PITTSBURGH

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Pittsburgh 2016 New Member Orientation

By James Cooper

Seven new members attended this session, which in my book was the best session at the conference. Dick Adelman, the organizer and chair of this committee, set forth a comprehensive agenda and completed it by lunch. After brief introductions, the group heard from a host of committee chairs about the various undertakings of their committees, which was followed up with a welcome aboard from President Allen Ponak and exhortations to participate from President-elect (now President) Margie Brogan, someone who absolutely practices what she preaches. In addition, Mark Lurie handed out thumb drives containing his incomparably organized computer program, and demonstrated in his seemingly magical way how to go paperless and get paid promptly.

Intermittently, Dick initiated various topics for discussion and these took off with Howell Lankford, Dan Jennings, Jules Bloch, and Bonnie Bogue leading the charge. The new members piped in without hesitation, politely disagreeing and explaining their positions. Once again, I could not figure out why these new members had not been admitted earlier in their careers. One of the reasons was explained by new member Bonnie McSpiritt. Her philosophy, like many of us, is to help the parties find their own solution to a problem, settle the grievance before her, and move on without need for a decision. Her dilemma was that she needed sixty written awards and this proved elusive given her success at getting settlements. She was caught hoping that parties would not settle. It occurred to me that, given the sharp decline in the number of arbitration cases, perhaps we should modify the admission requirements by allowing a substitution of ten selections for one written opinion or some other ratio. If we want acceptability as the key criteria, perhaps this would be an appropriate modification of admission criteria, and allow admission earlier in a career.

The new members, Jacalyn Zimmerman, Bonnie McSpiritt, Bob Grey, Ira Cure, Paul Chapdelaine, Charles Ammeson, and John Alfano, presented a fine picture of very experienced arbitrators who were not shy about expressing their views and participating in the extensive discussions about procedural and substantive issues. I should note that Bonnie Bogue was the only twenty-five year member who took up the Committee's invitation to join the New Member Orientation party while not being officially appointed to the committee. Her participation exemplified why the Academy should continue to make these invitations routine. The new members' biographies and pictures are found elsewhere in this edition of The Chronicle.

New members Charles Ammeson, Ira Cure, Robert Grey, Bonnie McSpiritt, Jacalyn Zimmerman, Paul Chapdelaine, and John Alfano

PRE-HEARING ISSUES:

AN INTERACTIVE EXPLORATION OF PRE-HEARING ISSUES IN U.S. AND CANADIAN LABOR ARBITRATION

By Lise Gelernter

In the first plenary session of the June annual meeting, NAA members had the chance to vote, with red (no) and green (yes) cards, on their responses to various knotty pre-hearing issues. All the issues considered arose from a hypothetical case concerning a Canadian/U.S. company with plants in Toronto and Pittsburgh. After the company unilaterally banned tobacco use on its property, the union grieved and, in the U.S., brought an unfair labor practice claim before the NLRB due to the company's failure to bargain on the issue. The first question the audience considered was whether the arbitrator had the authority to render a decision concerning the union's inquiry about some unresolved procedural and evidentiary hearing issues. U.S. arbitrators were asked to vote first and showed, by an overwhelming number of green cards raised, that the majority thought they had the power to decide pre-hearing questions. The Canadians thought no differently when they voted.

Donald McPherson (NAA-Pennsylvania), the moderator, then facilitated a discussion amongst the panel members. Randi Abramsky (NAA-Ontario) provided the Canadian perspective that, pursuant to Ontario provincial law, the answer was clear – arbitrators have the statutory power to issue interim orders on procedural matters. Ira Jaffe (NAA-Maryland) gave his view of the U.S. perspective: unless there is a contractual limitation, arbitrators have plenary authority over an entire case. He noted that the real question is when arbitrators should exercise that authority. John M. Cerilli, a management attorney with Littler Mendelson, P.C. in Pittsburgh, stated that, if the collective bargaining agreement (CBA) provides the arbitrator with authority to decide pre-hearing procedural matters, then the arbitrator obviously can do so. Without any contractual language, however, Mr. Cerilli said it was not so clear that the arbitrator could handle pre-hearing issues. In contrast, Robert A. Eberle, a union attorney with Eberle & Bundick in Pittsburgh, thought that with the parties' appointment of an arbitrator, the arbitrator received the power to set hearing dates and decide other procedural matters.

Seated: Ira F. Jaffe and Randi Abramsky, NAA Members,
Standing: Robert A. Eberle, Donald McPherson NAA Member, and John M. Cerilli

And so it went on a series of questions related to the union business agent's ex parte contact with the arbitrator, asking for the resolution of these questions: 1) seeking information that the employer had not provided after receiving the union's information request; 2) allowing a Toronto witness to testify by telephone for a hearing held in Pittsburgh; 3) objecting to the employer hiring a court reporter, particularly on the issue of splitting any of the cost with the employer; and 4) objecting to the employer's desire to bifurcate the hearing to deal with timeliness issues first. Although the ultimate answers to these questions were mostly similar for the Canadian and U.S. arbitrators, there were some important differences about how they would get there. For example, the Ontario labor relations statute specifically gives arbitrators the power (and discretion) to permit evidence provided electronically, whereas in the U.S. it is an inherent power. However, both the Canadian and U.S. arbitrators on the panel thought they would want to be satisfied that the testimony would be relevant before allowing it to proceed. As to court reporters, although they are used in a minority of cases in the U.S. where at least one party pays for the reporter and transcript, in Canada, parties almost never use court reporters because they are thought to have a negative impact on the hearing process. Needless to say, the union and management lawyers differed about their responses to most of the issues. For example, Mr. Eberle pointed out that it could be very frustrating and expensive for the union to have to wait until the first day of the hearing to receive and review the employer's evidence. Often it would require the scheduling of another day of hearing to give the union a fair chance at understanding and investigating what the employer's evidence revealed. Would it not be better, Mr.

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PRE-HEARING ISSUES IN U.S. AND CANADIAN LABOR ARBITRATION *(Continued from Page 3)*

Eberle argued, to give the union the information earlier in the process and make the hearing much more efficient? Mr. Cerilli contended that this would just be a way for the union to get something from the arbitrator (discovery) that it had been unsuccessful in getting at the bargaining table. As to bifurcation, both arbitrators were willing to hear the parties' arguments, but believed that, in the majority of cases, the arbitrator has to hear enough about the merits when deciding timeliness issues that bifurcation would not be helpful. However, both Mr. Cerilli and Mr. Eberle thought that deciding the question of the timeliness of a grievance before the hearing could be much more efficient in some cases by avoiding unnecessary preparation and presentation of a case in chief.

The Ontario statute again made a big difference on the question of whether the arbitrator should try to mediate a case. The statute gives arbitrators the power to mediate, which they do in about 95% of the cases. If it does not work, Ms. Abramsky noted, they can go on to arbitrate. Mr. Eberle, the union attorney, thought that mediation was the preferred vehicle to resolve a grievance and that an arbitrator sometimes needs to "read between the lines." Mr. Cerilli thought mediation was fine as long as the parties were the ones pushing for it and that he would not want an arbitrator to raise the issue. Mr. Jaffe said that he would not mediate in most cases because, although §2(f) of the Ethics code allows arbitrators to suggest mediation, they cannot pressure the parties to do so. Furthermore, if an arbitrator mediates and there is no resolution, the parties then may have to find another arbitrator to conduct the hearing. The audience and panel participants then had to deal with the problem of a grievant who has been accused of making a threat to kill a supervisor; the grievant claims it was just a sarcastic comment. Nonetheless, the employer had information that the grievant owns several guns and the question was whether the arbitrator had a responsibility to deal with the concern about security. Everyone agreed that security was important, but, as Mr. Jaffe said, the tricky part is figuring out how to deal with legitimate safety concerns while avoiding any unnecessary stigma for the grievant or an appearance of prejudice on the part of the arbitrator. One way to deal with a problem like this is for the employer or the arbitrator to seek to have the hearing in a building where people are routinely screened for weapons at the entrance, Mr. Jaffe offered. On the shifting sands of NLRB deferral to arbitrators when contract and statutory issues are virtually identical, Mr. Cerilli said that the NLRB's new position, announced in the recent Babcock & Wilcox case, made it harder to avoid double litigation on the same issue. Since the NLRB will defer now only when an arbitrator actually has jurisdiction over the issue in question and actually decided the same statutory issue that the NLRB would have had to decide, it is harder for an employer to know "up front" whether the arbitrator will actually decide the issue. This increases the chances of having to litigate the same issue twice.

