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NEW FRONTIERS IN ORGANIZING

by Randi Abramsky

The opening plenary session, New Frontiers in Organizing, got the annual meeting off to an excellent start. The session was moderated by NAA members Marty Malin and Susan Stewart, with four capable speakers: two Americans, Steven Ury, Associate General Counsel, SEIU, and Adam Wit, Littler Mendelson, and two Canadians, Richard Charney, Global Head and National Chair of Employment and Labour Law, Norton Rose Fulbright, and Lewis Gottheil, Counsel for Unifor, the newly merged union of the C.A.W. and C.E.P. The topic involved a review the state of organized labor in the U.S. and Canada and how both unions and employers are responding.

The statistics regarding organized labor, as outlined by Richard Charney, were disappointing, particularly in the U.S. In the U.S., less than 7% of the total workforce is unionized and that includes 35.3% in the public sector. In Canada, it is 30% overall. The public sector is 71% unionized while the private sector is 18% unionized. In both countries, the percentage of unionization varies by region as well as gender. There has been a bigger drop of unionization among men, most likely as a result of the loss of manufacturing jobs.

Steve Ury, Associate General Counsel of the SEIU, however, sees this situation as an opportunity for significant growth -- a "record high of unorganized employees." He noted that entire industries are ripe for organization. Ury pointed out that the fast food industry is organized in other countries throughout Europe and other locales. Adjunct faculty have also been historically unorganized, but with inroads being made.

Other models of collective bargaining are also being explored. Adam Wit reviewed the situation involving Volkswagen and the U.A.W. in Chattanooga, Tennessee, involving a workers' council concept, modeled on councils that the company has worked with in other countries. The U.A.W. lost the vote but the concept was a first and demonstrated a different approach.

Lewis Gottheil, Counsel for Unifor, the newly-named and newly-combined C.A.W. and C.E.P. unions in Canada, discussed his union's work with Community Chapters. This targets groups of workers historically excluded from unionization--

L to R: Lewis Gottheil, Susan Stewart, Richard Charney, Adam Wit, Steven Ury & Marty Malin

unemployed workers, unorganized employed workers, freelance workers, temporary workers, and even self-employed workers. Community Chapters are established either within an existing local union or by way of a direct grant of a charter. Members commit to one-year of membership and nominal dues ($5 to $10/month). The chapter provides the members with services and benefits, such as advice regarding rights in the workplace, educational opportunities and programs, and a group benefits package. Two community chapters have been established to date, with 30 more proposed. The first, Unifaith, is a community chapter of clergy and faith-based workers of the United Church. The second is the Canadian Freelance Workers, consisting of approximately 250 independent media workers. Potential groups include translators, interpreters, and injured workers. Unifor, according to Gottheil, is proceeding slowly and carefully.

According to Steve Ury, there are similar pilots in the U.S., with unions taking a "holistic view of unionization." He sees an opportunity with homecare workers in light of the "gray tsunami" that is coming demographically. Employers, however, according to Adam Wit, have been resistant. The new union strategy is causing employers to adjust their own strategy.

The discussion then turned to the Framework of Fairness – a historic agreement between the C.A.W. and Magna International, a very large auto parts manufacturer (83,000 employees, with 229 manufacturing operations) – in which the C.A.W. promised, among other things, not to strike. The framework recognized that the Union could be an important ally in addressing competitive challenges. The hope was that it would result in furthering unionization but it has been a "disappointment." Gottheil suggested that the timing of the agreement, October 2007, was a significant factor as it was the start of the prolonged and severe downturn in the economy, which devastated the entire auto sector.

To date, these new approaches have not led to a significant increase in unionization, and the question was posed whether or not these new approaches were sustainable, if, for example, the minimum wage were raised to $15 per hour. The panelists were asked for their best guess on what the future holds. The optimist of the group, Steve Ury, agreed that this was a time of "momentous change in the nature of work," largely due to technological change and believes that unions will adapt to this new world. Lewis Gottheil acknowledged that he was concerned about the next 25 years and thinks that through consolidation of small affiliates and community-based approaches, unions can maintain their relevance. Richard Charney underscored the real pressures on unions, citing the contracting out of garbage collection in Toronto – a fully unionized town – as a momentous change, yet contended that there may be models similar to those used in the construction industry (related employers, master agreements) that assist in retaining unions as the "loyal opposition." Adam Wit posited that unions are a "struggling industry" for which the traditional model no longer works, and suggested that unions need a significant shift to maintain their viability and growth, particularly in a global economy.

Interestingly, the theme of the annual conference was "The Test of Time." At this juncture, however, this period of enormous change in the nature of work, this panel showed us that while there is reason to be hopeful for the future of unionization, there's a long way to go.

WILL WE SEE THE RETURN OF THE LABOR STRIKE?

by Louise B. Wolitz

Moderator Walter De Treux, NAA, led off with the observation that from 1947 through 1981, major work stoppages in the United States, involving more than 1,000 workers, numbered in the hundreds every year, from a low of 145 to a high of 437. But since 1982, those numbers have plummeted, from a high of 96 in 1982 to a low of only 5 in 2009. Observers have cited various reasons for the dramatic decline in the use of the strike, including unfavorable economic conditions, a conservative political climate, declining union membership, the defeat of some hard-fought strikes in major industries, and the ability and willingness of employers to use replacement employees. However, there have been a series of recent high profile strikes and other job actions, such as the truck drivers' strike for recognition in Long Beach – Los Angeles, California, 21,000 Seattle grocery workers threatening to strike over contract demands, a four-day work stoppage in the San Francisco Bay Area shutting down BART, the nation's fifth largest commuter rail system, a one–day Boston school bus drivers' strike, and multi-city job actions and demonstrations at Walmart and in the fast-food industry, and an eight-day school teachers' strike in Chicago. Are these recent and well-publicized work stoppages, or threats of a stoppage, a sign that we are seeing a return of the labor strike? Can labor use the tactic effectively?

Thomas Kochan, NAA, MIT Institute for Work and Employment Research, said that the questions are, "Where will workers get their bargaining power from? What form will it take?" Up until 1980, there were positive returns from strikes. The more strikes, the more wages increased. After 1980, the returns were negative. The strike became a defensive mechanism, to keep work sites from closing or to respond to concessions demands, such as strikes at Greyhound, Hormel, and Eastern Airlines. We will not see a return to the numbers mentioned in the pre-1980 period, although there have been strikes in a few industries, such as long shore, transportation, and the public sector, where unions have leverage. The traditional strike is not likely to play as big a role as it has in the past.

According to Kochan, unions are forming alliances with community groups. No labor union can act alone; they must have public relations strategies. They provide information to the public, for example on health and safety issues in Bangladesh and provide information to workers and the public about good and bad jobs and employers. They can participate in corporate campaigns and enter partnerships with employers. They are becoming more active at the state and local level on such issues as minimum wage or living wage campaigns, such as the SEIU participation in the minimum wage campaign in Seattle. They are networking and using the power of the media. They are channeling the increasing unrest about rising inequality. Young people are using more creative ways to leverage influence through informal and collective actions. They are using mediation and negotiation and even arbitration. All labor politics are local, and unions are increasingly participating in political action and coalitions on issues like the minimum wage and the living wage, to improve the lives of working people. They are focusing on alternative means to put pressure on employers, such as one-day demonstrations or strikes. Unions are also cooperating with each other.

According to Kochan, the AFL-CIO's structure, under which power rests with the national unions, is antiquated. There is an enormous amount of cooperation among unions at the local level today. The mayor of Boston comes out of the labor movement and a labor coalition helped him get elected. There are lots of personal relationships at the local level and cooperation on community initiatives. Labor leaders serve on the boards of hospitals and civic organizations.

Jorge Ramirez, President of the Chicago Federation of Labor, strongly agreed with Kochan on this point. He said that the Chicago Federation of Labor has picked up local union affiliates even if the national union is not affiliated with the AFL-CIO. They are concerned with what works locally. The Chicago Federation of Labor focuses on local politics. The Boston example discussed by Kochan is an example of a trend. Chicago unions are concerned with the shrinking middle class. They are for a push for an increase in the minimum wage. Decisions on the minimum wage are made by who gets elected. This is a community issue. There is a moral high ground in protecting the middle class and providing for upward mobility. People feel that they have not gotten a fair shake. They work on these issues through social media and collective action. They want to reach the younger generation. During the Chicago teachers' strike, they forged a link with the community. For instance, when a butcher was fired at a local market, the

(Continued on Page 4)

L to R: Karl Fritton, Walt De Treux, Jorge Ramirez, Karen Kent, and Thomas Kochan

WILL WE SEE THE RETURN OF THE LABOR STRIKE? *(Continued from Page 3)*

men tapped their knives on a table and everybody walked out. They demanded the butcher be put back to work and achieved their goal in 15 minutes.

A community coalition works. Employees are willing to strike when they have nothing left to lose. People get frustrated when they work too many hours, at too many jobs, for too little pay. In Chicago, they launched the PROUD UNION HOME campaign. A survey showed that 20% of the respondents knew why they hated unions and 76% of the respondents knew that unions were necessary but could not tell you why. The PROUD UNION HOME campaign tapped into something. They got 85,000 signatures in support of unions. Thirty percent of the people did not belong to a union, but supported unions to stand up to corporate interests. The standard of living in the U.S. has gone to number 12 in the world from number 1. There is frustration out there.

Karl Fritton, Esq., Reed Smith, (Chicago, IL and Philadelphia, PA), a management attorney, said that wages have been stagnant and benefits have decreased. Employers are shifting a greater percentage of benefit costs to their employees. Senior management is grossly overpaid and insulated. Workers are concerned with job security and job loss. Employers are not in a position to weather strikes. Alcoa recently could not weather a strike, so employees got a good deal. He believes more strikes are unlikely because of a loss of union density, a lack of cooperation and coordination among unions, and NLRB decisions which encouraged parties to bargain hard and put pressure on unions to accept proposals.

Union membership is down to 7% in the private sector. While unions still have power in some markets, this is the exception. Is it bad that strikes are not coming back? One, two or three day strikes can be therapeutic. Employees get some anger off their chests and management sees that they really need those employees. Today, every employer is working on a just-in-time basis. The product needs to get out today, on time, or they will lose the account. The employer cannot afford a walk-out. Unions have realized that if they pull their asset base out of the plant, employers will bring in workers from other plants or contract out. The employer will find that the operation is now more efficient. Often, fewer people come back to work after the strike, such as in the Caterpillar-UAW case.

