CHAPTER 1

PRESIDENTIAL ADDRESS: THE CHALLENGE AND THE PRIZE

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Everyone, it seems, is 50 this year—the Academy, the Federal Mediation and Conciliation Service (FMCS), the Industrial Relations Research Association, Cornell's School of Industrial and Labor Relations, and major league baseball's very belated breaking of the color barrier when Wesley Branch Rickey brought Jackie Robinson up from Montreal.

I want to congratulate all of those institutions, but my particular fondness is reserved for this one. Yesterday at the membership meeting, and the night before, and again this morning we paid tribute to our founders, those who are here, those who are at home unable to travel, and those who are no longer with us.

It is such a pleasure to see Ben Aaron, Byron Abernethy, John Dunlop, Alex Elson, Jean McKelvey, and Willard Wirtz. As some of you know, Clark Kerr, Allen Dash, Jim Healy, and Charles Myers could not be with us, but I salute them as well. I also want to salute Clair Duff. Though Clair did not become a member of the Academy until 1956, he has not missed a meeting since—41 of them. I am not sure whether he should receive a medal for valor or for simply having the ability to absorb the punishment, but he certainly deserves our recognition and our applause.

We also have 23 past presidents with us today, almost all of those still with us. There are too many to call their names, but if they would just stand a moment.

I would also like to say a personal word about Clara Friedman. Clara died on March 25th. At the time, she was working on a photographic display of the Academy's early years, a small portion of which you can see in the hallway. It is not what Clara envisioned, but it is the best that Arnold Zack and I could do in the time we

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had. Her crowning achievement on behalf of the Academy and the arbitration process was her oral history project, which culminated in a marvelous book, *Between Management and Labor.*[1] She will be long remembered for that. For her graciousness, her spirit, and her indomitable will, she will not be forgotten. Like her book, she was a treasure.

I also want to thank the staff for their help and support, Brenda Ryan, Kate Reif, and all the others. And a special word for Bill Holley—one could not ask for a better secretary-treasurer and friend.

One of the pleasures of the presidency is responding to invitations from the regions. Since January, I visited 11 or 12 of them all across this country. At each meeting, I talked about the past, the present, and the future.

I tried to remind our members of this Academy's glorious beginnings. I know that those who were there in 1947 did not think of it as particularly glorious. Moreover, the founders were all relatively young then and did not consider themselves giants at all. Yet, it only takes a moment to appreciate their true measure.

The genesis of that first meeting was April 1947. Edgar Warren, who was Director of what was then called the U.S. Conciliation Service, asked some 37 arbitrators to attend a two-day meeting in Washington, which he dubbed the "National Panel of Arbitrators Conference." Out of that meeting came the idea for a professional organization that would meet every year to exchange experiences and ideas. In an editorial that summer, the American Arbitration Association (AAA) lent its support to the concept, suggesting that as labor arbitration began to take firm root after World War II, an organization such as the one being considered would aid in the education and training of new arbitrators.

Think of those who responded to that idea and came to that first meeting in the fall of 1947 and the first Annual Meeting the following January. Apart from those I have already named, there was Ralph Seward, our first and only two-term president, who had been marvelously effective at President Truman's National Labor-Management Conference in 1945. The labor and management representatives attending that conference had agreed on almost nothing, but one thing they did agree on—and Ralph was the

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[1]Between Management and Labor, Oral Histories of Arbitration (Twayne Publishers 1995).

facilitator of that agreement—was the value of grievance arbitration. Those representatives urged the voluntary adoption of that system of dispute resolution in all collective bargaining contracts.

Just listen, if you will, to some other names of 1947 and 1948. Whitley McCoy, Bill Simkin, Peter Kelliher, Lloyd Garrison, Harry Shulman, Saul Wallen, Aaron Horvitz, David Cole, George Taylor, and three who went on to become U.S. Senators—Wayne Morse of Oregon, Paul Douglas of Illinois, Frank Graham of North Carolina—Nate Feinsinger, Paul Prasow, Ed Witte, Father Leo Brown, Herman Gray, Ted Kheel, John Day Larkin, Walter Gellhorn, Sumner Slichter, Charles Killingsworth—105 in all. Some of you may be too young to recognize all those names; you may be saying, "Who are these people?" Well, just ask your older colleagues or read the early Bureau of National Affairs (BNA) reports.

Those individuals and many who followed in the early years, such as Archibald Cox, George Shultz, and Robben Fleming, shaped the field of labor arbitration. It was through them that concepts such as just cause, past practice, reserved management rights, and implied obligations, so well understood and accepted now, were given substance and life. For what they have done to advance the cause of fairness and of stability, we are in their debt.

This was a time, it should be remembered, when there was no Elkouri and Elkouri to guide us, no Commerce Clearing House Labor Arbitration Awards, only a single slim volume of the BNA Labor Arbitration Reports. There was no "common law" of the workplace, and only a few institutions, such as Cornell's School of Industrial and Labor Relations and Jesuit labor schools, to train an arbitrator. There was nothing other than hard-earned experience, apprenticeship with a colleague possessing a bit more experience, if one were lucky. The situation was akin to what former Academy President Charles Killingsworth called "the inexperienced leading the greenhorns." Yet, out of these beginnings was forged a body of principles that has stood the test of time.