Finally, the panel and the audience pondered these questions concerning witnesses: 1) should an arbitrator grant a postponement when the employer asks for it one week prior to the hearing because a witness has become "stressed out" about having to testify and has a doctor's note; 2) the union wants to depose the employer's expert witness on anger management; and 3) the employer wants information from the Employee Assistance Program (EAP) concerning the grievant's treatment for anger management. On the stressed-out witness, the arbitrators agreed that, rather than postpone the hearing, especially since the witness would always be stressed out about testifying, they would investigate alternative methods to lower the stress levels, such as testimony via Skype or other safeguards. In any case, if there were a postponement due to the witness's unavailability, both arbitrators agreed that the employer would have to pay any cancellation fee. Ontario law gave the answer for Canadian arbitrators on depositions: the statute requires parties to provide expert witnesses' written statements to the other side prior to the hearing. Although this was not true in the U.S., arbitrators could order the same result. However, on the EAP records, Ms. Abramsky said she would try to limit disclosure by balancing the employer's need for the information with the grievant's privacy interests, but Mr. Jaffe said he "routinely" refuses to order the production of medical records. The bottom line? Arbitrators in Canada have the advantage of having clear statutory answers on some pre-hearing issues. Nevertheless, union and management representatives will have the same concerns in either country. Ultimately, the panelists and the audience had a chance to think of new ways to use the pre-hearing period to make the actual hearing more efficient and be warned about the pitfalls and difficulties arising from some pre-hearing requests.

ARBITRATOR, THAT ADVOCATE IS GETTING AWAY WITH MURDER:

I'll Take It For What It's Worth or Evidentiary Conundrums in Labor-Management Arbitration

By Sharon Gallagher

Moderator: Homer La Rue, NAA
Columbia, MD

Panelists: Jules Bloch, NAA
Toronto, ON

R. Anthony DeLuca, Esq., (Labor)
DeLuca, Riccuiti & Konieczka
Pittsburgh, PA

Richard D. Miller, Esq., (Management)
Campbell, Durrant, Beatty,
Palombo and Miller, P.C.
Pittsburgh, PA

Jeanne Charles Wood, NAA
Pembroke Pines, FL

NAA Members Jules Bloch, Homer La Rue, and Jeanne Wood with Anthony DeLuca and Richard Miller

Labor and management argued each case scenario after it was presented to the audience. The audience (using red and green cards) then voted on questions suggested by the four case scenarios covered during the time allowed. The arbitrators then stated their rulings and rationale on each case.

Scenario #1:

The grievant was terminated for "picking on and intimidating another employee." The employee had received a verbal warning seven years before for making sexually-offensive comments and had received a written warning two and one-half years ago for insubordination and arguing with his supervisor. The contract is silent on how long discipline is to be carried on an employee's record.

The Company argued that the employee violated the Company's "three strikes" policy. The Union countered that the seven year old verbal warning should not be considered under the "three strikes" policy. The audience and the arbitrators overwhelmingly found that the verbal warning was stale, perhaps not even grievable, that it was a completely different kind of misconduct from the written warning and termination so that it could not fairly be used. Asked if the seven year old verbal warning was for abandoning the employee's post and the employee had signed a last-chance agreement thereon would the outcome be different, the arbitrators and the audience agreed that this would be different, but a seven year old last chance agreement without a sunset would be likely be unreasonable and the terms thereof would have to be read closely.

Scenario #2:

A police officer was terminated for not having probable cause to stop a red Corvette. The officer had received a tip from a confidential informant about a citizen in a red Corvette, providing cause to pull the car over according to the Union. The driver possessed multiple firearms and a large quantity of drugs. The City objected that the officer's testimony on the informant's tip is hearsay and should not be allowed.

The audience and the arbitrators overwhelmingly agreed that the officer should be allowed to testify regarding his conversation with the informant because it was being offered not for the truth of the matter asserted, but to explain why the officer pulled over the particular car, and why he had the encounter with the citizen. Arbitrator Wood stated that she would need more facts showing the officer's actions were reasonable before she would allow his testimony. Both the audience and the arbitrators agreed that the officer's after-incident report should be admitted (similar to incident statements taken by employers of eyewitnesses to the incident giving rise to the discipline).

Scenario #3:

The Company sought to call the discharged grievant as its first witness in a case where the grievant is accused of stealing an "X-Box" from another employee's car in the Company parking lot during the graveyard shift. The Company had a video surveillance tape showing the grievant crawling under the fence around the lot at 2 a.m. The grievant also admitted leaving the plant to get pizza for "lunch." The practice was for employees not to swipe in and out for breaks or to get food off premises.

The Union objected, arguing the Company has the burden of proof in the case and there are other ways for the Company to prove his guilt. The Union suggested the hearing should be postponed until any criminal proceeding had been completed. The Company claimed that the grievant was present, compe-

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David Shribman, Distinguished Speaker at Pittsburgh 2016 NAA Annual Meeting

Reported by James Cooper

Not many executive editors are known for their wit, political insight, and rhetorical skills. Unlike the Ben Bradlee mold, David Shribman demonstrated that not all executive editors carry a whip and smoke cigars. Pulitzer Prize winner Shribman, a long-time political reporter for the Boston Globe heading its Washington bureau and now the Executive Editor of the Pittsburgh Post-Gazette and frequent contributor to the Toronto Globe & Mail, entertained a full crowd at the Annual Meeting with his comments about the current political scene. Being a Canadian, he re-claimed his outsider heritage to put a somewhat sharper comical edge to his observations.

Starting with quotes from well-known reporters and observers H.L. Menken and Richard Harding Davis, Shribman asked the question all political reporters face today: "Where did Donald Trump come from?" As Shribman pointed out, Trump's running commentary of Making America Great Again by building walls and excluding people of one religious persuasion, encouraging all Americans to carry guns, stating that an American judge born of foreign parents is incapable of fairly judging him, flamboyantly promoting himself as the world's greatest businessman notwithstanding filing numerous bankruptcy petitions and facing thousands of lawsuits, including one alleging he defrauded an entire academic community with his Trump University, are not the sine qua non for assuming the most powerful political position in the world. Shribman's answer was that we should not be surprised because Trump is simply an amalgam of many political predecessors.

These predecessors include the businessman as better than a politician exemplified by Ross Perot in 1992; the sharp tongued dissenter portrayed by Pat Buchanan in the early 1990s; the claim of a populist mantle worn by William Jennings Bryant in 1896; the invocation of fear of a creeping socialist takeover of the government invoked by Senator Joe McCarthy in the 1950s; the portrayal of foreigners as venomous es-

DAVID SHRIBMAN

poused by Father Charles Coughlin in the 1930s and 40s; the flamboyance of boa-bedecked professional wrestler Jesse Ventura in winning the governorship of Minnesota in 1998; and the crusading excitement created by the Senator and Governor of Louisiana Huey Long between 1928 and his assassination in 1935. These attributes have produced a candidate for people anxious about their future and who feasts on their frustration. Polls show that two-thirds of

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I'll Take It For What It's Worth *(Continued from Page 5)*

tent, and able to testify and calling him first should be allowed.