The labor movement needs to get back to basics. They need to represent individual employees, not use their money for political campaigns. Unions need a service or a product. They are now selling representation, not job security, or defined benefit plans, or medical plans. There is a mismatch of training and education with employer's needs. Unions can play a role in improving education and training to improve the workers' value to the organization.

Fritton believes that organized labor should get a seat at the table. Maybe the adversarial model of our labor law is broken. It has contributed to the decline of unions. Unions should look at fixing the model. They should support the repeal of Section 8(a)(2). Top down organizing is not going to work within a legal framework. Unions should be concerned with how to improve workers' livelihood. We need a better model. The strike is irrelevant today.

Karen Kent, President of UNITE HERE, Local 1, is the head of hospitality workers in Chicago. A strike at the Congress Hotel began on July 15, 2003, and concluded last year, 2013, a ten-year strike. They have had a lot of strikes in their local. They built a stronger union starting in 2000-2002. In the Congress Hotel situation, the union was angry about a lack of wage increases. In August 2002, the contract was expiring for 7000 hotel workers.

They did not have a city-wide strike. The Governor intervened and they achieved a successful contract on the Sunday morning of Labor Day weekend. The Congress Hotel would not go along with the negotiated contract. But 100% of the workers supported the strike. The strike was a deterrent for other employers. They held other employers to the same standard. They will continue to use the strike to achieve their goals. It can be valuable.

However, it is clear that the strikes of the pre-1980 period will not return. Unions have developed other effective tactics, such as alliances with community groups, cooperation at the local level, demonstrations, support for minimum wage and living wage, and short strikes with which to demonstrate their power. However, in certain industries, and under certain circumstances, the strike is still a valuable tool.

"Story Time" by NAA President Jim Oldham

Reported by Barry Goldman

NAA President and Georgetown law professor James Oldham delivered a paper as his Presidential Address. The paper is formally titled, "Historical Perspectives on the Judicial Enforcement of Arbitration Agreements." Informally, it is called "Story Time" because, as President Oldham explained, "A central theme will be my quarrel with a nineteenth century Supreme Court opinion by Mr. Justice Joseph Story."

In the 1845 case of Tobey v. Bristol Justice Story wrote, "No case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration has ever been specifically enforced in equity…. So far as the authorities go, they are altogether the other way." Story went on, "At all events, it cannot be correctly said, that public policy, in our age, generally favors or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to ordinary operations of the common law."

President Oldham respectfully disagrees. In his view, "[t]he practice of arbitration in 18th and 19th century America was in fact extensive, even robust."

In support of this view, Oldham went back to the mid-1690s when the Board of Trade of London assigned John Locke to "draw up a scheme of some method of determining differences between merchants by referees [arbitrators], that might be decisive without appeal." Locke recommended to the Board, and the Board persuaded Parliament to enact, a statute that allowed "make believe" law suits "solely for the purpose of making the contempt power of the common law courts available for enforcement" of agreements to arbitrate.

By the time Story wrote his opinion in Tobey these "John Locke statutes" had been enacted in 22 of the 27 states, and "the process of arbitration in America was well known and actively practiced."

Richard Bloch introduces Jim Oldham

"The founding fathers," Oldham writes, "were completely familiar with arbitration procedures," as can be seen in the collected papers of John Adams, Alexander Hamilton, Andrew Jackson, John Marshall, Robert Morris, and Daniel Webster. Thomas Jefferson had a particularly lively correspondence on the subject of arbitration with a carpenter and joiner who worked on Monticello and the University of Virginia. The carpenter's name, as it happens, was James Oldham.

At the same time that this extensive, even robust, tradition of arbitration was developing, a contrary tradition was developing in the courts. In the 1743 case of Kill v. Hollister, Chief Justice Lee of the Court of the King's Bench wrote, "The agreement of the parties cannot oust this court." Oldham writes, "This expression - that an agreement to arbitrate by private parties could not oust the courts of jurisdiction – caught on in England, was repeated in subsequent cases, and travelled to America."

The King's Bench language was included in the 1924 House Report on the bill that became the Federal Arbitration Act:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the grounds that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment.

In 1991, the Supreme Court, in Gilmer v. Interstate/Johnson Lane Co., explained that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footings as other contracts."

Why, Oldham wonders, was "the pervasiveness of the state statutes adopting the John Locke method…so obscure, even to the Supreme Court?" The answer "may simply be that the enforcement proceedings did not appear in the printed records of the time."

The paper concluded with a quotation from a 1789 letter from one Zephaniah Turner to President George Washington that expressed a sentiment familiar to all of us:

I would not mean to discourage the Study of Law, but I really find that the multiplicity of Students in that branch, in this State, has been an inconvenience to the Sons of reputable Parents and more so to the Parents themselves.

THE AIRLINE INDUSTRY: CONSOLIDATION AND THE EXPECTED EFFECTS

by Joyce Klein

In this session, Joshua Javits, NAA, who did double duty as both moderator and panelist, led a dynamic discussion of the effects of the recent round of mergers on the future of the industry and its labor relations. Calling the recent consolidations, including the mergers of American Airlines and USAirways and of United Airlines and Continental Airlines "an enormously significant event," Javits provided an overview of the industry from deregulation in 1978 to the present. Javits cited the extensive collaboration between American and USAirways and the unions during the period when American was restructuring in the bankruptcy process as critical to the future success of that merger.

Panelists described the efforts the airlines and the unions were making to ensure the return to a stable and sustainable industry. Airline Pilots Association (ALPA) President Cpt. Lee Moak described ALPA's engagement at every level to ensure that American carriers are healthy going forward in this period of global economic competition. Describing the economics of a global airline industry as "full contact football," Moak characterized the effect of international policies on the airline industry as so significant that ALPA has shifted approximately half of its resources to the international stage. Moak suggested that the failure of founding U.S. flag carriers such as Pan Am and TWA stems from a lack of vision and a lack of supportive governmental policies. Moak emphasized that state-owned foreign carriers are heavily invested in influencing American policies. Discussing future threats to the domestic airline industry and its employees, Moak mentioned the policies of Norwegian Air International, a Norwegian flag carrier, basing flight crews in Thailand, at pay rates of approximately $500 per month, then flying the crews to Norway before flying into the United States.

Senior Vice President – Labor Relations at United Airlines Douglas Keen discussed the steps air carriers had taken to position themselves for the future including more rationalized capacity and de-leveraging their balance sheets. McKeen sees global alliances as an opportunity for continued success and emphasized that the industry is looking for a level playing field internationally. However, McKeen acknowledged that United still had work to do to integrate the cultures of United and Continental. McKeen cited the impact of representation elections after the merger and the difficulties of negotiating 18 separate agreements. Noting that United continues to operate with two joint agreements and with separate agreements for the Flight Attendants, McKeen cited expedited mediation provided by the National Mediation Board as enabling the carrier to negotiate new agreements in approximately six months. McKeen also noted that pilot shortages were having a significant impact on regional markets and had caused United to pull out of markets where the regional provider could not provide enough pilots.

Association of Flight Attendants (AFA-CWA) President Veda Shook cited the difficulties in organizing system-wide particularly for those who perform traditional reservation center work. Shook cited the seniority integration provisions of the McCaskill-Bond Amendment as very helpful in permitting a fair and equitable seniority integration process. Shook contrasted the difficulties of the American flag carriers in comparison to foreign flag carriers who receive government subsidies for infrastructure, labor, and fuel. Additional infrastructure problems in the United States include the lack of available public transit to and from airports as well as aging airports.

L to R: Joshua Javits, Veda Shook, Douglas P. McKeen and Lee Moak

LESSONS LEARNED: A Look at the 2012 Chicago Teachers' Strike

by Benjamin A. Kerner

"Lessons Learned: A Look at the 2012 Chicago Teachers' Strike," was moderated by Amedio Greco, NAA, and presented by Robert E. Bloch (for the Union) and James C. Franczek, Jr. (for the Employer).

The Chicago schools is an enormous system: 25,000 teachers and 1200 administrators working in 675 schools, with over 400,000 students and a 2012 budget of approximately $6B. The system has its own bargaining law. The original law outlawed bargaining on such crucial subjects as layoffs and recall. Then, this law was amended to make the formerly illegal subjects permissive subjects. In 2011, the length of the school day and the duration of the school year became permissive subjects. However, notwithstanding bargaining on the subject, Mayor Emanuel imposed the longest school day and the longest school year on record.

In 2010, Karen Lewis, described by some as a "difficult person," became the president of the Chicago Teachers Union. She began bargaining in the fall of 2011 by identifying 579 Union proposals. (That included a 29% pay increase over 2 years.) The Board responded with 433 initial proposals for a grand total of 1012 party initial proposals. The bargain proceeded through 64 formal negotiation sessions, 37 informal sessions, and 7 sessions devoted to mediation and/or factfinding. A factfinder's report was produced by Edwin H. Benn, NAA. Franczek conceded that "if we [both parties] had adopted the factfinding report, we would have avoided a strike." However, that didn't happen—both parties rejected the factfinder's report.

The special Chicago teachers' law required 75% support to call a strike, but the teachers supported their Union's call to strike in fall 2012 by 91%. This also was the first time that the public demonstrably supported a teachers' strike. The teachers were off the job for 8 days.

The net result of the strike, according to Mr. Bloch, was that the Union succeeded in putting the brakes on so-called educational reform. The new contract also contained some job protections in regard to discipline/discharge and involving lay-offs and recall. The new contract reverted to a more reasonable length of teacher day, while contemplating the hire of 500 new teachers to fill out the school day with non-core subjects.

L to R: James C. Franczek, Jr., Amedeo Greco, and Robert E. Bloch

One crucial aspect of the reform agenda was that student achievement in core subjects should be linked to teacher evaluations. The new contract accredited student achievement as one element of teacher performance evaluations. A total of 611 changes, amendments, or deletions were incorporated in the 2012-15 contract.

Lessons learned?

- Two "difficult" personalities in the leadership of a highly politicized labor dispute can exacerbate things.
- The best labor contract in the world will not alleviate the impact of exogenous factors such as apathetic parents, poverty, or substandard child nutrition on student achievement.
- You stand a better chance of getting to timely agreement when you start with a dozen proposals on each side rather than a combined total of over 1000.