To appraise that assertion, one need only read Harry Platt's early decisions on just cause, Whitley McCoy's views on the proper use of after-acquired evidence, decisions and writings of Harry Shulman and Ben Aaron and then Richard Mittenthal on past practice, Saul Wallen's writings on the framework of reality in which arbitrators must function, writings of Paul Prasow and Carl Peters on reserved management rights and the implied obligations to employees inherent in that concept, and Archibald Cox on the then-emerging industrial jurisprudence, what he dubbed and the

Supreme Court—with a nudge from David Feller—later referred to as the "common law of the shop."

It is a heritage of which all arbitrators should be proud. We are indeed fortunate that we are able to stand on their shoulders.

In anticipation of this day, I did not read every presidential address. I did, however, read the minutes of those first meetings. Even then, some were complaining of formalism and precedent-governed decisions, while others were deploring the lack of predictability. So, what else is new? The debates continue to rage. What I remembered most from those early minutes, however, was the advice of Burt Zorn, a highly respected management attorney from New York, with whom I often did battle when I was a young advocate. It is advice that arbitrators should have on their wall. He told those in attendance in January 1948 that "an arbitrator must have complete fearlessness and not give a damn about the reception of a decision which he feels is right."[2] The corollary to that sage counsel—from a respected advocate who stood to lose as well as win at the hands of those who followed his precept—was Saul Wallen's comment in his review of Paul Hays's charge that an arbitrator's sole concern, what infused an arbitrator's decisions, was survival. Wallen said, "Nonsense." The real pressure comes from within. "The external pressures are countervailing," he said, while "the need for living within (oneself) is inexorable." If an arbitrator "writes a decision that has a little bit in it for each party but not enough for either to accomplish justice, his cowardice becomes immediately apparent to both, and he courts the likelihood that both will axe him."[3]

As proud as we are of our heritage, what we cannot ignore today is that arbitration, as we know it, is under attack. It is under attack from many quarters and from intrusive judges who do not understand the *Trilogy*[4] or *Misco*[5] or understand well enough, but choose to ignore those limitations on their authority. It is under attack because of the unfairness of many employer-promulgated arbitration systems that disregard basic elements of fairness and due process and, being bad arbitration, give all arbitration a bad

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[2]Minutes of First Annual Meeting, January 16, 1948, p. 18.

[3]Landis, Value Judgments in Arbitration: A Case Study of Saul Wallen (Cornell Univ. Press 1977), 169.

[4]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[5]*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

name. It is under attack in other ways by those who would change the standard of review either by judicial or legislative means.

As the title of the recently published volume[6] edited by Academy members Joyce Najita and Jim Stern tells us, arbitration is indeed under fire. But it is not just arbitration that is under fire, it is the very underpinning of arbitration, the collective bargaining process, that is under fire and under attack, and it has been for some time.

I had a marvelous professor at Columbia Law School many years ago, Karl Llewelyn, an elfin man with great bushy eyebrows, who taught a course called "Law and Society." One day he told the story of John, standing hat in hand in front of the desk of his employer, asking for correction of some perceived inequity. John's employer looked up at him and said, "John, John, have I ever done you dirt?" It was Professor Llewelyn's way of making a simple point—that "everyone, everyone needs a representative."

Byron Abernethy, one of our founders who is with us today, said it as well in 1983 in his presidential address. What representation promises, what collective bargaining promises, and what arbitration promises the worker who feels aggrieved is "the opportunity to be heard, the freedom to stand upright, unafraid, with full human dignity, and to say to his employer, 'I feel that I have been wronged and I want the wrong remedied.'"[7]

Listening to the debate this morning, it is fascinating how some of the young, such as professors protected by tenure who speak of freedom of contract, forget history.

In a free enterprise system, being represented in the workplace coupled with the ability to bargain collectively is the economic equivalent of political democracy. "The underlying obligation of arbitrators," as Ray Marshall reminded us almost 20 years ago when he was Secretary of Labor, "is a commitment to collective bargaining—to maintaining a system that peacefully resolves disputes and involves the participation [and he meant the real participation] of all parties"[8] who choose to participate.

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[6]Labor Arbitration Under Fire (Cornell Univ. Press 1997).

[7]Abernethy, *The Presidential Address: The Promise and the Performance of Arbitration: A Personal Perspective*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), 1, 10.

[8]Marshall, *Collective Bargaining: Essential to a Democratic Society*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1980), 9, 10.

Today, as a recent, flashy brochure states, if you pass muster as a "bonafide management representative" and are willing to pay a whopping fee, you can attend a two-day "interactive seminar" that will teach you "How to Stay Union-Free Into the 21st Century." You could have learned how to do that in Chicago just three weeks ago and can still learn it in other cities next month. As part of staying "union-free," you can learn how to "blunt the early warning signs of union activity" and how to "defeat the organizing challenge before it begins." It is just an example of what goes on daily in some quarters of our country.

When I first came across this brochure, my friend and colleague, Walter Gershenfeld, a sharp-eyed and witty observer of such matters, said that it was nothing to be concerned about because the same outfit is "offering seminars on how to get along with the union once it wins." It is an amusing observation, of course, but not one that dispels concern. A strong collective bargaining system is essential to any industrial democracy. Almost 100 Academy members, 100 of us, signed a public declaration to that effect which was released on Labor Day 1994 in support of the efforts of the Dunlop Commission's report on the Future of Worker-Management Relations. That statement, as member Peter Florey reminds us in his article[9] in the latest AAA *Dispute Resolution Journal*, is as true today as it was then.