The audience overwhelmingly voted to deny the Company's request. Canadian arbitrator Bloch stated that the Company's request to lead with the grievor is normally granted in Canada and he would draw an adverse inference if the grievor failed to testify. U.S. arbitrator Wood noted that there are regional differences among arbitrators on this point – East Coast and Midwest arbitrators deny such requests while Southern arbitrators routinely grant these requests.

Scenario #4:

The disciplined grievant, an animal control officer, was called to a residence because a citizen's dog had been attacked by the neighbor's dog. When the grievant arrived, the citizen caller's dog was dead from the attack. The distraught citizen wanted Animal Control to remove her dead animal. The grievant explained that the City's policies did not allow him to remove her dead dog and suggested two mortuaries to call. (This was correct City policy.) The citizen was irate that the grievant would not help her. Later, she called the grievant's supervisor and complained that he had been rude and insensitive to her and insisted the City take action.

The supervisor decided that the grievant had "more likely than not" been rude to the citizen. He based his decision on his conversation with the citizen and that the grievant had been coached one year ago for rude and discourteous conduct. (Coachings are not grievable.) The supervisor issued the grievant a written warning. The City chose not to subpoena the citizen, but wanted to have the supervisor testify as to what she said to the supervisor that led to the discipline. Also, the supervisor found a Facebook post on the grievant's account shortly after the grievant's encounter with the citizen commenting that "a crazy pet owner thought I was an undertaker for dead dogs," which the City argued also supported the supervisor's decision.

The Union argued that the City's case is based entirely on hearsay; that it cannot cross-examine the citizen; that the City is offering the conversation between the supervisor and the citizen for the truth of the matter; and that the City must affirmatively prove the grievant engaged in misconduct and posted the comment (which in fact failed to show the grievant was rude to the citizen).

The audience was split whether to allow the hearsay testimony. Both panel arbitrators stated they would allow the testimony by the supervisor regarding the citizen's complaint because it was offered to prove the supervisor's reasons for the discipline. NAA Arbitrator Dennis Nolan opined that the exceptions to the hearsay rule do not apply, that the evidence was being offered for the truth of the matter asserted, and the testimony should not be admitted. Nolan stated that if one lets the hearsay in through the supervisor, the burden of proof is shifted. There was no time to discuss the remaining two scenarios.

IT AIN'T OVER 'TIL IT'S OVER

By Bill Hempfling

This interactive session concerned issues that may arise post-hearing and was moderated by Academy Member Jim Darby. The panel of practitioners included Academy Member William Marcotte, Management Attorney Robert L. McTiernan, and Union Attorney Marianne Oliver. Arbitrator Darby kicked off the session by explaining that the phrase "It ain't over 'til it's over" is attributed to the famous philosopher-turned baseball player, Yogi Berra. Jim indicated the panel was going to discuss the types of issues that occasionally occur after the conclusion of a hearing or post-award, when most arbitrators believe "it's over." The primary issue raised by the panel members was the requirement for arbitrators to sometimes provide clarification of awards, more specifically when it comes to remedies.

Ms. Oliver started the session by briefly describing instances when advocates attempt to proffer post-hearing evidence in their closing briefs. She relies upon the use of transcripts to avoid this from happening. She then moved on to discuss how it is sometimes necessary for arbitrators to clarify their awards with respect to remedies. Ms. Oliver believes it is incumbent on advocates to clearly state what remedy they are seeking. By doing so, it is less likely that an arbitrator will issue an award with a remedy requiring later clarification. If the arbitrator has a clear notion of the remedies being sought by the parties, he or she is better able to address this when fashioning a remedy. In circumstances when the advocates fail to clearly specify what they are seeking, she suggested it is incumbent on the arbitrator to ask the advocates to articulate what remedy they seek. This should help preclude the need for later clarification.

NAA Member Jim Darby, Robert McTiernan, Marianne Oliver, and NAA Member William A. Marcotte

Mr. McTiernan began his discussion by stating that the notion of functus officio is not helpful to the parties and is out of date. Mr. McTiernan opined that the Steelworker Trilogy rendered the idea of functus officio useless, since the Trilogy gave arbitrators a great deal of authority. In his experience, the most common post-hearing issue he sees is also the need for arbitrators to clarify the remedy portion of their awards. He believes that clarifying an award is an inherent right, perhaps even an obligation, for an arbitrator. He warned that arbitrators should limit the discussion to clarifying the remedy and not allow the parties to re-try the case.

Arbitrator Marcotte presented research data he gathered relative to the Canadian system. He reviewed ten years of arbitration awards (which are publicly available in Canada) and determined that, of about 3,500 awards issued during the ten year period, only 97 supplementary awards were issued. Of those 97 supplementary awards, the majority of the cases involved remedies in discharge-reinstatement cases and in cases involving violations of human rights. He provided a handout with a concise, detailed summary of his research.

The members of the panel then discussed a number of hypothetical cases. The consensus of the panel was that those cases requiring clarification are largely due to instances where the arbitrator failed to write clear, understandable remedies. The advocates suggested it would be beneficial for arbitrators, before submitting their awards, to consider whether their remedies are open to misinterpretation or misapplication by the parties and what possible ramifications would arise from the remedy being spelled out in the award.

DAVID SHRIBMAN, DISTINGUISHED SPEAKER *(Continued from Page 6)*

the electorate believe the government is going the wrong way. Many do not care what the candidate says but believe him because he is rich and has an aggressively flamboyant personality. Most importantly, Trump is willing to say things that others will not; their hero remains heroic, like Charles Lindbergh, no matter what he says or believes.

Shribman's central point is that none of these features are new or unusual, but what is unusual is finding them packaged together in one person. This election cycle will be like no other and Hillary Clinton will have to debunk Trump's message with tactics that are as aggressive and assertive and as forceful as Trump's, which he will deploy while prancing around in his cloak of returning greatness and never utter a word of explanation to that old Indian term "How."

NAA member Barry Simon asked Shribman about the reported difference in money between the two campaigns, with Clinton amassing $43 million to Trump's measly $1.5 million. Shribman's response was that Trump gets in front of the public on a daily basis and does not need a budget for formal advertisements. NAA member Jeanne Vonhof asked "What is the responsibility of the press?" Shribman's reply: to be fair to both candidates. It is not the press's responsibility to show one or the other to be a buffoon. The final question concerned the viability of a third party candidate. Shribman replied that such a candidate needed a recognized national poll showing he (or she) garnered 15% of the vote to get into the debates and there is no such person alive today. The audience awarded Shribman with a standing ovation followed by a wonderful and inexpensive gift from the NAA, to which he responded "That's a gift my paper could afford."

THE INITIAL MANAGEMENT CONFERENCE

(ONE MORE HOOP TO JUMP THROUGH OR A ONE-TIME OPPORTUNITY)

By Lise Gelernter

Catherine Harris (NAA-California) participated in a simulated pre-hearing management conference in an employment arbitration case to give arbitrators and advocates alike a picture of "best practices." Sam Cordes, an attorney who represents employees in his firm Samuel J. Cordes & Associates in Pittsburgh, and Casey Ryan, an attorney at Reed Smith Centre in Pittsburgh who represents employers, played the roles of advocates seeking the most efficient and fair process possible for their clients. For the uninitiated, the session was an excellent introduction into the pre-hearing process that simply does not occur in labor arbitration. For the experienced employment arbitrator, it was a great way to share practice tips. For everyone, it was an excellent vehicle for getting questions answered by experts in the field.

In the hypothetical case under consideration, an Iranian-American car salesman claimed he was fired due to discrimination on the basis of his national origin or race. The employer argued he was fired simply because he was not a good salesman, as shown by his sales statistics. Ms. Harris had the parties schedule a pre-hearing case management conference so that they could decide on schedules for discovery, hearing days, deadlines for dispositive motions, and other case management issues. Although most management conferences take place by phone, the parties in this case appeared in person so we could watch them in action.