What Arbitrators Need To Know About The Postal Arbitration Process

by Daniel Zeiser

A panel consisting of the United States Postal Service (USPS) and its Unions discussed their arbitration processes, changes since the National Agreement, and what arbitrators need to know about their procedures. Thomas J. Branch, Manager of Contract Administration for the National Postal Mail Handlers Union, began the discussion by describing the Mail Handlers' Modified Arbitration Procedure and its efforts to prevent cancellation of hearing dates. The goal is to improve effectiveness and reduce the costs of the grievance and arbitration procedure. The USPS and the Mail Handlers have adopted a Contract Interpretation Manual so the parties can determine whether an issue has been addressed previously. The parties create a Joint Grievance File (JGF), which includes stipulated facts, documents, and arguments, and exchange relevant documents. The parties meet monthly to review and discuss cases. Those that are not resolved are scheduled for one of three processes: a Stipulated Hearing, a Modified Alternative Hearing, or a Regular Hearing. At least three cases are scheduled for each date.

Tony McKinnon Sr., Director of Industrial Relations for the American Postal Workers Union (APWU), stated that the APWU has not yet perfected a procedure to reduce its approximately 33,000 cases, though it is looking at the National Association of Letter Carriers' and other models. McKinnon said the Union is looking to do more than one case a day, it wants arbitrators to decide each case based on the facts presented, and it wants arbitrators rather than mediators. APWU members want finality and the Union wants arbitrators to explain their reasoning to educate the advocates and let the parties know how the issue should be handled when it arises again. As to remedies, McKinnon said the APWU does not like it when arbitrators "split the baby."

Manuel L. Peralta Jr., Director of Safety and Health of the National Association of Letter Carriers (NALC) described how the NALC and USPS reduced grievances from over 100,000 in 1998 to approximately 2,000 by the year 2000. The seven to ten year backlog has been reduced to three to four months. In its procedure to standardize dispute resolution, the parties create a standard file and utilize a Joint Contract Administration Manual (JAM) to interpret their agreement. A disagreement over contract language can be resolved at the national level only. Peralta told the audience that arbitrators who disregard the JAM will be former panel arbitrators. Besides following the JAM, the NALC wants arbitrators to provide clarity in decisions so that the parties know what the decision is and what should happen the next time.

L to R: Thomas Branch, Tony McKinnon, Sr., Margo Newman, Mike Mlakar, Manuel L. Peralta, Jr., and Joey Johnson

The National Rural Letter Carriers' Association (NRLCA) represents 120,000 members. Joey C. Johnson, Director of Labor Relations for the NRLCA, indicated that the parties negotiated a joint dispute resolution procedure, which included the creation of a joint file and a loser pay provision. The Union works well with the USPS to resolve outlier cases and schedule those that need to go forward. The parties now have 156 cases nationwide, with 62 currently on the docket. In addition to the Union reviewing cases during the grievance procedure, outside counsel reviews them to ensure the Union does not appeal those where management correctly did its job. Johnson described how the Union expects arbitrators to decide difficult cases where the parties are unable to resolve a dispute and counsel advises the case should proceed. The NRLCA wants finality, intellectual honesty, and clarity in the decision so the Union knows why it won or lost.

Mike Mlakar, Manager of Field Labor Relations for the USPS, regaled the audience by describing how the USPS had over 100,000 cases in 1987 and was regularly called in front of Congress and berated for its poor bargaining relationships. Currently, it has about 33,000 pending arbitrations, most of them with the APWU. The USPS has reduced the cost of cancelled hearing dates, from $5-7 million five years ago to under $500,000 currently. Mlakar indicated that turnover at the agency has had an impact. Labor relations training has increased because the labor relations staff is less experienced. Many staff have less than two years' experience, requiring more training to recognize which cases should be resolved before hearing. The USPS has negotiated the JGF with the Mail Handlers and is working to do so with the other Unions. This allows the agency to handle more cases each day and resolve minor issue cases based on the JGF. Mlakar stated that the USPS wants arbitrators who take the facts before them and decide based on those facts, who understand contract interpretation is done only at the national level, who fashion specific remedies or are as specific as possible when remanding to the parties, and who write clear awards.

HOT OFF THE PRESS: SPORTS, LABOR LAW, ARBITRATION AND COLLECTIVE BARGAINING

by Jim Darby

Steroids, concussions, unionized college athletes, "bountygate": the sports world has become a legal playground. Guest speaker, ESPN Legal Affairs Analyst Lester Munson, opened the panel giving an overview of a number of these timely topics from a media perspective.

Munson expressed frustration over the recent drug-testing arbitration process, where the proceedings are private and the arbitrators simply "shut-up." He commented it was difficult for the media to cover the Ryan Braun arbitration, relying only on information leaked by the parties. Munson described how the Union leaked its winning result in the Braun case -- a decision that was "surprising" and a "good story for ESPN." To the contrary, Munson characterized the A-Rod case as "very public," with both sides issuing many press releases throughout the process.

According to Munson, the Northwestern University NLRB case presents an intriguing issue for the media to cover, since the NLRB process is foreign to it. Munson reviewed the common law definition of "employee" and listed the many ways the football coaches control minute aspects of the players' lives (from where they can live to what social media they can use) in return for the players "tendering" their services and receiving large scholarships. He chided the University for focusing on how unionizing will create chaos, while neglecting to focus on the employment relationship issue.

Panelist David Prouty, General Counsel for Major League Baseball Players Association, noted that the MLBPA has a rule of not publicizing their player arbitration victories and that the Braun decision was never leaked by the Union. Questioning the credibility of "leaks," Prouty observed that whoever leaked the Braun results did so prior to the hearing. While he disagrees with the decision in the A-Rod case, Prouty respects the arbitration process that was utilized and the benefits of having a full hearing before a neutral. Additionally, Prouty commented that the MLBPA agreed with the imposition of tougher testing for performance enhancing drugs (PEDs) in conjunction with stricter confidentiality provisions. He characterized the process as having a "positive outcome" overall.

Panelist Tom DePaso, General Counsel for National Football League Players Association, agreed that the Northwestern case was correctly decided and that finally "the players are now empowered." He also remarked that new antitrust routes against the NCAA are being considered and that this issue is "not going away." DePaso also stated that the NFLPA has pushed for a new deal on PED testing, and that progress has been made on testing for HGH. However, he cautioned that any program has to include a right to appeal to a neutral arbitrator. Currently, the Commissioner has the final word.

DePaso also expressed his view that the media "has changed our business," especially due to the rapid and increased use of social media. Off-the-field conduct of players is in public view, which has made the Union's job much tougher.

Panel member Dan Halem, Senior Vice President and General Counsel for Major League Baseball, dismissed the notion that sports arbitration is a "great gig" for arbitrators. He characterized the A-Rod case as the "X Games for arbitrators." Halem stressed that arbitrators looking to take on this work must be "trained and patient," and expect to be terminated for good reasons or no reason at all. Although the Braun and A-Rod cases were very difficult, Halem expressed delight over the fact the parties were miraculously able to bargain and implement a new testing program mid-term.

Audience members asked about the concussion problem in football and whether the panel believed it impacted the result in the Northwestern case. DePaso noted that the NCAA does not currently have a program in place as does the NFL, and that certainly long-term health insurance issues are at play in that dispute. He described the concussion protocol now used in the NFL (which includes an on-field Neurological Consultant and a trainer in the booth looking for concussion symptoms) and is hopeful it "pushes down to the NCAA."

A question also arose regarding the decision quashing A-Rod's subpoena to have Commissioner Selig testify. Halem noted that the arbitrator made 25 separate rulings in that case, and as with all of them, the arbitrator carefully considered precedent and practice before determining that Selig would not have to appear. He also observed that since the MLB had the burden of proof, it was up to the MLB to decide whether or not it wanted to produce the Commissioner as a witness and for the arbitrator to decide whether the MLB met that burden.

Finally, audience members queried whether it is a problem for the neutral to be a sports fan or a fan of a particular team. The panel agreed that this is not a "deal breaker" as long as the neutral discloses any such affinities. As a general rule, in baseball salary arbitration the parties do not select a neutral from the player's team's home city.

Rocky Perkovich with Lester Munson, Tom DePaso, David Prouty and Dan Halem

A THREE JUDGE PANELCONVENES IN CHICAGO

Reported by James S. Cooper

Just in case you were wondering, the federal bench is as uncertain and confused by the status of labor and employment arbitration as we are. Despite moderator Barry Winograd's pointed and perceptive questions as he attempted to elicit the view from the bench, the Honorable Laurence H. Silberman (Senior Judge, D.C. Circuit Court of Appeals), the Honorable Diane P. Wood (Chief Judge, 7th Circuit Court of Appeals) and the Honorable Paul L. Friedman (D.C. District Court), provided limited prognoses about what will happen, but plenty of insight on what they saw going on in their court rooms. At the District Court level, Judge Friedman sees a lot of statutory discrimination cases and a smattering of employment law cases and almost no traditional labor law cases. This does not mean his docket is not chock full of employer/employee related cases, but many of these are outside the realm of collective bargaining issues such as wage and hour and pension benefit cases.

Judge Wood's docket is similarly barren of traditional labor law cases, but she has seen very high quality employment law litigation. She recently served on a panel for the organized employment bar sponsored by the American Bar Association and reported that she was very impressed with the organization and depth of the plaintiff and defendant bar. The arbitration of these disputes is the future, and arbitrators can no longer rely on the traditional collective bargaining agreement grievance dispute as the sole source of their livelihood.

Judge Silberman, along with Judge Harry Edwards, represents a long line of traditional labor lawyers who have taken seats on the D.C. Circuit. He simply does not see that line continuing with the near disappearance of the traditional union/management issues and the slimming down of the traditional labor bar. The melding of the FAA with §301 actions represents a further tightening of the noose around the long-established "national labor policy." All three judges agreed that the success of wage and hour legislation, health care coverage, and the growth of individual retirement plans have diminished the need for employees to bring a union onto the scene. The unions' success legislatively has brought about the diminished demand for union representation. While the judges presented their view as one of uncertainty, anyone sitting in that audience would not go away with a feeling of optimism about the future of traditional labor -management arbitration.

L to R: Hon. Paul Friedman, Barry Winograd, Hon. Diane Wood and Hon. Laurence Silberman

Distinguished Speaker Luncheon, Featuring George H. Cohen

Reported by Ben Kerner

George H. Cohen

At the luncheon on Friday, May 23, George H. Cohen, retired Director of the FMCS, was honored. He served four years as Director, following a 40-year career as union advocate. He added, "I want to set the record straight: I am not qualified to be a member of the National Academy."

Regarding his service at the FMCS, he ad-libbed, "I had the best job in the federal government. I had no boss, no board. I had no regulatory authority. No one knew what I did." But he knew that his job was to encourage collective bargaining in all its forms.