Those who deplore today's overlay of protective legislation—what some have called the "Europeanization of the American Workplace"—because it sometimes makes our job more difficult when we are asked to interpret statutes in addition to collective bargaining agreements, should remember that in large measure the labor movement is responsible for those employee-oriented statutes, for those laws that emphasize individual rather than collective rights. Without the labor movement's vigorous participation and its concern for the unorganized as well as the organized, much of that legislation would not have come into being.

With the rapid changes in the organization of work and with the globalization of the economy, it may be that the labor movement, unless it too goes global, unless it implements new methods of organizing, and unless it enters into productivity partnerships with the owners of the enterprise, will not occupy the place it has in the past. I suspect that John Sweeney, our Distinguished Speaker,

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[9]Florey, *Labor and Employment Arbitration: Questions for the Late '90s*, 52 Disp. Resol. J. No. 2, 66 (Spring 1997).

will have much to say about that tomorrow. It may be too, as Tom Kochan has put it, that grievance arbitration will continue to lose its workplace "centrality."

Nevertheless, arbitrators cannot remain silent in the face of assaults such as those I have described. Labor arbitration is not, as Dave Feller has observed, a "disembodied freely floating" entity, but a "totally dependent process."[10] Our stake in the vitality of the labor movement means that we have to do our part to arrest and reverse the decline of the organized work force. Speaking up for collective bargaining and speaking against those who would deny or curtail that fundamental right, as many of us have done and will continue to do, is not about jobs for arbitrators. Arbitrators are talented individuals who could do a number of things with the skills they have acquired. Nor is it about who wins or loses a particular case. What it is about is the preservation and strengthening of a system of governance that is an imperative in a democratic society. There is no acceptable substitute for free labor unions or for fair labor laws. As responsible individuals, we must do what we can to ensure that the basic right to organize and to be represented by representatives of your own choosing is not curtailed or hindered, but fostered. Collective bargaining may not be the *only* means for employees to have a voice, but it deserves to be a protected means.

At the same time, the Academy as an institution must step up its efforts to protect the arbitration process. All of you have witnessed the encroachment of judges who know little of the genesis of labor-management arbitration or do not care, judges who pay lip service to the *Trilogy* and *Misco* and go on to ignore those admonitions simply because they disagree with what the arbitrator has done. While the Fifth Circuit may be the leader in this damaging enterprise, it is not alone. Almost every circuit has overturned awards in one way or the other on the flimsiest of grounds. I spare from this statement, at least as of now, the District of Columbia Circuit and the Ninth Circuit which seem to understand and accept what the Supreme Court has said.

Many of us have spoken of this issue. I did at the Society of Professionals in Dispute Resolution in 1987. I was preceded by Professor Theodore St. Antoine at the Academy's Annual Meeting in 1977 and Professor Ted Jones in 1983, then followed by

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[10]Feller, *The Impact of External Law Upon Arbitration*, in The Future of Labor Arbitration in America (American Arbitration Ass'n 1976), 83.

Professors Roger Abrams and Dennis Nolan in 1989 and the Honorable George Cohen in 1992. I was asked to speak on the topic again at Stetson College of Law a few months ago, and my more recent research revealed that the trend has not abated, not at all. Moreover, the analysis of our colleague, Paul Barron of Tulane Law, shows that the Fifth Circuit was far ahead of the pack, overturning in the last 10 years 75 percent of the challenged awards that the union had won and in which the arbitrator had modified the imposed penalty.

A recent Fifth Circuit decision, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers Local 2713,*[11] is particularly egregious. In *Bruce,* the grievant, a woman named Dixon, had asked her supervisor if she could have a short period of time off. When the supervisor pressed for an explanation of her personal reason, she said it was so she could take her daughter to the doctor. The supervisor agreed and she was given a 45-minute unpaid absence from work, which, she was informed, would be noted as "unexcused." While she was gone, some co-workers told the supervisor that the grievant really needed the time off to pay an overdue electric bill. When she returned, her time card was missing and she was subsequently told that she had been fired for obtaining a leave "under false pretenses."

The contract provided in Article 24, Section 2 as follows:

> The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less severe discipline.
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> (a) An employee will be discharged immediately without prior warning for the following or similar offenses:
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> * * *
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> (16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.[12]

There followed a list of less serious offenses that were subject to progressive discipline, in which the company would "endeavor to adhere to the following order"—an oral warning, a written warning, a three-day suspension, and discharge. None of the listed offenses specifically mentioned obtaining a leave or time off under

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[11]103 F.3d 449, 154 LRRM 2207 (5th Cir. 1997).
[12]*Id.* at 451 n.1, 154 LRRM at 2208 n.1.

false pretenses, though one cited "abuse of . . . lunch periods" and another referred to "neglecting duty."

Ms. Dixon admitted, and the arbitrator found, that she had "fabricated" the story about her daughter. Nevertheless, he ruled that the company should have applied progressive discipline and that her discharge, given the circumstances, was unreasonable. He reinstated Ms. Dixon and reduced the penalty to a 10-day suspension. The District Court for the Eastern District of Texas had no trouble confirming this award.