Ms. Harris opened the conference by telling the parties she preferred it when the parties agreed upon a plan for the case, but that she would have no trouble ordering a plan should the parties fail to do so after a reasonable period of time. She then invited the parties to give a short summary of the issues in the case, especially since she had a minimal amount of information about it. The parties talked about the case for about five minutes each and then Ms. Harris dove into the case management details.

She started by reminding the parties that, since AAA was managing the case, they were bound by AAA rules on employment arbitration. She observed that, when they set hearing dates, they would then work back from those dates to establish the scheduling for discovery, motions, and the exchange of information about witnesses prior to the hearing. She asked the parties if they had discussed these issues prior to the meeting and, in an example of how the parties can work cooperatively to make the best use of the time at the conference, Mr. Cordes said that he and Ms. Ryan had conferred and decided that a three day hearing in March 2017 would give them the six-month discovery period they would need.

Casey Ryan, NAA Member Catherine Harris, and Sam Cordes

Wasting no time, Ms. Harris had them pick dates when all parties and the arbitrator could make the hearing, as well as a location for the hearing. Other hearing details, including transcription and the treatment of expert witnesses, were settled quickly. By raising potentially problematic issues up front, such as the need to safeguard proprietary information, the parties and Ms. Harris were able to reach an agreement on those issues and avoid unnecessary delays and conflicts later on. In setting discovery and motion schedules, Ms. Harris gave the parties room to craft the schedule that would suit them best.

As part of the conference, Ms. Harris was able to set formatting and submission requirements so that, when the parties exchanged documents and then ultimately presented them as exhibits, she would receive them in the electronic and hard copy format that made them most accessible. She included specifications on the creation of indices and tabs in a binder of exhibits. Ultimately, this up-front organization would lead to a more efficiently run hearing.

Ms. Harris commented after the simulation that arbitrators should take full advantage of the first management conference because the parties are most receptive to making the case proceed efficiently and to agreeing on sometimes thorny procedural and even legal issues.

In the Q & A session that followed, Maretta Comfort Toedt (NAA-Texas) commented that in a AAA employment arbitration training she found that AAA seemed to be pushing the concept of the "muscular" arbitrator who does not let the parties do too much discovery. Ms. Harris was surprised at that emphasis and said her practice was to allow the parties to determine how much discovery should be allowed. Following up, John Sands (NAA-New Jersey) said that the "time for muscle is when parties disagree." Mr. Cordes, the union attorney, agreed, but Ms. Ryan said that she had no problem with an arbitrator who puts limits on, for example, the number of depositions, but who would give permission for more if necessary.

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RECENT DEVELOPMENTS IN THE AIRLINE INDUSTRY:

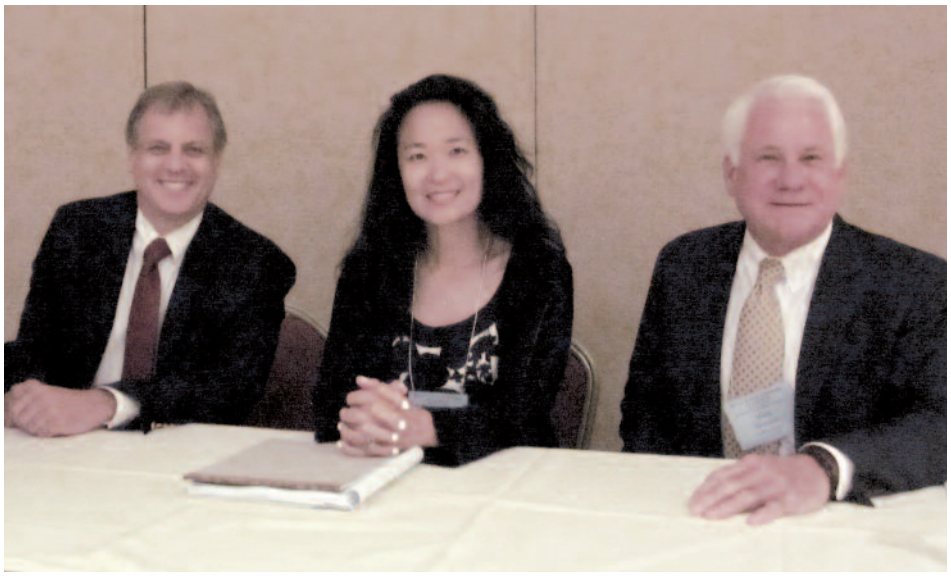
CAN GRIEVANCE MEDIATION WORK?

By Elizabeth MacPherson

The merits of grievance mediation were the subject of a lively debate among airline industry representatives, NAA members, and guests at a session moderated by NAA member Jeffrey W. Jacobs. Mark Moscicki, Manager of Labor Relations for American Airlines, and Helen Yu, General Counsel for the Southwest Airlines Pilots' Association, both spoke positively about their experiences with the process, which involves mediators supplied by the National Mediation Board (NMB). The same service is available in non-Railway Labor Act industries from the Federal Mediation and Conciliation Service (FMCS).

The industry representatives indicated that, in their respective organizations, grievance mediation is primarily used for discipline and discharge cases. Both noted that it is important to ensure that the clients understand and are well prepared for the process. They also agreed that it is important that the mediator be a person both parties respect, who can, in confidence, provide each with a blunt, truthful assessment of the strengths and weaknesses of its respective case. These "advisory opinions" by an objective third party are considered helpful in persuading the clients to settle rather than proceed to arbitration.

Participants identified some of the dangers of grievance mediation, including the possibility that, should mediation fail, the other party may use the information obtained through the process as a form of discovery. Additionally, if mediation is viewed as merely another step in the process of getting to arbitration, it will be perceived as and will become ineffective. However, the benefit of better outcomes, designed by the parties themselves, and the advantage of preserving the relationship between the parties were two factors generally seen as outweighing these dangers.



NAA Member Jeffery Jacobs, Helen Yu, and Mark Moscicki

Labor and management representatives in the audience expressed considerable reservations with the concept of using the same individual to conduct both the mediation and arbitration components of the same matter (med/arb), despite the positive experiences with this process recounted by a number of arbitrators present at the session. However, most agreed with the moderator's succinct summation: grievance mediation may not always get you what you want, but it will sometimes get you what you need.

INITIAL MANAGEMENT CONFERENCE *(Continued from Page 8)*

Mr. Sands gave some pointers on practices that worked well for him. In terms of exhibits, he asked for electronic copies of everything in word processing and PDF format as well as hard copies, giving him the ability to easily cut and paste excerpts from exhibits. With experts, he tries to get the parties to agree to have the experts' reports be considered their direct testimony and then have expert cross-examination only at the hearing.

Barbara Chvany (NAA-California) also had some helpful suggestions. First, since the parties typically underestimate the time necessary for a hearing, she asks for agreement on an extra set of dates outside of her cancellation period so that they do not have to scramble for dates too far down the road, but the parties do not have to pay for dates they cannot use. Second, she likes to ask about the nature of the remedies so that the case can be bifurcated and hearing days on remedies are held only if necessary.

Mitchell Goldberg (NAA-Ohio) commented on the perennial problem of a party's last minute continuance request due to, for example, the unexpected unavailability of a witness. His practice is to tell the parties that they will figure out some way to use the time. Ms. Harris agreed and added that she tries to think creatively about the best use of the time, such as going out of order on witnesses, or taking care of other matters.

Through the simulation and discussion, the panel and audience members were able to engage in a productive discussion about the benefits and the productive use of the management conference. It might make labor arbitrators think about translating some of the lessons learned into the labor arena!

