certainly it is fair to conclude that most employees, if asked, would not quarrel with an employer-pays-all provision. It sounds like a good deal. Depending on the stakes, however (and some cases involve some very highly compensated employees), an employee may prefer to be on an even basis with the employer in terms of whom the arbitrator will look to for payment.

Where both sides share the cost of arbitration, different problems arise in nonunion arbitration. Chuck Rehmus touched on some of these in his May 1989 *Chronicle* article.[2] A question may arise over ability to pay. Are we compromised in hearing a discharge or termination case (and most of these cases involve termination) where the employee's actual or apparent ability to pay a substantial arbitration fee could depend on winning the case? Even if we have no doubt that we will decide the case fairly on its merits, are we comfortable with the notion that if the employee prevails, it may seem that we ruled that way to ensure we got paid?

In raising that issue, Chuck alluded to the possibility that each side in advance could put in escrow half the anticipated fee and expenses, so that no one could even imagine that the decision turned on the arbitrator's financial interest. This has been done on some occasions that I am aware of. Chuck did not see this as a painless solution, however, since it effectively placed the arbitrator in the position of imposing this escrow arrangement on an employer and an employee to guarantee payment of the fee or peace of mind or both. Moreover, what if the originally escrowed amount was based on a one-day hearing, which has turned into a week? Do you ask for more? What if the employee is unable to put up more money?

The perception that whoever pays the piper has some control, however subtle, over the tunes that are played also may have an impact on the manner in which a court may evaluate an arbitration award challenged by an unhappy employee. Maybe that is not our direct concern, but it is part of the overall picture, which brings us back to the arbitrator-selection process and to the need to assure adequate representation and due process in the arbitration proceeding. If the employee is on an even footing in

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[2]Rehmus, *Unrepresented Grievants: An Arbitral Dilemma*, The Chronicle (May 1989), 1.

those respects, the question of who pays for the arbitration seems far less critical.

I suspect that under the best circumstances the employer is likely to see itself in a somewhat dominant position where it establishes a nonunion arbitration procedure, and this may have an impact on the arbitrator in different, possibly quite subtle, ways.

One member wrote that after hearing an employee termination case in which he upheld the employer's action, the employer asked him to prepare a two-page summary of his decision for posting on plant bulletin boards. This may seem somewhat trivial, but the member clearly was disturbed by the employer's assumption that it was free to contact the arbitrator ex parte to seek something beyond the decision already rendered, and he refused the request. When Mary Jean Wolf spoke to us several years ago about an employer-promulgated arbitration procedure at Trans World Airlines, she noted that senior management did not always take kindly to arbitrator decisions reinstating fired employees. She went on to state:

> What I am saying is that a tendency to reinstate employees not covered by a labor agreement may not work in the long-range interest of expanding the use of arbitration for such employees.[3]

I am not exactly sure what she had in mind, but there is something troubling about that statement.

Another member has indicated to me his concern in continuing to serve as a hearing officer under a state statute that provides for a hearing in the event of layoff or discharge of a teacher. He noted that the law provided for the hearing officer, who was usually a labor arbitrator, to be selected and paid by the school district. He was troubled by the appearance of partiality inherent in this procedure, but felt that it was probably preferable to have a labor arbitrator serve as the hearing officer rather than some of the alternatives. He went on to say:

> I am *most* troubled, however, by the very presence of these extrinsic political quarrels when I am trying to decide a particular case. All sorts of distracting ideas arise:

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[3]Wolf, *Novel Roles for Arbitration and the Arbitrator: I. Trans World Airlines' Noncontract Grievance Procedure*, in Arbitraton 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1987), 32.

> Am I deciding for the teacher in an attempt to demonstrate that I am truly neutral, or does my decision rest firmly on the evidence and argument?
>
> Am I actually contributing to a just result by keeping a flawed system in place, or should I drop out with a few other arbitrators who advise that these statutes will only be repealed/amended when the system of review it created collapses of its own shortcomings?

Let there be no misunderstanding; there are others with a distinctly different point of view. One member wrote concerning his experience with an arbitration procedure set up by a public employer. Originally, the employer and the employee were to obtain a list from the Federal Mediation and Conciliation Service (FMCS) in order to jointly select the arbitrator, but the employer was dissatisfied with the delay in this process. At the member's suggestion the employer established a permanent rotating panel. Its personnel manager and outside labor counsel picked several arbitrators to be panel members. The member added: "I understand the panel and process serves the purpose for which it was intended and *the Employer* is well satisfied [emphasis added]."

I readily admit that I find this somewhat troublesome, but the member also stated: "In defense of such system, I would ask, in a nonunion situation, whether or not a properly constituted panel of qualified arbitrators, serving in rotation might not be a better solution than one where the final determination is made unilaterally by management." If those were the only alternatives, I might agree, but I believe that, no matter how imperfect and even if somewhat time consuming, an employee's ability to have a say in the selection of the arbitrator is far preferable, if not necessary, to the integrity of the impartial decision-making process.

After discussion at a regional meeting of Academy members, the regional chairman wrote:

> Almost all of the members at the luncheon had participated in arbitration systems which did not include unions, and in which the employer may be totally responsible for all costs. No member expressed the opinion that these systems are inappropriate, even where the employees are not involved in arbitrator selection, as long as there is disclosure and the arbitrators utilized are bound by the Code. The members believe that these arbitration systems serve the interests of many employees and will continue to exist if not expand, and that NAA arbitrators should be free to accept or reject appointments under these systems. Some members urged the Academy to

specifically endorse its members' participation in these arbitration systems.

Speaking of disclosure, Part 2.B of the Code of Professional Responsibility requires:

> 1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, *or consultative relationship with any company* or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. . . .
>
> 3. . . .
>
> Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close 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* [emphasis added].[4]

If I have served as an arbitrator for Employer X under a nonunion employer-promulgated arbitration procedure and later am selected—say through the AAA or FMCS—to hear a case between Employer X and Union Y, am I required to disclose my earlier service for Employer X? Was I serving in a consultative relationship with Employer X in that type of situation? Even if not, might such service reasonably raise a question as to my impartiality? Does it make a difference whether instead of hearing a single case in which I was jointly selected from an AAA or FMCS panel, I heard 10 cases as a semipermanent hearing officer solely appointed by Employer X? Disclosure in the latter case surely seems required. In the former, I would think not.

III. FEDERAL SECTOR ARBITRATION: A MANAGEMENT VIEWPOINT

ANTHONY INGRASSIA*

Remember when Rex Harrison, as Professor Henry Higgins in *My Fair Lady*, sadly sang to his male colleague, Colonel Pickering, "Why can't a woman be more like a man? Yes, why can't a

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[4]Code of Professional Responsibility for Arbitration of Labor-Management Disputes (NAA, AAA, FMCS: 1985), 7–8.

*Deputy Associate Director, U.S. Office of Personnel Management, Washington, D.C. Other participants on this panel were Jerome Ross, Member, National Academy of Arbitrators, and H. Stephan Gordon, General Counsel, National Federation of Federal Employees, Washington, D.C.