The Fifth Circuit reversed. We find from the opinion of the dissenting judge, Judge Benavides, that grievant's electricity had been cut off because she had failed to pay her bill; that she intended to pay it at the end of the workday, a Friday, when she received her check, but found out during the morning break that if she did not pay it by noon the electricity would not be restored until the following week. She then went to the supervisor and asked for the time. When pressed for details, grievant, rather than telling, as Judge Benavides put it, the "undoubtedly embarrassing truth," told the supervisor that her daughter had a doctor's appointment.

In vacating the award, Judge Garza, speaking for the majority, duly recited the words circumscribing the limits of the court's reviewing authority, including one of its own decisions, *Executone Information Systems v. Davis*,[13] in which it had said that an arbitration award "'must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement;'"[14] that it "'must, in some logical way, be derived from the wording or purpose of the contract.'"[15] Then, the majority went merrily on its way. After citing its much criticized *Delta Queen* decision of 1989,[16] the majority found that the award was not "'derived from the wording or purpose of the contract.'"[17] After noting that the arbitrator, under the collective bargaining agreement, could not add to, amend, or depart from its written terms, the majority found that this is what the arbitrator had done. The arbitrator had found that the grievant had lied.

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[13]26 F.3d 1314 (5th Cir. 1994).

[14]*Id.* at 1325 (quoting *Railroad Trainmen v. Central Ga. Ry.*, 415 F.2d 403, 412, 71 LRRM 3042 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 73 LRRM 2120 (1970)).

[15]*Id.*

[16]*Delta Queen Steamboat Co. v. Marine Eng'rs Dist. 2*, 889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989), *cert. denied*, 498 U.S. 853, 135 LRRM 2464 (1990).

[17]*Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers Local 2713, supra* note 11, at 452, 154 LRRM at 2209 (quoting *Executone Info. Sys. v. Davis, supra* note 13, at 1325).

Lying, the majority said, was a dischargeable offense. That is to say, lying was "immoral conduct" under Article 24, Section 2, for which an employee is to be discharged immediately.

In answering the dissent's assertion that it was interpreting "immoral conduct" as used in the contract and thus substituting its interpretation of the collective bargaining agreement for that of the arbitrator, the majority, in footnote 4, said that it was not doing that at all and that, indeed, the arbitrator was without authority to interpret the phrase because *Black's Law Dictionary* on page 751 of the 6th edition (1990) told the court that lying, since it was clearly "inconsistent with the principles of morality," must, by definition, be "immoral conduct." Therefore, the court said, the arbitrator had added to the contract and departed from its written words and had thereby "exceeded the express limitations of his contractual mandate."[18] The fact that the 6th Edition did not, in fact, mention lying did not seem to matter to the majority at all.

The majority had another reason for overturning the award. "Nowhere," even under the progressive discipline section of Article 24, the majority said, "does the CBA [collective bargaining agreement] provide for a penalty of a ten-day suspension from work."[19] It only speaks of warnings, three-day suspensions, and discharge. As a consequence, the court said, the parties have limited the arbitrator's authority to fashion such a remedy. In the majority's view, "once the arbitrator found that [Grievant] fabricated her story, he was bound to impose the penalty provided for by the CBA for that conduct."[20]

I characterized this opinion as particularly outrageous because it is so clearly contrary to Supreme Court doctrine and such an obvious intrusion on the arbitrator's authority—as the parties had fashioned it—to interpret the contract and to determine whether a specific action of management was or was not for just cause. I am not alone in that view. On March 15, the Academy members in attendance at the Southwest Regional meeting in Houston unanimously asked that the Academy file an amicus brief in support of the union's petition for certiorari in *Bruce Hardwood*, and the Academy's Executive Committee unanimously agreed. David Feller, our past president who, as you know, had much to do with the *Trilogy* when he was counsel to the Steelworkers and who wrote

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[18] *Id.* at 452, 154 LRRM at 2209.
[19] *Id.*
[20] *Id.* at 452, 154 LRRM at 2210.

our last amicus brief in *Misco*, has once again been pressed into service, not, I might add, at all reluctantly.

Beyond that, under the leadership of Bill Slate, the AAA, in a sharp break with a long tradition and very much to its credit, has agreed to file an amicus brief on its own. We do not know if the petition will be granted. Those in the field know that the Court, to say the least, has been most reluctant in this area. But our view is that if we do not bend our efforts to this task now, much of what the Supreme Court has said in the *Trilogy* and in *Misco* will be lost, and the lower courts increasingly will intrude on the system of self-government that management and labor have built over the years. If you think I exaggerate, read the opinion of a district court judge for the Southern District of New York in *Hill v. Staten Island Zoological Society*,[21] or the opinion of District Judge Stanley Sporkin, an otherwise knowledgeable and estimable man, in *Madison Hotel v. Hotel & Restaurant Employees Local 25*.[22] After those readings, you will be even more impressed with the truth of Justice Douglas's words in *Warrior & Gulf* [23] that, as compared to an arbitrator, even "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[24]