The Case of the Handcuffed Suspect –

By Jerry Sellman

When confronted with a disciplinary case involving allegations of excessive force by law enforcement officers, are there standards applicable to determining what constitutes reasonable action to subdue a suspect versus unjustified excessive force? Are there relevant factors that should be considered in determining the reasonableness of the action taken by a law enforcement officer? Since law enforcement officers are educated, well-paid, and constantly in the public eye, they are without question held to a higher standard of conduct than ordinary citizens. Within these parameters, however, they also have a duty to protect the public, the suspect, and themselves from harm. How are these responsibilities balanced? These questions were addressed by a panel comprised of Joseph Kovel, President of the Pennsylvania State Troopers Association; Clifford W. Jobe, a former Lieutenant with the Pennsylvania State Troopers and current expert and consultant on "use of force;" Cameron McLay, City of Pittsburgh Chief of Police; Michael Palombo, a labor lawyer; and Eric C. Stoltenberg, labor lawyer. George T. Roumell, Jr., NAA, moderated the panel.

To address the questions presented, a video taken from a dashboard camera of a Pennsylvania State Trooper, who was charged criminally and suspended for 25 days for excessive use of force, was used to illustrate not only the complexities of relying primarily on a video of an incident, but also how to apply and consider standards applicable to determining what constitutes excessive force, as well as relevant factors in determining the reasonableness of the action taken by a law enforcement officer.

The video shows a suspect, who was handcuffed in the backseat of the State Trooper's car, complaining that his handcuffs, coupled behind his back, were too tight and his hands were becoming numb. This went on for more than 15 minutes. The car was running while the State Trooper was investigating the crime scene outside the car where another State Trooper had been injured while trying to apprehend the suspect. The State Trooper eventually checked the suspect's cuffs and concluded that they were not too tight and that the suspect's hands should not be numb. In this case, the suspect had been double cuffed to give him more room. While talking to a Medic and former police officer known to the State Trooper, the Medic indicated that he believed the suspect was trying to "slip his cuffs" and escape. The video reveals that the State Trooper opened the door, the suspect leaned toward the Trooper, the Trooper pepper-sprayed the suspect, and the suspect fell out of the cruiser. Based upon this video evidence, the State Trooper was given a 25-day suspension.

NAA Member George Roumell, Jr., Michael Palombo, Clifford W. Jobe, Jr., Joseph Kovel, and Eric Stoltenberg

At the arbitration hearing, the Employer argued that the act of pepper spraying a handcuffed suspect by a seasoned State Trooper (Sergeant) constituted excessive force. As such, it would be harmful to the public perception if law enforcement officers in general, and specifically in this case, put the officer back to work after using excessive force. Supervisors are to be held to a higher standard and there was no threat to the officer here.

The State Troopers Association representative argued that, based upon the facts and circumstances discovered during the investigation, the action taken by the State Trooper to subdue the suspect was "objectively reasonable" and the suspension should be overturned. The standards for objectively determining the reasonableness of the action taken by a law enforcement officer were set forth in *Graham v. Connor*, 490 U.S. 386 (1989). Applying those standards to the facts and circumstances with which the officer was confronted in this case, without regard to his underlying intent or motivation, supports a finding that the action of pepper spraying the suspect was reasonable and did not constitute excessive force.

Graham v. Connor, supra, held that:

1. All claims that law enforcement officials have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

2. There is no generalized use of force standard under the Constitution. A plaintiff must identify the specific constitutional right alleged to have been violated (many lawyers had argued that there was an inherent prohibition on the use of excessive force implicit in the Constitution).

3. The determination of whether the force used was reasonable requires the balancing of the kind, type, and severity of the force against a citizen's reasonable expectation of privacy (to be left alone).

4. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the "20/20 vision of hindsight." The only facts that can be considered to determine whether or not

(Continued on Next Page)

Or was there Excessive Force?

the force used was reasonable are those that the officer knew at the very moment he used force. What was learned after the force was used cannot be considered.

5. The test of reasonableness is not capable of a precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including:

a. The severity of the crime at issue

b. Whether the suspect poses an immediate threat to the safety of the officer or others, or

c. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

6. An officer's motivation and/or intent have no bearing on the reasonableness of the use of force because it is an objective standard (or put another way, an officer's bad motive/intent will not make an otherwise reasonable use of force bad, and an officer's good intentions will not save an otherwise bad use of force).

7. The decision to use force is instantly made (based on the totality of circumstances that the officer is aware of at the moment of having to use the force).

8. The use of force may not be judged from hindsight. It must be judged by placing the trier of fact (judge or jury) in the shoes of the officer at the very moment the force was used.

In addition to the standards established in *Graham*, most states have statutory provisions regarding "the Use of Force in Law Enforcement." As an example, Title 18, *Pennsylvania Consolidated Statutes*, Section 508, "Use of Force in Law Enforcement," provides that a peace officer is "… justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest…" Further, "A peace officer, corrections officer or other person who has an arrested or convicted person in his custody is justified in the use of such force to prevent the escape of the person from custody as the officer or other person would be justified in using under subsection (a) [believes to be necessary] if the officer or other person were arresting the person."

The focus of the defense in this case was to demonstrate that the State Trooper used such force as a reasonable officer would use, based upon the information available to him and the totality of the circumstances at the time. The defense set forth factors describing the events that were occurring at the time of the alleged misconduct, what the officer knew about the suspect before arriving on the scene upon which he was relying, and the background and experience of the officer.

The following events were occurring at the time that affected the decision of the officer to deploy the force used:

- The Trooper's car was running (required to effect communications) and an uncuffed suspect would have access to a rifle, as well as a car, in which to escape;
- The suspect was trying to remove the cuffs;
- The suspect had already injured another Trooper (paramedics were attending the injured Trooper who was near the vehicle) while the Trooper was arresting the suspect to effect a Mental Health Commitment;
- The officer was supervising a crime scene: the other Trooper was injured by the suspect;
- The grievant was informed that the suspect was trying to "slip the cuffs."

The following information was known to the State Trooper before arriving at the scene:

- The suspect had a history of mental illness, had injured others before (beat a victim with a baseball bat), and had escaped on a previous occasion;
- The officer had a suspect under custody in the past who uncuffed himself;
- The suspect was a danger to himself;
- Dispatch informed the officer that the suspect said he would not be arrested or jailed.

The following information about the background of the Trooper was presented:

- A patrol supervisor for 17 years;
- No prior discipline;
- Has used force in the past to subdue a suspect;
- Had training on use of force and knew levels of force to use.

In reviewing an excessive force case, what constitutes a "reasonable" officer and the force that officer would use? The panel suggested that a reasonable officer is one who has had initial training on the use of force necessary to make an arrest or detain a suspect, ongoing training, and even special training on the subject.

Applying the above factors under the standards of *Graham*, the defense argued that once the trier of fact (in this case the Arbitrator) put himself in the shoes of the officer at the very moment the force was used, the use of the pepper spray was reasonable under the circumstances. It was a reasonable option to gain control of a suspect. Other than the use of open hands, pepper spray is considered the next lowest option in the use of force.

After considering the totality of the circumstances in light of the cited standards, the State Trooper was found innocent of the criminal charges. The Arbitrator, after a subsequent two week hearing, sustained the grievance and ordered the Grievant to be made whole and the suspension removed from the Grievant's employment record.

While the Employer relied exclusively on the video evidence, the additional factors examined, in light of the standard of reasonableness espoused in *Graham*, demonstrated the caution that needs to be exercised when viewing video from a static camera. While the camera sees events from one angle with no distractions, a law enforcement officer has numerous distracting events that must be considered in determining what a reasonable officer would do under the circumstances surrounding the event requiring force. A camera cannot capture the totality of the circumstances existing at the time.

In conclusion, the panel recommends that an arbitrator handling a use of force case should consider the national standards set forth in Graham v. Conner, supra, as well as relevant state laws to which a law enforcement officer is subject in arriving at his or her decision.