In furtherance of this mission, the FMCS sponsored a series of conferences dubbed, "Partnership in Workplace Relations." The first conference, held in December 2012, attracted Ford Motor Co. and the UAW, U.S. Steel and U.S.W., Alabama Power and IBEW, Major League Baseball and the Baseball Players Association, and Kaiser Permanente. A similarly star-studded conference followed in December 2013. The overarching message of these conferences was that building relationships requires behavior modification both from hourly workers and from foremen and supervision. Mr. Cohen led us to believe that, even in retirement, he is not done with the job of behavior modification.

Film Presentation: "The Art & Science of Labor Arbitration"

by Sharon Gallagher

Allen Ponak, NAA, introduced the documentary produced by the College of Labor and Employment Lawyers for its "Video History Project," and funded in part by the NAA's REF. The movie covers a brief description of labor history and the history of arbitration as seen through the eyes of some of the most distinguished arbitrators in the NAA. The movie also describes how these arbitrators view their responsibilities as arbitrators and how they believe the parties view the arbitration process.

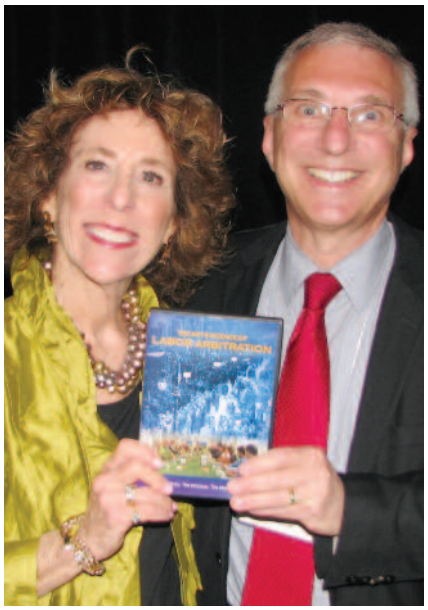
Carol Rosenbaum, the film's Writer/Director, set the stage for the film's viewing by saying that she included insights, anecdotes, and advice of distinguished arbitrators, not just the practice of arbitrators, but also the passion of arbitrators. Rosenbaum told the audience that in her work with the College over the past 12 years on its "Video History Project," she had collected some 25 long interviews with arbitrators, including the NAA's "Fireside Chats." All that was needed to complete this movie was "a little bit more."

The movie opened with a brief overview of the rise of unions in the early 20th century. Arbitrator Arvid Anderson stated that as a 15-year old, he was present the day before and the day after the opening of the 1937 Republic Steel strike in Chicago when ten picketers were killed (seven shot in the back as they fled). Anderson stated that this experience made him realize "labor relations needed peacemakers."

The advent of World War II lead to the creation of the War Labor Board, an institution that laid the foundation for modern labor arbitration. After the War, the NAA was founded in 1947. The career of Ted Kheel, the "Transit Czar" in New York, and his role in the 1949 wildcat transit strike was pictured and summarized.

Francis Bairstow, one of a few early female arbitrators and an NAA charter member, recounted the great value of having gained experience working on the line in a Lockheed factory which stood her in good stead throughout her storied career. She also described what it was like for her to be the only woman in the room at her hearings.

Jim Harkless' early years in labor law were sketched – his work experience in a steel foundry, his education at Harvard, and his representation of unions in negotiations. Harkless stated that in the early days, lawyers had to go to court to force companies to go to arbitration.



Director Carol Rosenbaum with Allen Ponak

Everything changed in 1966 with the Supreme Court's decisions in the Steelworkers' Trilogy cases: grievances could be brought and arbitrated and the award would be final and binding with very limited review.

Arbitrators Allen Symonette, Bobby Golick, and Jim Harkless commented upon the process of arbitration, including observations regarding how an arbitrator can tell when a witness is lying, what to do when there is an imbalance of abilities of the parties' representatives, when arbitrators should ask questions, and how to handle a visit site of a dispute.

Regarding the writing process, Arbitrator Arnold Zack stated that he writes the facts of his cases within 24 hours of the hearing. Arbitrator Harkless stated the facts are the heart of all arbitration cases and that it is normally because the parties can't agree upon the facts that the case must be heard. Arbitrator George Nicolau stated that he writes his awards so the parties will understand his ruling and to avoid doing any harm the parties' relationship. Nicolau said sometimes "when an award does not hang together, when something does not feel right," the arbitrator must go back and rethink and rewrite the award. Arbitrator Ted St. Antoine said awards must be written so the winner and the loser can move on. St. Antoine said that arbitrators must decide every case, accepting that this one may be their last case.

What do the parties want from arbitration? Arbitrator George Nicolau said they want a no-nonsense hearing and a good opinion rendered quickly, they want the arbitrator to be in control of the process, and to allow the parties to put in their cases. Nicolau said, "Courage is the key." Nicolau added that the arbitrator must look closely at the evidence and make sure he/she is right, "but above all you've got to be fearless. If you are good, the cases will come."

Nicolau's described his experience as a major league baseball arbitrator in the 1980's and 1990's. Nicolau discussed his two collusion cases and the Steve Howe case where Nicolau set aside the Baseball Commissioner's decision to ban Howe from baseball for life. Nicolau said that he thought that because the cases were so controversial and (concerning the collusion cases) "worth millions to the owners," that he would likely be dropped from the panel because of his rulings. Nonetheless, Nicolau served the parties on the panel for eight more years.

Bobby Golick, 2011 NAA President, and Judge Harry T. Edwards described the struggles of women and African-Americans to become accepted as arbitrators in the United States. Judge Edwards recalled the assistance he received from his mentor, Arbitrator Jean McKelvey, in gaining acceptability.

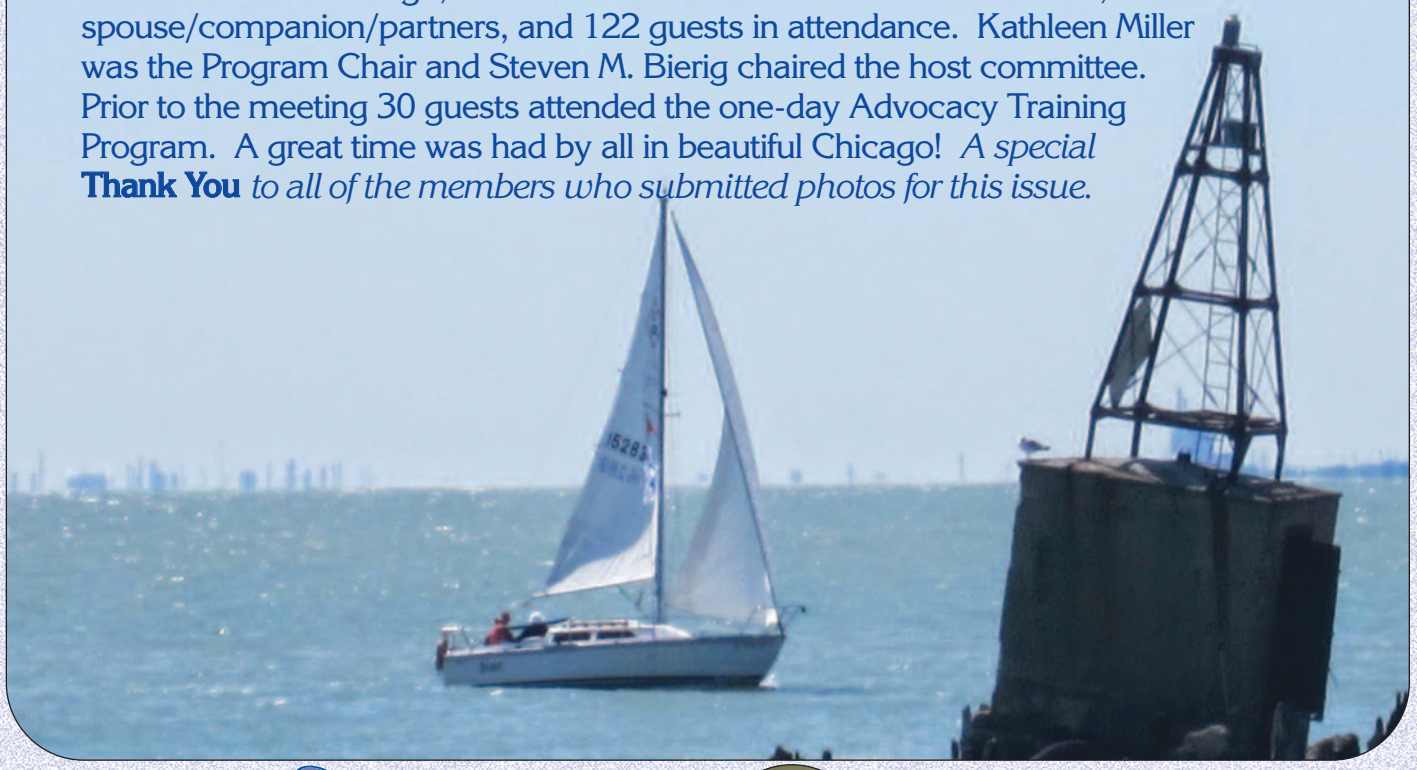
Arbitrators such as Golick, Edwards, Harkless, St. Antoine, Zack, and Nicolau commented upon the qualities of a good arbitrator and the characteristics of an arbitrator's life.

Arbitrator Golick said, "The profession is a lonely one." The parties trust and respect the arbitrator so much so that they put the case in the arbitrator's hands and later the parties will pick that arbitrator again even though one lost and one won. Arbitrator Nicolau said, "The parties trust your fairness. You are not a professional arbitrator until you have been fired. But you always do what is right."

(Continued on Page 14)

"Scene" in Chicago

The 67th Annual Meeting of the Academy was held from May 21 – 24, 2014 at the Fairmont Chicago, Millennium Park. There were 186 members, 101 spouse/companion/partners, and 122 guests in attendance. Kathleen Miller was the Program Chair and Steven M. Bierig chaired the host committee. Prior to the meeting 30 guests attended the one-day Advocacy Training Program. A great time was had by all in beautiful Chicago! *A special* **Thank You** *to all of the members who submitted photos for this issue.*



Personality Disorders under the APA's Diagnostic and Statistical Manual – V and Just Cause

by James S. Cooper

If you think the NAA fights internecine battles, we play a distant second fiddle to the American Psychiatric Association. Think about this. The American Psychiatric Association ("APA") decided to revise a portion of its bible, known as the Diagnostic and Statistical Manual of Mental Disorders IV (routinely referred to as "DSM -IV"), which is the categorical description of various psychoses so that everyone (including the insurance companies who sometimes pay the bills) uses the same definitions. The desired revision of Section 3 concerned personality disorders ("PD's"). Next, the APA selected a group of world-renowned psychiatrists and psychologists to revise Section III for DSM -V. The group worked diligently for years to develop an alternative analysis for categorizing PD's. After this was done and the work was generally hailed as outstanding, the APA decided that it was too radical a change and so DSM-V contains the original Section 3 and labeled the newly revised section as 3-A, opting to make its acceptance voluntary and up to individual practitioners as to whether it should be accepted.