Though these are not isolated examples, my concentration on such cases should not be misunderstood. Most arbitration awards are not appealed, and when appeals are taken, many courts properly interpret and accept the limits of their authority. Others, however, do not and it is the Academy's role, in my judgment, to speak out when that occurs. There may be consequences when we do, but those consequences, I suggest, must be borne. For example, the rules of the Supreme Court require those seeking to file an amicus brief in support of a petition for certiorari to ask permission from both parties. If that permission is denied, one may seek leave from the Court. As expected, the employer in *Bruce* refused permission. But counsel went beyond that and suggested, when refusing permission, that an amicus filing by the Academy would cause the company to take a closer look at the arbitrators "who may be on panels submitted to it in the future." I alerted our Southwest Region members to that statement last month and have received no indication of a change in their resolve that the arbitra-

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[21] 153 LRRM 2410 (S.D.N.Y. 1996).
[22] 154 LRRM 2031 (D.D.C. 1996).
[23] *Steelworkers v. Warrior & Gulf Navigation Co., supra* note 4.
[24] *Id.* at 582.

tion process needs to be protected and that an amicus brief in a case such as this is an appropriate means of doing so.

Another means of protecting the arbitration process is one that many of us have emphasized over the years. The paper I delivered at Stetson was entitled, "Whatever Happened to Arbitral Finality: Is It Their Fault or Ours?" My conclusion was that the fault was shared. Some judges simply have refused to accept what the Supreme Court has repeatedly said and have failed to curb their natural proclivities. They are, after all, deciders, who have found it difficult to understand, when faced with an arbitrator's award, why they were ever told they could decide so little when they are not so limited when faced with commercial contracts or when reviewing administrative determinations.

But I must say this as well: it is also our fault. It is the fault of the arbitrators because, in many instances, we have not been careful enough or clear enough. In their articles, Abrams and Nolan, Cohen (and now Nicolau) have all found living examples of lack of clarity, inattention to detail, and failures to explain upon which judicial reviewers have feasted. Arbitrators, as they consider their opinions, need to anticipate the possible attacks and find ways to meet them, whether those attacks be exceeding jurisdiction, failing to draw the essence of an award from the contract, ignoring plain language, dispensing one's own brand of industrial justice, or violating public policy. Particularly when the matter is sensitive or hard-fought, we must craft our opinions carefully and, in a sense, write for the courts as well as the parties. Some years ago, Alex Elson[25] in reacting to the Abrams/Nolan paper and its unassailable assertion that "[c]raftsmanship is a fundamental aspect of the arbitrator's job,"[26] suggested ways in which the Academy could give greater substance to one of its stated purposes, that of fostering the "highest standards of . . . competence" among those in the profession. Some of his suggestions may not be to everyone's liking, but this is an area to which we should return. For the hard fact is that many adverse judicial decisions, either vacating awards or remanding them to the arbitrator for clarification, could have been avoided by greater clarity in thinking and in writing.

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[25]Elson, *The Arbitration Process: Comment*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 324.

[26]Abrams & Nolan, *The Arbitration Process: Part II. Arbitral Craftsmanship and Competence*, *id.* at 313, 324.

There is now even more reason to be on our guard and on our mettle. Consider the standard of review emerging in the non–collective bargaining context of employment law when the arbitrator is called upon to interpret statutes. The case I refer to is the District of Columbia Circuit's February 11, 1997, decision in *Cole v. Burns Int'l Security Services,*[27] with which you are all probably familiar. There, the court approved a mandatory, condition of employment agreement to arbitrate statutory claims, specifically Title VII, under the AAA Employment Dispute Rules and the Due Process Protocol *if,* and *only if,* the employer paid the arbitrator's fee.

I have commented on that conclusion and other aspects of *Cole* elsewhere. Here, I want to concentrate for a moment on the standard of judicial review articulated in that opinion. On that point, the *Cole* decision, written by our good friend Harry Edwards, a former arbitrator and member of the Academy and now the Circuit's chief judge, was foreshadowed by the Eleventh Circuit's earlier decision in *Interstate Brands Corp. v. Retail, Wholesale & Department Store Union Local 441.*[28] There, the Eleventh Circuit said that it owed no "special deference" to an arbitrator's interpretation of Department of Transportation regulations even though it could easily have been argued in that case that the regulations had been incorporated into the collective bargaining agreement and were, therefore, the arbitrator's province.

The *Cole* case was even more explicit. Judge Edwards extensively discussed the reasons behind the deference to arbitral decisions under collective bargaining agreements but concluded that this deference was not appropriate in the statutory context. He said that the assumptions underlying *Gilmer*'s[29] approval of the arbitration of statutory claims, namely, (1) that a person required to arbitrate does not "'forego the substantive rights afforded by the statute,'"[30] and (2) that review must be sufficient to "'ensure that arbitrators comply with the requirements of the statute at issue,'"[31] were "valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have *properly* interpreted and applied statutory law."[32]

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[27]105 F.3d 1465 (D.C. Cir. 1997).
[28]39 F.3d 1159, 148 LRRM 2086 (11th Cir. 1994).
[29]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[30]105 F.3d at 1487 (quoting *Gilmer v. Interstate/Johnson Lane Corp., supra* note 29, at 26, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 628 (1985)).
[31]105 F.3d at 1487 (quoting *Gilmer v. Interstate/Johnson Lane Corp., supra* note 29, at 32 n.4, quoting *Shearson/American Express v. McMahon,* 482 U.S. 220, 232 (1987)).
[32]105 F.3d at 1487 (emphasis added).