The Postal Industry: Consideration of Evolving Practices

By Mary Ellen Shea

The Postal Industry is always well attended and the Thursday afternoon session was no exception. As one of the largest U.S. employers, USPS ranks between Walmart (2 million employees) and McDonald's (420,000 employees). More importantly, with well over 600,000 unionized employees, the postal industry is a significant source of work for Academy members. According to their websites, membership in the four postal unions is:

American Postal Workers Union
(APWU)220,000 members

National Association
of Letter Carriers (NALC)
277,000 members

National Mail Handlers Union
(NPMHU)47,000 members

National Rural Letter Carriers Assoc. (NRLCA)
102,000 members

Academy member, I.B. (Beber) Helburn moderated the Postal Industry panel. (Don't know Beber? For a good introduction, read James Armstrong's piece in the Article Factory, "University of Texas Professor, Turned Arbitrator-Mediator.")

The panel included Richard "Rick" Acker of the Postal Service, who as Manager of Labor Relations for USPS, has the unenviable responsibility of overseeing and administering all four collective bargaining agreements; Lew Drass, Vice President of NALC, who heads the Contract Administration Unit; Thomas J. Branch Jr., Manager of the Contract Administration Department at NPMHU; and Michael Gan, Esq. of Peer, Gan and Gisler, LLP, who is General Counsel for NRLCA.

As always, the panelists each provided an overview of their arbitration case loads and trends, and offered tips and reminders about grievance and arbitration procedures unique to their bargaining unit and collective bargaining agreement. In addition, each panelist addressed an issue of particular interest or concern he wanted to impress on our members.

Rick Acker addressed two issues: scheduling hearings and awards involving a remand. The parties have increased their efforts to identify the specific case or cases to be heard when scheduling hearing dates and continue to work to reduce the number of cancelled or re-scheduled

Rick Acker, Michael Gan, Lew Drass, Thomas Branch, Jr., and NAA Member I.B. (Beber) Helburn

hearings. The goal is to provide more predictability for advocates as well as the arbitrator and assurance that the case will go forward on the scheduled hearing date. Rick explained the parties have been challenged in this area because they do not always have enough advocates who can be available and prepared to present the number of cases the parties were able to present "in the old days." Rick also addressed a USPS concern about arbitrators remanding part or all of the remedy to the parties. He explained that, by the time a case gets to arbitration, the parties have had extensive discussion and settlement discussions most often fail when trying to negotiate the remedy. According to Rick, a decision that remands part or all of the remedy fails to provide what the parties need from arbitration, i.e., a complete and final resolution of the issues the parties could not resolve themselves. (For more information, go to Labor Relations at *https://about.usps.com*)

Lew Drass, Vice President of NALC, described a May 9, 2016 USPS-NALC agreement to expand two pilot programs to test changes to the arbitration scheduling process. The programs have been expanded to 38 USPS districts and 11 NALC regions. In the first pilot (in areas that do not have many cases pending arbitration), the parties at the NALC regional/USPS area level will follow an established procedure for jointly scheduling hearings with the goal of eliminating (or at least reducing) lost hearing days. The second pilot (in areas with many cases pending arbitration) requires the parties at the NALC regional/USPS area level to schedule hearings within 120 days of appeal to arbitration. Lew reported that the earlier pilots were achieving the desired results and, while it remains to be seen, he is optimistic that the parties will see similar results after the May agreement to expand the programs. (For more information, go to Contract Administration Unit at *https://www.nalc.org*. For more details about the pilots, see Lew Drass's article, "Arbitration Scheduling Procedures Pilot Tests Update" in The Postal Record, June 2016 issue.)

Thomas J. Branch Jr., Manager of the Contract Administration Department at NPMHU, addressed a question regarding billing for additional study time. He explained that requests for additional study time are considered on a case-by-case basis and, when appropriate, there is no problem approving such requests (the other panelists concurred). Mr. Branch went on to explain that the four bargaining units represent a broad and diverse membership and that each has unique working conditions and distinct cultures. He emphasized the need for arbitrators to recognize this diversity and become familiar with the particulars of the Mail Handler's contract, avoiding assumptions based on experience with the other bargaining units. (For more information, go to Contract Administration Department at *http://www.npmhu.org/*)

Michael Gan, Esq., General Counsel for NRLCA, focused on two issues. He discussed a "massive" national level project to evaluate the rural carrier's job (Evaluated Compensation System Time Study Project). The NRLCA is concerned about the project's impact on the compensation system for its members. Attorney Gan also addressed the parties' well-established dispute resolution system. According to him, in an average year, "a couple dozen" cases at the national level go to arbitration and no more than 50-60 cases total go to arbitration. He explained that the NRLCA uses a different approach in selecting cases for arbitration. While state and local officers can appeal any grievance to arbitration, the decision as to which case the Union will take to arbitration is reserved exclusively to the General Counsel. (For more information, go to *https://www.nrlca.org/* or *http://peerganlaw.com/*)

Ready to Value Add in Education?

By Robert Grey

Newly inducted NAA Member Bob Grey, Jody Buchheit Spolar, Gretchen Love, and William Hileman

On June 23, 2016, nascent NAA Member Robert "Bob" Grey moderated a concurrent session entitled "Arbitration – Ready to Value Add in Education?" The session was originally organized by NAA Member Bill Lowe. However, during the 2015 San Francisco Annual Meeting, Bill realized he had a scheduling conflict with the Pittsburgh meetings, so the Program Committee Chair handed the reins to Bob.

The three (3) panelists were Jody Buchheit Spolar, Chief Human Resources Officer for the Pittsburgh School District; Gretchen K. Love, Esq. (Management), shareholder at Pittsburgh's Campbell Durrant Beatty Palombo & Miller, P.C.; and William "Bill" Hileman (Labor), Pittsburgh Federation of Teachers, Vice President for Middle Schools and Staff Representative.

Education reform and teacher accountability have resulted in legislation that mandates (in some states, including Pennsylvania) that student outcomes be factored into teacher evaluations. Using the Pittsburgh Public School system's implementation of "Value Added Measures" or "VAM" as a case study, this presentation explored whether labor arbitration can keep pace with changing expectations in the educational field.

Jody analogized the changes in teacher evaluation to the changes in Major League Baseball player evaluation brought about by "Moneyball." Measuring the "value added" by professional baseball players and individual teachers is complex and not without controversy.

Jody pointed out that previously one lens only was used for teacher evaluations: observation of teachers teaching. Under the new legislatively mandated paradigms, the one lens of observation has given way to multiple lenses, including the lens of student achievement. She posited that this fundamentally changes the assumptions that have been in place for decades as to how teacher evaluation disputes are handled in the arbitration forum.

Multiple measures of student performance are analyzed to identify the individual contributions of teachers and schools to the achievement of their students. Value added measures (VAM) and student learning objectives (SLO) are the two main methods student outcomes are measured in the Pittsburgh Public Schools.

To assure fairness and accuracy in a VAM, many variables must be taken into account. The more variables that are taken into account, the more complex the VAM statistical framework becomes. For example, this is one equation for one student in the Pittsburgh Public Schools VAM:

$$Y_{i,t,c} = B_{i,t-1}\alpha + X_{i,t}\gamma + \bar{X}_{i,t,c}\theta + D_{i,t}\delta + T_{i,t}\tau + e_{i,t,c}$$

SLOs are a process to document measures of teaching effectiveness based on student achievement of content standards. To assess such achievement, students are tested on content early in the school year and again on the same content late in the school year. Teachers are evaluated on the percentage of students meeting, not meeting, and/or exceeding the content standards target, and the degree by which the students do so.