Fortunately for us, NAA President James Oldham's twin brother, John, was the leading researcher on DSM-V, Section 3A. Dr. Oldham and Dr. Greg Bloche who is a psychiatrist and an attorney presented their thoughts on how PD's could be factored into arbitration cases. I listened to the session in Chicago and read Dr. Oldham's Forward, Chapter 1, Personality Disorders, Recent History and New Directions, and Chapter 24, An Alternative Model for Personality Disorders, DSM-V Section III and Beyond, of his textbook PERSONALITY DISORDERS, Second Edition (all printed in the proceedings) and I can honestly say that I have no idea how or when I would or could find a grievant suffering from a personality disorder for which his or her misconduct could be excused or if excused could be cured and therefore subject to reinstatement. (The only exception I could think of would be a case where the employee with the personality disorder sought an accommodation under the ADA and the employer could make the accommodation.) The list of personality disorders such as obsessive-compulsive, narcissistic, passive aggressive, antisocial, borderline, schizoid, schizotypal, paranoid, histrionic, explosive, and (my favorite) non-specific, could individually or perhaps collectively in pairs or triplets, be applied to every one of my dischargees, including many whom I have reinstated. I am not a psychiatrist or a psychologist or a social worker who could begin to analyze an employee's psychosis. How in the world would I ever render a personality disorder a sufficient medical condition to excuse misconduct? I may find the employee's underlying misconduct was insufficient to warrant discipline, but not because he or she suffered from a well-diagnosed PD, but because the misconduct simply did not warrant such a result. I am just as uncertain as to how a psychiatrist's pigeonholing an employee's personality disorder would motivate me to consider a broader "societal view" of dealing with such disorders. If I missed the point of this exercise, someone please read the materials and explain it to me.

L to R: John Oldham, Gregory Bloche, and Jim Oldham

Art and Science of Labor Arbitration *(Continued from Page 11)*

Arbitrator St. Antoine recounted a 1950's encounter with Teamster Boss Jimmy Hoffa when Hoffa told his daughter she should strive to be like the Arbitrator. Arbitrator Harkless stated that as an arbitrator, he learned a lot about America and its people. Arbitrator Zack recounted his experience over many years extending arbitration and mediation into foreign lands and training arbitrators and mediators abroad.

Former Secretary of State George Schultz said that his early training in labor law was very important in his life. He learned to listen and to support people in their love of learning.

Working as a labor negotiator, an apprentice to a neutral, or a neutral is the way into the business, but getting selected as an arbitrator starts slowly. Arbitrator George Nicolau suggested that one should "get a day job" while waiting to gain acceptability. The film concluded with Arbitrator Nicolau's observation, that at an arbitration hearing, "We are the least expensive professional in the room, but I wouldn't change it for anything, not for anything."

This movie is a "must-see" for all labor and employment arbitrators, advocates, and those who hope to become labor and employment arbitrators.

Social Media and Electronic Communications: Ethical Practices and Pitfalls

by Jon Monat

The use of electronic and social media as a means to communicate with parties, schedule cases, or handle requests from advocates has become widely used in arbitration. The expanded use of social media presents new opportunities for arbitrators but also exposes us to new risks and liability. Arbitrators must exercise great caution and due diligence when using social media and electronic communications.

Jeanne Charles Wood, NAA, moderated this plenary session, using the popular "Red Light, Green Light" format. Arbitrators Margaret R. Brogan, NAA, Jane Devlin, NAA, and Michel G. Picher, NAA, were given a series of fact situations and were required to show agreement or disagreement by switching on the red or green light. References to appropriate sections of The Code of Professional Responsibility were necessary to support the arbitrators' choices.

In the first scenario, Arbitrator Jones links to an advocate whom he sees regularly at hearings. Jones learns that his old law firm is looking for an experienced advocate, so posts the opening on his LinkedIn page because Jones believes it unethical to approach the advocate directly. The advocate applies for and gets the job. The Union removes Jones from the panel and decides to report Jones to the NAA for unethical conduct. One green and three red lights in response to the question, "Should the NAA sanction the Arbitrator?" (Code Section 2D.) The question arose about arms- length relationships, but in general, the respondents found no code violation, because LinkedIn is not directed at one person.

A second scenario involved e-mail chains. An arbitrator is appointed jointly to a case, notified by e-mail from counsel representing both sides. Others are copied. Arbitrator hits 'reply all,' a practice the four panelists did not support. Only counsel should be copied, since it is not known who all the others are. As a result, perhaps, the arbitrator is copied on an email between counsel saying discharged grievant is a "real loser." The panel felt the arbitrator should not recuse himself. A lot of winners are losers. However, the arbitrator must avoid the appearance of collusion. Should the arbitrator receive an email from counsel on which opposing counsel is not copied, the arbitrator should disclose this communication.

L to R: Vicki Peterson Cohen, Jane Devlin, Michel Picher, Jeanne Charles Wood, and Margaret Brogan

The third scenario raised questions about websites. The particular concern here was deceptive practices. An arbitrator posted a 20-year old picture of herself on her web page. The panel split evenly that it was a violation of Code C(23)(C). The audience did not think it was a big deal. However, it was unanimously considered a violation if the arbitrator listed ten permanent arbitration panels even though she had previously been fired from five of the ten panels. Claiming that she was the very best arbitrator was too "Barnum and Bailey" for the panel and was a violation.

The panel was split as to whether testimonials from advocates were properly posted on the web page. Some felt it undermined the appearance of neutrality, but was not necessarily a Code violation. And a most important question was raised about the posting of fees. The panel considered it a Code violation to charge more than the fees currently accessible from the website. Arbitrators are obligated to keep their website current.

Another scenario involved private information which becomes public. This issue is a concern because it may impact how this information will impact a grievant, for example, if it is discovered. For example, should an arbitrator disclose he has a child who has drug problems when he is appointed to a drug termination case? There is a lot of private information available in cyberspace. Some of it is true or current and some of it is not. It is often out of the arbitrator's control. The majority of the panel did not find a violation and would not require the arbitrator to recuse himself. The arbitrator may inform both counsel privately. But there is no need to disclose private, personal information.

The final scenario discussed was about Facebook. An arbitrator is attending a benefit for a prominent museum. A flight attendant from the union on whose permanent panel the arbitrator sits is there and takes some pictures of the arbitrator, putting the pictures on her Facebook page. He discovers the pictures on her Facebook page sometime later. The pictures show him looking tipsy with a large glass of bourbon in his hand. The picture was accompanied by a comment from a friend of the flight attendant. This friend is waiting for the arbitrator's decision on a recently heard case. The majority of the panel felt the arbitrator should disclose the situation in which the pictures were taken. But recusal was not necessary because his attendance at a social event was independent of the parties' relationship. One audience member suggested strongly that pictures of professional friends should not be posted.

Cyberspace is fraught with peril. Arbitrators should exercise caution and due diligence in their use of and awareness of social media. Electronic communication such as e-mail should be used with great care and thoughtfulness in the message and who receives it. E-mail is a widely used tool which gives the appearance of informality. Failing to give serious consideration to the message may land the arbitrator in difficult ethical territory.

Designating Agency Update

by Michelle Miller-Kotula

During the 2014 Annual meeting, representatives from the American Arbitration Association (AAA), the National Mediation Board (NMB), and the Federal Mediation and Conciliation Service (FMCS) provided the NAA members with a review of the issues and trends in labor arbitration, including statistical information which reflects the trends in usage. This session, moderated by Joan Parker, provided an update of what has occurred since the NAA's last meeting. Useful tips, facts, and statistics were also shared. Handouts were provided by the FMCS and the AAA that included specific caseload statistical data.

Christine Newhall, Senior Vice President of the AAA, led the discussion. She thanked the regions for partnering with the AAA to host regional events. She said the AAA is currently staffed by 25 full time employees who support labor and handle the caseloads. She explained other AAA offices handle multi-employer pension cases. She said that in 2013, the AAA handled 8,456 labor cases, with over half being from the private sector. The largest caseloads were handled out of the New York office, followed by the Somerset, New Jersey and Boston offices. She stated that while there was a reduction in the labor caseload from the previous year, the caseload related to multi-employer pensions has increased. Newhall noted that the 2013-14 caseload appears to be stable.

Newhall discussed the results of a survey of users of the case administration service and noted 91.4 percent of the customers who used AAA would recommend AAA to others. She said the input the AAA receives from its customers is important and they plan to continue to share feedback with the arbitrators. The AAA also plans to expand the programs and webinars that are offered. Any arbitrators interested in presenting programs in the future should contact the AAA to be considered. The AAA is also looking for articles and submissions for its Dispute Resolution journals. She thanked the NAA members for providing high quality arbitration services.

L to R: Christine Newhall, Vella Traynham, Roland Watkins, and Joan Parker

Roland Watkins, the Director of the Office of Arbitration Services for the NMB said that the Board's new chair began July 1, 2014. He noted that the present waiting list for cases is 331, with approximately 1,300 total cases on the list. He requested that arbitrators not schedule hearing dates with the parties until they receive an official case assignment. He said that in January 2013, approximately 218 cases were assigned to arbitrators, whereas, in December 2012, about 452 cases were assigned. He identified the top carriers for cases. Watkins said that the NMB website is up and running, and that a lot of changes have occurred with the case management and the budget systems this year, and he thanked the arbitrators for their patience.

Vella Traynham, Director of Arbitration Services, spoke on behalf of the FMCS. She said the FMCS is in the process of developing a new arbitration system, which will enable parties to order multiple panels at one time. She strongly recommended that arbitrators periodically update their bios with Peggie Shoulders.

Traynham said that arbitrators who accept federal sector work must verify who is going to pay for the work. She reminded arbitrators with two addresses that they must charge for travel from the closer address. She said if an arbitrator receives a case that appears to be an FMCS case, the arbitrator should notify the FMCS in order to receive the proper credit. Also, an arbitrator who will be incapacitated for a period of 14 or more days should notify the FMCS. She encouraged arbitrators to contact the FMCS if they experience problems being paid for invoices.