I would suggest that, with language such as this, particularly given the rather murky and somewhat inconsistent definitions of "manifest disregard of the law," that we may rapidly approach the criterion required for more than 20 years in Canada under the lead case of *McLeod v. Egan*.[33] There, the standard for arbitrators interpreting statutory law is that of "absolute correctness."

Whether we do or not, Chief Judge Edwards deemed that closer review really should not undermine finality because most employment discrimination claims were "entirely factual in nature and involve well-settled legal principles."[34] Nevertheless, he cautioned that arbitrators had better educate themselves about the law, "follow precedent and . . . adopt an attitude of judicial restraint when entering undefined [legal] areas."[35]

This admonition should give us some pause. As my espousal and many years of training of nonlawyers as mediators and arbitrators show, I discern no magic in being a lawyer. But whether we be lawyers or nonlawyers, we will have to educate ourselves even further. That is one of the things that the Due Process Protocol of May 9, 1995—the formulation of which and the success of which we owe to the Task Force Co-Chairs Arnold Zack, Chris Barreca, and Max Zimny—is all about. I know that we, lawyers and nonlawyers alike, have been interpreting statutes all along, under contractual antidiscrimination clauses, in National Labor Relations Board deferral cases, and the like. And when not interpreting statutes, we have drawn from them. Yet, when statutes are involved in the non–collective bargaining context, the standard of review will be more rigorous than that with which we are accustomed and comfortable. Some, such as the Committee on Labor and Employment Law of the Association of the Bar of the City of New York, have even gone so far as to suggest, with only a few dissents from arbitrators on that Committee, that judicial review in such cases be akin to that under the Administrative Procedure Act, pursuant to which the courts would not only review our legal conclusions de novo, but also review our factual findings to determine if there is "substantial evidence" to support them. As a consequence, a transcript would be necessary in every case.

It may well be that transcripts will be required in statutory cases, but if most of these cases are, as Judge Edwards suggests, fact-

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[33]46 D.L.R.3d 150 (1974).
[34]105 F.3d at 1487.
[35]*Id.* at 1488.

bound, let *me* suggest that subjecting arbitral factual findings to an Administrative Procedure Act "substantial evidence" review will seriously undermine finality and defeat the very purpose many voluntarily choose arbitration as opposed to administrative or judicial proceedings.

I should not be misunderstood. I have no quarrel with the standard of review Judge Edwards articulates with respect to our legal conclusions in statutory matters. After all, public law is public law, and it should be interpreted uniformly across the land. My concern is that the judicial activists on the federal bench, those of the 1980s, may well begin to import this more rigorous standard into their review of conventional grievance arbitration decisions. Judge Edwards tried to protect arbitration under collective bargaining agreements from this possible fate by a long dissertation in *Cole* on the difference between our kind of arbitration and all other kinds and why arbitration under collectively negotiated contracts should continue to be subject to the deference the Supreme Court has mandated. Though he was writing for his fellow judges, I doubt that the judicial activists will listen. At the very least, two quite different standards of review are bound to generate considerable confusion.

There is no doubt in my mind, by the way, that sooner or later the Supreme Court will extend *Gilmer*[36] beyond its stockbroker-plaintiff and, like many lower courts, sanction arbitration of statutory disputes irrespective of the employee's status, perhaps through a narrow reading of the "contract of employment" exclusion in the Federal Arbitration Act, as in *Cole*, or by other means. And if *Gilmer* is any guide, the Court will not be dissuaded by the absence of fair procedures when it does so.

This brings me to my last point, for which I am sure you are all grateful. All of us recognize what an important step the Due Process Protocol has been in this growing field of employment law and the arbitration of statutory disputes. By now everyone is aware of its provisions. It is being emulated in many places and looked upon as a standard. The House of Delegates of the American Bar Association has approved it as the "exemplar for systems of alternative dispute resolution." Both the AAA and JAMS/Endispute have adopted it and reserved the right as of last year to refuse to administer cases where a dispute resolution system does not ad-

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[36] *Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 26.

here to the Protocol's standards. The Massachusetts Commission Against Discrimination has in place a Protocol-based system of voluntary mediation and arbitration of discrimination claims. The U.S. Department of Labor intends to use it for Family and Medical Leave Act claims, claims under a number of whistleblower statutes, Occupational Safety and Health Act complaints, and affirmative action contract compliance matters. The Task Force on Alternative Dispute Resolution in Employment, which is now examining whether there is a need for an expanded code of ethics in this field, should be proud of its work. Though all members of the Task Force have been active, those of you who do not know should be aware that virtually all of this just-mentioned expansion of the Protocol's influence is rightfully a tribute to the energies of Arnold Zack and the seemingly untiring John Dunlop. They particularly deserve our thanks.

We have also recognized, however, that the Protocol, as important as it is, was only a first step. That understanding is what led me and President-Elect Milton Rubin to appoint a special committee last year. Formally, it is known as the Special Committee on Employment-Related Dispute Resolution, but we call it the "Beyond the Protocol" committee. It is chaired by Michel Picher of Toronto (Canada, too, has this unilaterally promulgated plan problem) and includes some of our most illustrious members.