The panel debated whether traditional labor arbitration fits the needs of the parties vis-à-vis the complicated mathematics and statistics at the heart of this new legislatively mandated multiple lens approach to teacher evaluations. Gretchen Love presented the management viewpoint that, under the legislation mandating this new approach, arbitration awards are subject to layers of appeal in the courts. Thus, arbitration of these matters loses the benefit of finality of arbitration awards, even more so because public policy is involved. She also posited that the complicated technical nature of these cases requires expert testimony to educate arbitrators, thus increasing the expense and decreasing the efficiency of arbitration. She suggested that, if this is the situation, why not just go to the courts to begin with? Bill Hileman presented the labor viewpoint that the parties negotiated for arbitration of their disputes and they are entitled to the benefit of their bargain. He further posited that, if expert testimony is needed for these cases, it would be needed whether the forum is arbitration or the courts. Whether the trier of fact is an arbitrator or a judge, the expert testimony would be the same. All else being equal, arbitration would therefore still be the more efficient forum compared to the courts.

Bill noted that 15% of a teacher's evaluation is based upon the "Tripod Student Survey" -- student ratings of their teachers. All K-12 students are surveyed. Bill suggested that Tripod survey results may produce mathematically reliable numbers, but at the same time be fundamentally flawed for their intended purpose.

The session had substantial audience participation, including Member John Sands's comment that arbitrators often hear expert testimony, so the use of expert witnesses in these cases should not be cause for avoiding arbitration.

In conclusion, the panelists agreed that both labor and management advocates are entering a period of risk and uncertainty regarding how teacher evaluation disputes will be resolved in this new era. The stakes are high, and it remains to be seen how the tensions between collective bargaining provisions, legislation, and public policy will play out.

JUDICIAL REVIEW OF ARBITRATION AWARDS:

The View from the Bench and from the Front Lines

By James Cooper

This session, ably chaired by President-elect Kathleen Miller, focused on two elements of judicial review: Arbitrability and Last Chance Agreements. The Hon. Mark Hornak, Judge of U.S. District Court for the W. District of Pennsylvania, began with a quote from Bruce Froemming, the longest serving umpire in major league baseball: "You are expected to be perfect on day one and get better every day thereafter." Judges are held to that standard and so are labor arbitrators who do not enjoy lifetime appointments. This point was clear in the lively discussion that followed with Richard Brean, General Counsel of the United Steelworkers, and attorney Mark J. Neuberger of Foley & Lardner's Miami office.

On the issue of arbitrability, Brean quoted from the Steelworkers Trilogy, maintaining that the scales tip to arbitrability unless the positive assurance posed by Justice Douglas exists. Attorney Neuberger insisted that he goes by a different rule of thumb: arbitrators always find disputes arbitrable and, with arbitrability on the table, they are prone to split the baby. He finds that, far more important than his legal opinion in deciding whether to challenge arbitrability, it is the emotional state of his client that guides his strategy. Contrary to popular opinion, there is no monolithic "management view," but rather a more emotional and cost conscious pragmatism that influences his tactics.

On Last Chance Agreements, Judge Hornak posited that the judicial view is very narrow and arbitrators should heed the federal courts in giving short shrift to claims requiring a second "just cause" hearing. Breen disagreed, stating that, unless the Last Chance Agreement says the "decision is solely and exclusively management's," the need for a fair factual determination trumps the word "last" in such agreements. Neuberger firmly disagreed. And so the fight continues to our professional and financial benefit.

The Hon. Mark R. Hornak, Richard Brean, and Mark J. Neuberger with NAA Member Kathleen Miller (standing)

General Counsel Breen pointed out the continuing viability of "class actions" under arbitration agreements in Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064 (2013). In that case, the parties asked the arbitrator whether their agreement's referral of all civil actions to arbitration included the right to bring a class action. When the arbitrator said it did, one party disagreed and took it to the Supreme Court. Justice Kagan, citing the language found in the Steelworkers Trilogy, stated, once again, that when the parties agreed to the submission to the arbitrator, they bought that interpretation whether it was "good, bad or ugly." These are words I will quote from now on when parties ask me about my authority to interpret an agreement.

The program materials included an addendum listing dozens of cases on the subject of judicial review of arbitration awards. It would be impossible to summarize them, but if an NAA member wants this list, I will forward it via e-mail. There was also a substantial summary of the Tom Brady deflategate case. The miscarriage of justice has not been depriving Tom Terrific of four NFL games, but the amount of attention devoted to this matter along with the umpteen thousands of dollars of public money spent on judicial resources devoted to a single employee who makes more than $1 million per game or $500,000 per hour. Bring on Justice for Janitors please.

RE-THINKING ARBITRATION

By James Cooper

This provocative and controversial session was designed by NAA member Paula Knopf, who served on the panel moderated by Elizabeth Neumeier along with attorneys Joseph J. Pass, Jr. and Peter J. Ennis representing labor and management, respectively. While Knopf caused it, Neumeier controlled the steam coming out of many NAA members' ears. The panelists did not hesitate to contribute to the controversy. Knopf posited ten changes to the arbitration process, but with forty-five minutes allocated to this session, only two of her firebombs were considered. Before I get to those discussed in Pittsburgh, I would suggest that the NAA circulate pages 81 to 91 of the program materials to all NAA members and that Ms. Knopf agree to face the crowd at a subsequent NAA meeting (with or without advocates) until many of her ideas are fully explored. NAA members who attempt some of them may be able to post their experiences at subsequent meetings.

Proposal #1 is a re-thinking of the "shared costs" of arbitration and imposes a loser pay provision as a means of increasing the incentive to settle. But this "loser" would also be responsible for counsel fees incurred, a very steep departure from the loser pay provision already found in some collective bargaining agreements where half the arbitration fee is passed on to the losing party. Attorney Pass suggested that his union clients may be willing to do this if the "damages" included consequential damages, such as loss of a house or car or even a divorce. Attorney Ennis scoffed at such a suggestion asking how his employer clients could collect any consequential damages? Would it include the cost of training a replacement, the loss of production caused by the terminated employee's misconduct, or the cost of drug testing, for example? Further, how would this work in the public sector where it is tax money going out the door for consequential damages. Such funding requires a legislative appropriation, an unlikely occurrence. However, Attorney Ennis conceded that an agreed issue "what shall be the remedy?" included interest on back pay awards, something I only award upon request but perhaps should simply do as a matter of course.

Naturally the line of NAA members at the microphone seeking to comment on this proposal was long and the speakers boisterous. Leading the charge was NAA member George Roumell, Jr. from Detroit. He asserted that the entire consequential damages issue (including back pay and interest) would disappear if the parties simply moved to an expedited grievance and arbitration process. The enemy is delay, which no one could dispute, but is impossible to prevent. Others were less sanguine about a loser pays system, suggesting they generate as many problems as they attempt to solve. The consensus was to tell Ms. Knopf: "Go back to the drawing board" on this issue.

Joseph Pass, Jr., NAA Member Paula Knopf, NAA Member Elizabeth Neumeier, and Peter Ennis

Proposal #3 was that the arbitrator engage the parties in pre-hearing discovery or similar pre-hearing requirements well before the date for the hearing (e.g., seeking stipulation of the issue; stipulated facts; witness lists; will-say statements; expert reports, etc.). Alternatively, the arbitrator could offer or suggest grievance mediation via a limited two-hour conference call. The panel members agreed that these suggestions were worthwhile and noted that they frequently engaged in this activity depending on the sophistication of their client and opposing counsel. More often, however, the case came to them late in the process and there was little effective background information provided. The not surprising result was that they had little or no basis to engage in any pre-hearing activity other than the preparation of evidence for hearing. In other words, no part of counsel's preparation was available to the other party before the morning of the hearing, not even a statement of the issue.

The audience was much more agreeable to Proposal #3, provided the parties accepted active intervention and the proposal would not overly delay the progress of the case. NAA members Arnold Zack and Frank Silver suggested that arbitrators insist that only evidence and issues raised during the grievance procedure be admitted and considered in arbitration, thereby forcing the parties to reveal their hands before the arbitration hearing. Many NAA members took to the microphone to explain their tricks of the trade to get the hearings completed. In short, many of Ms. Knopf's suggestions have already been adopted.