Traynham ended her presentation by informing the NAA members that she is retiring from the FMCS on May 31, 2014. She discussed her work career and said she loved serving the arbitrators in her position for over the last 14 years. The arbitrators gave her a standing ovation and many took the opportunity to personally thank her for all of her support. We wish her the best in her retirement.

MILITARY ACTIVATION AND RETURN:

The National Guard and Reserve Employee

by James S. Cooper

The NAA's Brian Clauss, who is also the Executive Director of the John Marshall Law School Veterans Legal Support Center & Clinic, and Law Professor Roger MacDougall of Chicago–Kent University provided a road map for dealing with the rights of military reservists and veterans returning from active duty. Since less than 1% of the population of the United States serves in the military in any form (either reserve or full time) and less than 0.5% in Canada, the chances of an NAA arbitrator having to deal with these issues is exceedingly small. But if you have such a case, it sure would be nice to have some idea about veterans' rights.

In Canada, veterans' rights are controlled almost entirely by provincial law, with two narrow carve outs: federal employees and employees in federally regulated industries (i.e., railroads, airlines, banking, postal, etc.). The Canadian statutes, provincial or federal, are so new (2007) that there is almost no law on this subject and no arbitration awards. In a nutshell, these rights include the right of a reservist or veteran to return to his former position without loss of employment status. For example, in Nova Scotia, after one year of employment, a reservist is entitled to return to a former position for eighteen months, and a veteran has the right to return to former position within four weeks of release from active duty.

The United States, in contrast, has long-established civil rights for veterans, but those legal rights were substantially augmented with the passage of Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Under this federal law, a reservist is required to give notice to his employer of his deployment, and under most conditions, is entitled to reinstatement to such position as he would have attained had he not left. The law prohibits discrimination or retaliation for exercise of veterans' rights and further invalidates any attempt to have the employee resign.

There is a private right of action, as well enforcement by the Department of Labor. To exercise his rights, a veteran must establish three things:

L to R: Roger MacDougall, Brian Clauss, and Michelle Miller-Kotula

1. He must have given advance notice to his Employer of his deployment.

2. He must have served in the armed forces (or reserves) and not be dishonorably discharged.

3. He must return to his workplace as follows:

– If deployed for 30 days or less, he must return on his next scheduled workday after safe travel to his place of employment plus 8 hours.

– If deployed for 31-180 days, he must return within 14 days after completion of his service.

– If deployed for more than 180 days, he must return within 90 days after completion of his service.

These concepts are not new to NAA arbitrators. These rights can be applied within the context of a collective bargaining agreement. And there is a body of case law interpreting the regulations and the law. However, few, if any, arbitration awards have surfaced.

THE ADVOCATES' VIEWS OF UNUSUAL AND NOT SO UNUSUAL REMEDIES

By Jon Monat

After opening remarks, by moderator Steven M. Bierig, NAA, the advocate members of the panel, Heidi B. Parker (labor) Asher, Gittler & D'Alba, and Jeremy J. Glenn (management) Meckler Bulger Tilson Marick and Pearson, were presented with nine scenarios, each representing typical remedies in discipline and contract cases. Each panel member reflected on the nuances of the remedies granted and the wide range of problems inherent in each scenario.

As an example, Scenario 1 presented the case of a long-term employee who was unstable, had mental health issues, and had threatened a co-worker. The grievant testified on his own behalf, while the accuser did not testify. Grievant is reinstated with full back pay but subject to a fitness for duty examination, including mental health exam. The Grievant balks. The panel was asked to respond from their respective roles: arbitrator, labor advocate, and management advocate. The session was informative, not only from the creative responses, but for the questions each scenario raised for arbitrators to consider. PowerPoint ® slides are available from the panelists.

L to R: Jeremy Glenn, Steve Bierig, and Heidi Parker

ARBITRATION IN CANADA: TRENDS IN DAMAGES

by Chris Sullivan

Arbitrators and Courts in Canada have struggled with remedial issues in the recent past. In this incisive panel discussion, led by moderator Randi Abramsky, NAA, panelists Ken Swan, NAA and Emily Burke, NAA (now Madame Justice Burke of the British Columbia Supreme Court) outlined the recent jurisprudence in Canada on the measurement of special and general damages, damages for pain and suffering, particularly psychological injury, entitlement to aggravated and punitive damages, and the issue of damages prescribed or limited under human rights legislation.

The panelists began their discussion with a review of three seminal Supreme Court of Canada decisions, which have essentially given direction to arbitrators, judges, and tribunal decision-makers across the country. In the 1988 case of Wallace v. United Grain Growers, the Supreme Court extended the notice period in a discharge case because of bad faith in the manner in discharge. In 2006, the Supreme Court, in Fidler v. Sun Life Insurance, awarded aggravated damages for loss of a psychological benefit without an independent actionable harm. In 2008, the Supreme Court, in Keays v. Honda, found the normal distress on discharge was not compensable, but bad faith or egregious conduct would attract additional damages. The Court in that case determined that "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."

The principles of these Supreme Court of Canada decisions have been applied in a number of court cases and arbitration decisions, which were the topic of review by the panel. The salient principles may be summarized as follows:

1. Damages for mental distress in contract cases are generally recoverable if they may be fairly and reasonably be considered rising naturally from such breach of contract itself, or if they may reasonably be supposed to be in the contemplation of the parties at the time the contract was made.
2. Damages for mental distress may be recoverable where the parties enter into a contract the object of which is to secure a particular psychological benefit or an intangible benefit like mental security.
3. While mental distress as a consequence of the breach must reasonably be contemplated by the parties, it need not be the very essence or the dominant aspect of the bargain. An independent actionable wrong is not a pre-requisite for the recovery of mental distress damages.
4. True aggravated damages, which arise out of aggravating circumstances, may be awarded as a result of an independent cause of action and have nothing to do with contractual damages.
5. The degree of mental suffering caused by the breach must be of a degree sufficient to warrant compensation.
6. Punitive damages should be resorted to only in exceptional cases and the required conduct should constitute a marked departure from the ordinary standards of decency and must be independently actionable. A breach of the contractual duty to act in good faith will meet this requirement. However, an award of punitive damages does not depend exclusively on the existence of an actionable wrong. An actionable wrong can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.
7. Punitive damages are awarded for malicious, oppressive, and high handed conduct that offends a sense of decency.
8. The objectives of punitive damages are retribution, deterrence, and denunciation. The aim is to punish the defendant.
9. The better practice is that a claim for punitive damages should be specifically pleaded.
10. Punitive damages must be proportionate to the blameworthy conduct, the vulnerability of the claimant, the need for deterrence, and the compensatory damages.

L to R: Ken Swan, Emily Burke, and Randi Hammer Abramsky

In relation to cases where there is a failure to accommodate a disability, and thus discrimination, the following factors are considered in the awarding of damages:

- Humiliation experienced by the complainant.
- Hurt feelings experienced by the complainant.
- A complainant's loss of self-respect.
- A complainant's loss of dignity.
- A complainant's loss of self-esteem.
- A complainant's loss of confidence.
- The experience of victimization.
- Vulnerability of the complainant.
- The seriousness, frequency and duration of the offensive treatment.

The panelists gave a comprehensive review of the prevailing case law that included court, arbitration, and human rights tribunal authorities from across the country, and included numerous notable recent cases. Many of the attendees wondered out loud when, if at all, does Ken Swan sleep, after he gave thorough commentary on the Ontario Court of Appeal's significant decision in Boucher v. Wal-Mart, which had been issued the day before the session. Amongst other matters, the Court in that case made clear that the tort of intentional infliction of mental suffering requires subjective intent to cause mental harm, and it was not enough that one "ought to have known" this could result.

by James S. Cooper

Mittenthal on Intervention

On a bad day Dick Mittenthal gives more thought to our profession than most of us do in our careers. This paper is no exception. Not only did Dick write the paper and submit it for publication, but even after submission, he added another page which was handed out at the session on Friday afternoon. Unfortunately, Dick was unable to attend the NAA conference in Chicago and so he asked Ira Jaffe to present the paper for him. As Ira noted, it was the first time and only time Dick Mittenthal spoke with a New York accent.

The substance of Dick's paper was that we, as a group, are overly timid and so worried about what others think of us, that we avoid "intervention" at all costs. By "intervention," Dick is referring to more than just asking questions during a hearing; he suggests that arbitrators should venture into a neglected or overlooked theory or an unvisited area of the law or an inquiry into further facts which may warrant the arbitrator to insist that the hearing be re-opened or a specific issue be briefed. The goal is a full and complete hearing, enabling a fair and complete award. The reaction of the audience was not one of abject horror, but was sympathetic to Mittenthal's goals.

A survey of those attending suggested that some of Mittenthal's urgings have been adopted, but most were unwilling to accept his castigations, except in the most extreme cases. Hence, it is only when the lions among us roar, that some of us will growl. Dick Mittenthal is the lion.

L to R: Donald McPherson, Ira Jaffe, Marty Malin, Sara Slinn, and Jon Werner

An Empirical Evaluation of the Adjudication of Statutory Human Rights Claims before Labour Arbitrators and Human Rights Tribunals in Ontario: A Preliminary Report

Don't let the academic nature of the title of this paper fool you. I would retitle it: The Consequences of 14 Penn Plaza: A Comparison of Agency vs. Arbitral Handling of Civil Rights Claims.

Professors Martin Malin, NAA, (of Chicago-Kent Law School), Sara Slinn (of Osgoode Hall Law School) and Jon M. Werner (of the University of Wisconsin, Whitewater) took on the task of comparing the processing and outcome of cases heard by a civil rights agency versus arbitrators. This task follows the United States Supreme Court's 2009 opinion in 14 Penn Plaza v. Pyette, 129 S. Ct. 1456 (2009) in which the court required Union-represented employees to use the grievance and arbitration provisions of their collective bargaining agreement rather than a statutory civil rights agency when the Union had bargained away the employees' individual civil rights.

As an old-time state agency guy, I am deeply committed to Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), so I was appalled with 14 Penn Plaza, and thought for sure NAA's position would be sustained after reading Matt Finkin's and Barry Winograd's outstanding Amicus Brief. However, at the NAA's annual meeting in Minneapolis after I heard the 14 Penn Plaza's parties' explanation of their rationale for negotiating away civil rights I was intrigued to find out the consequences. This research will eventually quantify the consequences of Pyette.