Back in 1993, after a three-year review by a committee headed by Michael Beck, the Academy, while electing to remain at its core an organization of labor-management arbitrators, amended its constitution to incorporate the study and understanding of employment disputes. We also amended the Code of Professional Responsibility so that it now governs the behavior of our members who arbitrate in this area.

Now, four years later, the issue was how much further we should go. Should the Academy be setting standards for participation in employer-promulgated plans to which our members should adhere? Should we be telling our members that they should not accept cases in the employment and statutory area unless certain standards are met? Or, should we continue to content ourselves with educating our members as to the issues involving these plans and leave participation to individual discretion? That, as everyone knew, was the unfinished business of this organization.

Some have said that we should not be in this area at all, that we have gone far enough or perhaps too far. Let me register my disagreement with that view and tell you why.

Fairness is our business and the absence of fairness, wherever it occurs, should be our concern. We cannot ignore the fact that ours is a small world and that there are 100 million members of the work force who have no access to arbitration and that many of those who are being given access (or having such access forced upon them) are being subjected to unfair and biased procedures.

Let me give you an example. I know that this assembly does not eat or drink at Hooters. But if you did and if you happened to engage one of the company's employees in conversation, you would find that she is subject to an employer-promulgated arbitration system, which the company is free to change at any time and under which she is required to submit all employment issues, statutory or otherwise, to binding arbitration before a "Company approved" arbitrator who is not required to follow federal law. If an employee brings a claim, she is limited to a single deposition with discovery impermissible absent a "substantial, demonstrable need," a wholly inappropriate burden in statutory disputes. The arbitrator may award an employee back pay if she prevails, but punitive damages are capped at "one year of gross cash compensation," regardless of the nature of the employer's actions. Arbitral decisions under the plan are not subject to appeal under any standard of review. Moreover, the plan even purports to require administrative agencies processing an employee's claim to adjudicate that claim in accordance with Hooters' Rules rather than the statutes and regulations the agency is obligated to enforce. There is much more, but this should be sufficient for you to understand why my good friend Dennis Nolan and I, when asked by those challenging this plan, did not hesitate to declare that the plan was completely inconsistent with the Due Process Protocol and one in which reputable designating agencies and arbitrators would not participate.[37]

It is no small irony that the statutory rights of unorganized employees are being placed in the hands of unreviewable arbitrators with little or no experience in that area, while arbitrators in the organized sector, many with considerable experience in interpreting statutes, are told by *Alexander v. Gardner-Denver Co.*[38] that their authority in the statutory realm is minimal.

Given the backlog of administrative agencies and the desire of employers to avoid the perceived perils of jury panels and the costs

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[37]*Hooters of Am. v. Phillips*, Civil Action No. 4:96-3360-22 (D.S.C., Florence Div. 1996).
[38]415 U.S. 36, 7 FEP Cases 81 (1974).

of litigation, employment-promulgated arbitration will proliferate. Given the indifference of the courts to what goes on in the "real world"—for example, the Supreme Court in *Gilmer* and most circuit courts since have not been particularly interested in what really happens in the securities industry—plans such as Hooters will continue to be the vehicle of choice for many employers. Such plans will not go away on their own. There is no self-correcting mechanism to which they are subject. All of us in this community of ours—labor, management, and arbitrators—have a stake in hastening their demise. At risk is every ounce of the credibility we have established over the years with our design, implementation, and administration of fair procedures created to produce just results. Fairness is our business and fair arbitration should be our concern.

I am well aware that some in the labor movement do not look with favor on this view. They say that employer-promulgated arbitration is primarily a union-avoidance technique and that participation in such plans, fair or not, only aids those bent on preventing unionization. Most evidence suggests that the primary motive for employer-promulgated arbitration is litigation-avoidance rather than union-avoidance, but whatever the impetus, the criticism, in my judgment, is misplaced. It would leave the field to those with little concern for fairness. It also fails to consider the fact that resort to time-consuming and expensive lawsuits or hopelessly clogged administrative agencies is hardly an acceptable alternative for most employees. Beyond that, it ignores an organizing opportunity. That opportunity has not been lost on unions such as the Service Employees International Union, the American Federation of State, County and Municipal Employees, and the Teamsters. Locals in those organizations are offering representation to employees subject to employer-promulgated plans or legal representation insurance to those employees choosing to join their ranks. Whatever the vehicle, unions that reach out in this area can easily take the occasion to remind unrepresented employees that, once you get beyond the statutory area, what they lack is a contract dealing with working conditions against which the conduct of their employer can be judged.

Fully five years ago, in his 1992 presidential address, Tony Sinicropi, after discussing these changes to which we are all witness, reminded us, "We cannot postpone for a moment engaging and beginning to resolve the important issues that the future pre-

sents for our profession and the National Academy of Arbitrators."[39] Five years later, the future is here and we must come to terms with it.

All of what I discussed suggests—indeed, it advocates—a more assertive role for the Academy. Sinicropi called the Academy the "conscience of the employment-related dispute-resolution profession."[40] We must also be its voice.