From this preliminary paper, which so far has been based on a very small data base, the consequences of 14 Penn Plaza may not be as awful as I had supposed. As Malin explained, the idea is to compare U.S. experience with the Canadian experience in Ontario where the arbitration of statutory civil rights claims has long been a routine part of the collective bargaining law. The professors enlisted six law students, three from Chicago-Kent and three from Osgoode Hall, to examine every reported workplace civil rights case in Ontario for the past three years, whether decided by the Human Rights Tribunal of Ontario (HRTO) or by an arbitrator. Slinn carefully screened the law students' coding of each case and Werner did the statistical analyses looking at various metrics such as outcome, remedy, and time span from filing to decision. To cite one interesting preliminary result: Remedies requested in arbitration included reinstatement (32%), back pay (31%), and compensatory damages (25%); whereas before the HRTO, the remedies requested included back pay (16%), compensatory damages (18%), and seven other remedies ranging from education/training to legal costs, but not reinstatement.

Because of the paucity of data, more cases need to be thrown into the hopper for examination, but the preliminary results show some promise that arbitrators do a decent job at resolving these individual civil rights claims. The study will continue and perhaps in another year, the data will be sufficient for meaningful statistical results. Thanks are due to the NAA Research and Education Fund which supported this very worthwhile project.

Interest Arbitration in Hard Times

by Marsha Kelliher

Fredric Dichter, NAA, moderated a session that addressed a former panel's conclusion that "Comparables pre-recession were not valid post-recession in interest arbitration." The panelists, representing different perspectives and practices across the United States, discussed whether that proposition is still valid.

Harvey Nathan, NAA, shared that he has found with some parties that anytime they go to interest arbitration, it is hard times. He stressed that what is important is the flow of revenue and the economics of the region versus the country. He shared that from his perspective, the truly essential measurements are the parties' bargaining history and comparability. He recommended using cities within 50 miles of the city of interest and that the parties identify 10 municipalities that have similar population and revenues. The parties should also refer to similar bargaining units within the municipalities.

Susan Hansen shared that there has been an increase in interest arbitration in Minnesota. Under Minnesota law, arbitrators cannot address issues other than the terms and conditions of employment and only "essential" employees have the right to interest arbitration. Under the Minnesota Pay Equity Act, political subdivisions are statutorily required to equalize pay between female and male employees and that since the passage of the Act, internal consistency has been the focus of arbitrations. Once there is a compensation system in place that is consistent with the Act, the system should not be disrupted by wage changes that could alter those relationships.

Minnesota law also requires arbitrators to consider the financing of operations. While there have been improvements to the economy, the public sector is lagging behind the private sector. Because of the cuts in state aid to local units of government their reliance on property taxes has increased; however, the city councils and local boards are facing significant pressure not to raise property taxes.

L to R: J. Dale Berry, Fred Dichter, Mary Jo Schiavoni, Susan Hansen and Harvey Nathan

She added that Grandfathering and 2-Tiered Systems are common, especially with employer contributions to retiree benefits because employers have had massive unfunded liabilities due to the increasing costs of healthcare as well as the changes in accounting standards.

According to J. Dale Berry, there should be a relationship between prior negotiations and interest arbitration. His experience has been that times are hard because employers don't have the same level of revenue and unions are facing new challenges. His advice to employers was to not distinguish between management and rank and file when determining raise percentages and not to lie about the entity's financial situation. None of his clients have agreed to a 2-tiered system.

The perspective of Mary Jo Schiavoni, NAA, is that interest arbitrators are generally a very conservative group. Each state sets the criteria for arbitrator's awards and the criteria vary widely from state to state. Arbitrators like to look to patterns across the local economy, including the turnaround of local economies over the past few years and indicators they will continue to improve. The parties have the burden of proving why their positions should be accepted if it is not the status quo and arbitrators should not provide the parties through arbitration what they could not get through bargaining.

She explained that Minnesota's system is unique in that employers have had to create detailed systems for classifications and associated wages. She urged arbitrators to keep this in mind because of the impact of an arbitration decision on the overall payment system.

In her practice, retiree health insurance is an emerging issue due to the impact of the Affordable Health Care Act. The parties are recognizing that the generous health care plans of the past may not be sustainable going forward.

Using Mediation in the Grievance Process at American Airlines

by Linda Byars

Kathy Fragnoli, NAA, who was a senior attorney for American Airlines before she began her life as a neutral, moderated the panel, which included Debbie Carvatta, Director of Flight Service for American Airlines, and Laura Glading, the President of the Association of Professional Flight Attendants (APFA). They discussed the med-arb process they have been using successfully since 1993 to resolve disputes. American Airlines is the only airline in the country using this process. Judging from the enthusiasm of the panelists, it has been remarkably successful in many ways.

During contract negotiations in 1993, the parties' relationship went from "bad to worse" and there was a five-day strike. When the strike was over the med-arb process was in the contract and the parties started jointly training. The parties were looking for a new way to do business because of the backlog of cases.

At the core of the process is resolving the dispute at the lowest possible level. Grievances are resolved at the first level between the supervisor and the employee 60% of the time. The process is designed to bring the employee into the process, unlike, for example, with NATCA and FAA, where that does not happen. The employee becomes better educated as a benefit of the process and has the opportunity to become a part of the solution. When the grievance does not settle at the first step, it goes to the mediation step.

The mediation step allows the grieving flight attendant and company representative to meet with a neutral mediator. The mediator works with the parties in an effort to resolve the dispute. If the dispute is not resolved, the mediator is empowered to make a recommendation. The recommendation by the mediator is binding on the Company, but not on the Union. The recommendation cannot be introduced as evidence in a subsequent hearing. Everything during the meeting is confidential.

Focusing on interests, not making it personal, and keeping it transparent were mentioned by the panelists as the keys to the success of the med-arb process. By focusing on the issues and not the people, the parties will not be as positional. Not taking the issue to the point where relationships are harmed is at the heart of the process. The panelists describe their process as a new way of communicating. By maintaining the dignity of both parties and an interest-based approach, the handshake becomes more powerful. Also, the panelists report that the training helped them to see things in a very different way. By fostering trust, relationships remain intact.

Kathy Fragnoli with Debbie Carvatta and Laura Glading

The cases are treated on a case-by-case basis. For example, with attendance, the circumstances are so different that so-called "consistency" is not possible. The mediator makes a recommendation for the one employee that makes sense for that one employee. The panelists agree that if not treated on a case-by-case basis they would be back into a grievance machinery that is expensive and time consuming.

The parties also use the interest-based approach in bargaining, as they did during the recent merger. The process became an education on the issue for all the parties. The process requires continual training, but mediators usually have a natural talent for the work.

The process is not in place for grievances involving a policy issue and is not generally used for termination grievances. When the issue applies company-wide, and not to just one flight attendant, it is much more difficult to resolve and more likely to go to arbitration. If there is no settlement, the issue goes to the systems board and then to an arbitrator. The panelists assured the audience of arbitrators that there will always be issues needing independent thought, to which there was a standing ovation!

Lorine Cantrell Receives NAA Service Award

Lorine Cantrell was honored at the Chicago annual meeting as the third recipient of the "David Petersen NAA Service Award." The Award was established to "Recognize the outstanding dedication and quiet contributions of members and friends of the National Academy of Arbitrators."

Jim Oldham presenting Lorine Cantrell with the service award.

Indeed, Lorine and her hard work on behalf of the Academy made her a perfect honoree. She has been a constant face at NAA meetings since 2005, greeting and assisting members and guests galore. Never without a smile or a solution to problems, she has had a big hand in making the meetings run smoothly and pleasantly. She has also worked between meetings to that end ably assisting Future Sites Chair Jim Odom in securing the best possible contracts with our host hotels. Her career at Jim's law firm in Birmingham, Alabama has spanned some 49 years during which she raised twin daughters and became a proud Grandmother.

The Award (a perpetual plaque to displayed at each annual meeting) was created to honor and recognize the immense service and contributions of David Petersen who has served as Secretary-Treasurer since 2002. His current, and he says his last, term ends at the end of the annual meeting currently set for May 24-27, 2017.

The award, established by Gil Vernon in 2011, and was left to be awarded at the discretion of each subsequent President at the annual meeting. Prior recipients include Vella Traynham (2011) and Barb and Fred Dichter (2013).

Challenging Orthodoxies

by Marsha Kelliher

The intellectually curious and prolific author, Dennis Nolan, NAA, shared with moderator, Shyam Das, NAA, that he has found throughout the years, that there have been occasional arbitration decisions which, although outliers, make more sense than those which repeat common arbitral wisdom. He shared lessons learned from several arbitrators who issued such awards.

The case that triggered his interest in this area involved interest on back pay. He remanded the determination of back pay to the parties. When the parties could not come to an agreement and the union requested interest on back pay three years after he remanded the determination of back pay, he began researching the propriety of the request and discovered that most arbitrators did not award interest.

He found it was impossible to reconcile an award that did not include interest with the make-whole concept. His research revealed arbitrators' most common reasons for not awarding interest were that "no one was doing it" and that the "NLRB did not do it." He also discovered that in 1962, the Board had changed course and began awarding interest, yet 25 years later, arbitrators were seemingly unaware that the Board was awarding interest. He turned to the outlier award of Arbitrator Reginald Lane. Finding no good reason not to award interest, Lane awarded interest. Nolan's case was more complicated than that before Lane because the interest request before Nolan was part of a remedial proceeding, not an initial hearing. A couple of years later, Nolan received a timely request for the award of interest and he granted it.

According to Nolan, the "plain meaning rule" is literalism personified. Only if the words themselves are patently ambiguous should the parties examine context. In 1987, Arbitrator Carlton Snow wrote an article and offered an alternative: the plain meaning rule should only be used in conjunction with other rules. Snow recommended looking to extrinsic evidence to determine the intended meaning of the terms of the agreement to effectuate the intent of the parties. The plain meaning rule had provided a crutch for many arbitrators, but after reading Snow's article, Nolan thought that arbitrators should no longer treat the rule as sacrosanct.

Dennis Nolan and Shyam Das

Arbitrator Jack Dunsford debunked the widely used mechanical Seven-Question Test for just cause. Nolan explained that everyone likes short-cuts (and checklists are short-cuts) so parties and arbitrators adopted the test. Skeptical of the test, Dunsford researched the test's origins and presented a paper at a meeting of the NAA, debunking the widely accepted belief in rigidly following the test.

Dunsford also tackled the long-held belief that arbitrators should not retain jurisdiction after issuing a decision. He posited that the arbitrator who handled the main case is in the best position to resolve questions/disputes that may arise due to ambiguous awards. He concluded that the retention of jurisdiction should be routine and remedial jurisdiction should be retained regardless of whether it is requested by the parties.

According to Nolan, the application of external law is one of the longest running theoretical debates in the profession. He shared that Arbitrator David Feller vigorously argued that arbitrators should ignore external law even when it conflicts with the contract because an arbitrator only has the authority to determine issues under the contract and arbitrators should leave it to the courts to correct illegalities. History has proven there is no single right answer on this subject; regardless of which viewpoint an arbitrator espouses, he is as likely as the next guy to be overturned.

From the *Steelworkers Trilogy* we learned that arbitrators should not apply their own brand of industrial justice. In his Presidential speech, Arbitrator Ted Jones argued that the Supreme Court had it backwards. Arbitrators often had no choice but to dispense their own brand, as what other brand was there?

In 1996, Snow held that the supervisor, instead of the grievant, should be disciplined. While a commonly held belief, no arbitrator had applied this principle, as no one believed they had jurisdiction to do so. Snow found that a joint statement regarding violence in the workplace modified the contract and that the joint statement applied to grievance arbitration. As a result, he expanded remedies to include grievances requesting discipline and, even the removal, of supervisors.

Nolan's advice was that that after very careful examination of the history of arbitrators' decisions, if a better course of action is available, an arbitrator should adopt it. He encouraged arbitrators to be willing to improve upon current practices.

Arbitrator Best Practices: From the Advocates' Perspective

by Daniel Zeiser

This session focused on what arbitrators do that bothers the advocates. It could have been titled "How Not to Get Work." Attorneys Kevin Camden, General Counsel of Teamsters Local 700 and Jennifer A. Dunn, Franczek Redelet, P.C., both of Chicago, addressed arbitration practice from scheduling the hearing to writing awards.

Scheduling delays was first. Both wanted arbitrators to control their docket and hold a pre-hearing conference, if needed. Should an additional day beyond the first be necessary, Dunn would like to see the second day scheduled within 30-45 days. If a longer time frame is needed, the arbitrator should let the parties know before the hearing. Both advocates opined that when a pre-hearing conference is needed, only procedural matters should be discussed and no substantive issues should be raised. A formal, on-the-record pre-hearing conference should be rare. Neither was a fan of pre-hearing motions, briefs, etc. However, if they are needed, they should be kept simple and short.

The next topic was whether arbitrators should mediate. Generally, the advocates indicated it depended on the case. For a serious dispute where the parties needed a decision, mediation was unwelcome. The advocates should let the arbitrator know if mediation is helpful. Two factors are important in determining whether mediation will work. The first factor is the nature of the case, that is, the number and seriousness of the issues. The second factor is the personalities involved. Dunn was generally more receptive to mediation, believing it falls within the dictum, "No harm, no foul." On the Union side, Camden stated that there was often much going on in the background and the Union sometimes needed someone to decide who was right and who was wrong. He would let the arbitrator know when to back off mediation.

Once the hearing begins, neither advocate wants an arbitrator to be too active in questioning witnesses. If the arbitrator needs to know something, e.g., an unfamiliar term, asking a clarifying question or two is fine. Neither wants the arbitrator to assume he or she knows what a witness meant. Questions should be limited to clarification, however. Both advocates thought the arbitrator had no obligation to develop the record, as that is the advocate's job. Camden indicated he thought it was appropriate for an arbitrator to stop an advocate from needling a witness or to help an inexperienced advocate at times, for instance, how to admit an obviously relevant document. However, if the advocate were struggling with a key piece of evidence, the arbitrator should let the advocate struggle. While understanding its place, neither Camden nor Dunn was especially fond of the "I'll take it for what it's worth" ruling. However, if the case were to rise or fall on a piece of evidence, the arbitrator should not allow it in on that basis, but should instead make a ruling on why it should be admitted.

L to R: Kevin Camden, Jennifer Dunn, and Randi Lowitt

Dunn asserted that at the conclusion of the hearing, arbitrators should allow parties to submit briefs if they desired. In her view, contract interpretation cases were more suitable for briefs, while discharges were more suited to closing arguments. She also thinks arbitrators should have a written record of the closing. Camden advised that he is always prepared to close orally in discipline cases and prefers to do so in most discipline cases. He is comfortable with having one party close orally without the other side present, while Dunn has some concerns.

Both advocates addressed their likes and dislikes about awards. Dunn told the crowd that there is nothing worse than not knowing why she won. She wants a reasoned award and to know why the ruling was reached. When the parties cannot stipulate to the issue, the arbitrator should give an award on the basis of a narrowly-defined issue. She does not mind arbitrators who set out the arguments of the parties, so long as it shows the arbitrator read and understood them. Finally, she likes arbitrators who make factual findings on disputed issues. Likewise, Camden believes it is okay to summarize disputes in testimony, so long as the arbitrator makes a credibility determination. He wants to know why he won or lost. He does not appreciate arbitrators who are duplicative in their awards, e.g., repeating the same facts and who go out of their way to raise issues not raised by the parties. Finally, Dunn and Camden were adamant about getting awards out quickly, especially in discharge cases and interest arbitration awards. Otherwise, they won't complain, they just won't pick you again.

by Randi Abramsky

NAA member and Gemmill Professor Emeritus at the University of Pennsylvania Law School Robert Gorman was interviewed by colleague and collaborator Matt Finkin, NAA, for the 2014 Fireside Chat. The interview was well-attended, and the audience was rewarded with a fascinating look into his incredible professional life. (I was a student of Bob's at Penn.)

Beginning with his attendance at Harvard College (class of 1958) and then Harvard Law School (class of 1962), Bob initially felt intimidated and inferior since he lacked the private school and privileged background of many of his classmates. Any feelings of inferiority, however, might have been dissipated by two facts he did not mention during the chat: he graduated *summa cum laude* from Harvard College and *magna cum laude* from the Law School. He did mention, though, that he had a Fulbright Scholarship at Oxford in the year after college, and that is when his interest in law began.

At Oxford, he studied with Professor Hart in legal philosophy. Hart also became his mentor, and when Bob was unsure of the direction he should pursue – law school or graduate studies – he asked Professor Hart. As Bob relayed their conversation, Professor Hart asked him what he wanted to be, and Bob responded, "A legal philosopher like you." Without hesitation, Professor Hart unequivocally recommended law school, telling him that if he wanted to think about the law, he must know what it is. So Bob returned to Harvard Law School.

Labor law was not, however, an instant passion. He took a labor law course with Professor Derek Bok and found it "kind of interesting" even though he sat way in the back to avoid being called on. After law school, he clerked for Judge Irving Kaufman in the Second Circuit Court of Appeals, where he worked on some labor law cases. His interest was truly sparked, however, when he began to work for the New York City law firm of Proskauer, Rose. He worked there for a year and a half as an associate, doing "a lot of labor law work."

In 1965, the University of Pennsylvania Law School needed a labor law professor, and at the tender age of 27, Bob began his illustrious teaching career. Some of his students were older than he was.

One of the sources of Bob's renown is his casebook on labor law, *Cases and Materials on Labor Law*, with Archibald Cox and Derek Bok. According to Bob, that came about as a result of a fortuitous meeting with Archibald Cox outside the men's room at Harvard Law School where Bob was a visiting professor in 1973. Bob was not aware that Cox even knew who he was when Cox said to him, "Hello, Bob, would you be interested in picking up the Cox and Bok labor law book, since neither of us is attached to the field anymore and we need new blood to carry it on." In a nanosecond, Bob agreed. A lot of work later, the eighth edition came out in 1977, followed by a 9th (1981), 10th (1986), 11th (1991), and then joined by Matt Finkin, a 12th (1996), 13th (2001), 14th (2006), 15th (2011), and a 2013 supplement. Bob also wrote his famous "hornbook," *Basic Text on Labor Law: Unionization and Collective Bargaining*, in 1976. I can personally attest to the enormous value of that book which clearly explains every basic concept in labor law, including secondary boycotts. In 2004, Matt Finkin joined him in writing the second edition of that book.

Through these books and his teaching, Bob influenced many law students. His influence also came through his re-examination of the law school curriculum in 1969-70. He recommended semester-long classes (versus year-long) and that labor law be made a required first year course. This was revolutionary and insightful, as labor law involved statutory interpretation, administrative law, and alternative dispute resolution (arbitration). It was also a significant factor in why I chose to attend the University of Pennsylvania Law School.

Bob began his labor arbitration career when he was contacted by a premier labor arbitrator in Philadelphia to serve as his assistant. This arbitrator would go to the hearings and take copious notes. They would then talk about the case and the analysis and then Bob would do a draft. After about three years, Bob began doing his own arbitrations and continued to do so for thirty years. Naturally, he alienated a few parties when he decided cases as he thought they should be decided, rather than the way the parties indicated. Or when he imposed novel remedies. But he would "do the same again."

He has also served for many years as an international arbitrator, serving as a Judge, Vice-President, and President of the World Bank Administrative Tribunal as well as Judge and President of the Asian Development Bank Administrative Tribunal, and as Judge and President of the Inter-American Development Bank Administrative Tribunal. In those positions, Bob worked alongside colleagues from England, France, Egypt, Nigeria, Uruguay, and other countries. He quipped, "Star quality international people, and me." From this "truly exciting experience," he learned to appreciate the commonality of legal principles that govern the workplace throughout the world. He issued more than 300 judgments, with no dissenting or even concurring opinions, since all of the judges agreed on the principles and their application.

His one "losing" experience at arbitration came when he insisted that the hornbook's name be changed from "Gorman and Finkin" to "Finkin and Gorman" and Finkin resisted. The matter was submitted to Arbitrator Nicolau for final and binding judgment. Bob lost, and his name remained first. He was "shattered," of course, but it gave him first-hand insight into how those who lose at arbitration feel.

Bob's other professional and leadership roles were touched on – including his serving as President of the Association of American Law Schools as well as President of the Association of University Professors. He also co-authored two texts on copyright law.

Finally, it was also revealed that after his admittance to the NAA, he was approached to form a barbershop quartet, with Steven Briggs, Calvin Sharp and one other. The four practiced, bought matching ties, handkerchiefs, and socks, so that they were a "certifiable" barbershop quartet – and performed for four or five years at Academy meetings. How I wish I could have seen that!

The Fireside Chat ended with Bob's touching statement of appreciation for his lovely and supportive wife of 53 years, Carol, who enabled him to accomplish so much. There is undoubtedly more to come.