We have now taken that step. Last Wednesday, May 21, 1997, the Board of Governors adopted a Statement of Principle.[41] While the Statement recognizes that under the present state of the law, arbitrators may choose to take cases arising under unilaterally imposed, condition of employment plans, the Academy, through its Board, now opposes such plans when they require, as most do, either explicit or implicit waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights. If a member chooses to consider service under such a plan, the Academy has adopted a set of Guidelines[42] that members should use as an aid in evaluating the fairness of any employment arbitration procedure in which they may be asked to participate. All of this is designed so that the Academy and its members can use our moral authority to ensure procedural, substantive, and remedial fairness.

The Guidelines, which go beyond the Protocol, are being given a wide distribution. They are not permanent guidelines, but current guidelines, with the Committee on Issues in Employment-Related Dispute Resolution monitoring their effectiveness in light of changing conditions and recommending modifications, if such be needed.

The Board has also authorized the filing of an amicus brief in *Duffield v. Robertson Stephens*,[43] a case in the Ninth Circuit that challenges the securities industry's arbitration system on constitutional and other legal grounds. In *Gilmer*, the Supreme Court rejected a facial challenge to that system. However, the factual record in

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[39]Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 1, 3.

[40]*Id.* at 14.

[41]The Statement of the National Academy of Arbitrators on Condition of Employment Agreements is reproduced in Appendix B.

[42]The Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems is reproduced in Appendix C.

[43]No. C-95-0109-EFL (N.D. Cal. 1995).

Duffield is much more extensive and squarely presents the issues *Gilmer* left undecided.

There is further favorable news. As you know, the American Arbitration Association (AAA) had not taken a position on mandatory versus voluntary predispute plans, declaring it would administer both as long as the Protocol was followed. Now, however, the AAA is about to take a stand. Soon, if all goes according to plan, it will affirmatively encourage employers to offer their employees voluntary, rather than condition of employment, agreements. The plan the AAA is now considering for its own hourly employees can well serve as a model. That plan has a mediation step followed by arbitration at the *employee's* option. If the employee chooses arbitration, the AAA must arbitrate and will also contribute $1,000 to the employee's counsel fees. Moreover, the employee also has the right to choose the source from which the arbitrator is selected, whether it be an AAA panel, one from the FMCS, or any other source. For these initiatives, the AAA should be commended.

If we believe these are good ideas, we should say so, and we have. If we believe that employers should stop offering bonuses or participation in a profit-sharing plan to those who sign predispute agreements and withholding those benefits from employees who refuse, as some employers have done, and that predispute plans should be offered without strings, on a fully voluntary basis, with a guarantee against retaliation or disparate treatment if the offer is not accepted, we should say so, and we have. And if we believe that the lifting of the veil of confidentiality of decisions and making them available to employees and the public, redacted if necessary, as the AAA is now considering, is a good idea, then we should say that as well. Reasoned opinions in statutory cases are clearly a necessity. But the question is a larger one, for what good are opinions to an individual claimant if there is no access to them? It is relatively easy for union and management to know what went before, even in other industries. An individual, however, does not have those resources. Unless, at a minimum, a claimant knows what other arbitrators have ruled with respect to the company, he or she is at a distinct disadvantage. Beyond that, there needs to be, in my judgment, a mechanism or reporting service that will make decisions at other companies readily available.

My point is that we cannot be silent on these issues. Our voice must be heard. If not, we forfeit our leadership role, and we will have no say in the future of dispute resolution and the development of mechanisms as "workable, fair, and affordable as [those in] the

current system of labor arbitration."[44] We have stepped forward. What happened this week is an important and unprecedented step for this Academy and a clear signal that we intend to lead.

If we continue to do so, if we continue to expand our horizons, then we must seriously consider once again our membership criteria. I suspect that the examination of this area will be painful; it always has been. Yet, the expansion of our horizons and our membership, though separate questions, are clearly linked. For if we are to say to those who are arbitrating statutory issues, some of which are highly complex, that you must do so at a particular ethical level, we must ask ourselves if we should continue to say that what those individuals do and the professionalism with which they do it is not worthy of consideration for membership purposes.

There are hard choices ahead, my friends, difficult challenges, but if we face and resolve them in a suitable way, the prize is knowing that we have made a difference, that we have once again done something significant or, at the least, tried.

All arbitrators surely recognize, as Ralph Seward said many years ago, that "[a]rbitration is only a minor phase of labor relations and a still more minor phase of civilized life."[45] Nevertheless, it stands as he said, "in the main stream of man's historical effort to bring reason to bear upon the solution of his problems."[46] Though as Seward put it, being an arbitrator is "a training school in humility,"[47] the profession is an admirable calling. Yet it will remain so only if those within it continue the unceasing promotion of professionalism and the constant protection of the arbitration process.

Perhaps Byron Abernethy, the last founder to be Academy President, said it as well as anyone in his presidential address in 1983:

> The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of responsibility for advancing socially desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[48]

Let it continue to do so.

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[44]Sinicropi, *supra* note 39, at 20.

[45]Seward, *Arbitration in the World Today*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, 1948–1954, National Academy of Arbitrators, ed. McKelvey (BNA Books 1957), 66, 66.

[46]*Id.*

[47]*Id.* at 67.

[48]Abernethy, *The Presidential Address: The Promise and the Performance of Arbitration: A Personal Perspective*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), 1, 13.