The closing quote for this session was from that renown philosopher Yogi Berra: "You've got to be very careful if you don't know where you are going, because you might not get there."

"Scene" in Pittsburgh

The 69th Annual Meeting of the Academy, June 22 - 25, 2016 at the Wyndham Grand Pittsburgh Downtown was another success, with 166 members, 58 spouse/companion/partners, and 85 guests attending. Walt De Treux was Program Chair and Michelle Miller-Kotula chaired the Host Committee. Prior to the meeting, 41 advocates participated in a highly successful Advocacy Continuing Education Program directed by Louis L.C. Chang.

Presidential Address in Pittsburgh

PRESIDENT ALLEN PONAK

Reported by Susan Grody Ruben

At the NAA 2016 Annual Meeting in Pittsburgh, President Allen Ponak was wittily introduced by his friend and colleague, NAA member Andy Sims. Andy noted Allen grew up in Montreal, a community that also produced Leonard Cohen, who also cannot sing well. Andy further noted:

> *The Academy springs from the basic notion that industrial disputes are best resolved when the parties have the freedom and responsibility to appoint their own decision makers and to craft their own rules for adjudication. The Academy's role must be to foster quality, creativity, and independence in those arbitrators, chosen by the parties, to make their system work.*
>
> *That has been the focus of Allen's entire academic and arbitration careers. It is what he has worked for inside and outside the Academy. It is work that has made him worthy of the honour of being our President.*

Allen chose as his topic contemporary challenges to arbitration and the Academy's responses to those challenges. Allen explained that he, like many Academy members:

> *grew up in an era where collective bargaining was expected to be an enduring part of our economic landscape. Arbitration…was held in high esteem….*
>
> *Today we face a vastly different environment….as collective bargaining evaporates and corrupt forms of arbitration flourish, our brand of arbitration is increasingly under attack. The universal respect for labour arbitration that was a bedrock…can no longer be taken for granted.*

Allen stated it is not the Academy's job to defend the merits of any particular decision, but rather to defend respect for the process.

Allen probed the reasons why arbitration has come under heightened attack. One explanation is simply "the times in which we live, [where] rage and bombast, accelerated through social media, have replaced analysis and facts." In Allen's opinion, however, there are "deeper causes."

First is the spread of what has been described as "'cram down arbitration' – arbitration forced on a weak party by [a powerful] party…." This type of arbitration is often seen in consumer, commercial, and employment matters. "Our system has been hijacked by those who are trading on the good name of arbitration to advance their own self interests." Allen elaborated:

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"The Academy…has a role to play in helping return workplace arbitration to the respected place it deserves."

> *The irony is that the spread of arbitration beyond labour relations should have been a triumph for [ADR] that we pioneered. Instead, it has become a bludgeon by the strong against the weak, damaging all arbitration, including what we do….We are collateral damage.*

Allen cited "another reason why respect for labour arbitration has diminished – the continuing decline of collective bargaining [in the U.S., Britain, Germany, and Australia]." Allen noted, however, (with some pride) that "Canada has been one of the few advanced industrial economies where collective bargaining…has remained stable at around one-third of the workforce." Allen attributed this strength in Canada to there being no "right to work" laws in Canada. In the U.S., "labour arbitration has become a shrinking part of the economic landscape and increasingly isolated. It is always easier to attack the weak than the strong."

"The Academy…has a role to play in helping return workplace arbitration to the respected place it deserves." "Thanks to the incredible work" of Gil Vernon, Kathy Miller, and many others, the Academy has advanced an education initiative. In partnership with the Center for the Study of Dispute Resolution at the University of Missouri's School of Law, in particular Professor Rafael Gely, *ArbitrationInfo.com* was launched in early 2016. The website "provides authoritative, objective, and comprehensive information about workplace arbitration." It separates "fact from fiction and…distinguish[es] high integrity arbitration under collective bargaining agreements from other types of arbitration."

"Education also lies in our own hands as individuals with a stake in the reputation of labour arbitration." As NAA member Barry Goldman wrote in an Op-Ed in the Los Angeles Times, "Arbitration is not the problem. The greedy and cynical perversion of arbitration is the problem."

"If education and speaking out in defense of our system is a first strategy, the second strategy is a recognition that the Academy cannot do this alone." One such organization is LERA. Many NAA regions work with local LERA chapters. "One of my initiatives as president has been to see if this cooperation can be extended to the national level. This year, LERA and the Academy have reciprocal, branded sessions at each others' conferences."

"Another organization with which the NAA has partnered is the College of Labor and Employment Lawyers. Together we produced a wonderful film called "The Art and Science of Labor Arbitration." Other "obvious candidates" are FMCS, AAA, and ABA-LEL.

Allen's third recommendation has been somewhat controversial. It is that the Academy "should take a position in support of the right to collective bargaining." While Sara Adler in her presidential address said, "Everyone who gives it a moment's thought knows that the NAA supports collective bargaining – we wouldn't exist without it," Allen noted three reasons have been advanced by some as reasons not to make our support explicit. First, it could be seen as "self-serving." "So what?" asked Allen. "That doesn't disqualify us from speaking out any more than a judge who proclaims that she supports the constitution."

The second reason offered by some for not making the Academy's support for collective bargaining explicit is that it could "jeopardize the perception" of the Academy's "neutrality." Allen recognizes this as "a legitimate concern. The difference between remaining fiercely neutral on any given case while endorsing the framework within which the case is being heard is a nuance that will be lost on some."

"The third reason that gives pause is the proposition that collective bargaining as a system of employee representation is on the way out as our economy transforms into…[a] 'gig economy'….We would be hitching our wagon to the past, not the future." "[T]hat may be true," said Allen, "but supporting the right to collective bargaining is not meant to be mutually exclusive of any other forms of collective representation or individual employment contracts…."

While an Academy endorsement of the right to collective bargaining will not "arrest the decline" in collective bargaining, "sometimes we do things because it is the moral thing to do." Allen elaborated:

> *The right of workers to freely choose whether they want to be represented for collective bargaining purposes is the hallmark of pluralistic democratic societies. This right is enshrined in U.S. and Canadian labour law….To support this right sends a message that this right is important and is part of the foundation of societies like ours. It ought to be part of the foundation of the Academy.*

As Academy members are aware, Allen initiated a survey on these questions. "Of the members who responded, a substantial majority favored endorsing the institution of collective bargaining. However, not nearly enough of our members chose to respond to create the necessary conditions to move forward at this time….From the many very articulate comments that were made by the respondents, it was also clear that the issue is a very divisive one…." Allen concluded:

> *Ultimately, whatever the Academy does, if anything, it will be because the members agree that it should happen. My intention was to start this conversation. Now it is up to the membership and future leaders to decide if we want this conversation to continue, and if so, how.*

BASEBALL GAMES AND ARBITRATION HEARINGS

By Bill McKee

SCOTT BUCHHEIT

Spiked with role playing, storytelling, and numerous baseball anecdotes, NAA colleague Scott Buchheit's presentation entertained and informed the audience in his examination of the parallels of baseball umpiring and arbitrating. The similarities abound. Behind his topic was the book, *As they See 'Em: A Fan's Travels in the Land of Umpires*, written by Bruce Weber.

Underlying both pursuits is the fundamental reason that umpires and arbitrators exist – to protect the integrity of the game. Scott extracted from the book nine criteria by which umpires are judged and applied them to arbitrators. His results are summarized in the following table:

Criteria by Which They are Judged	
Baseball Umpires	***Arbitrators***
Call balls and strikes accurately	Create a level playing field & just cause zone
Manage the situation	Maintain control of the hearing
Deal with a miscall ("kicked one")	Manage the stressors
Follow the rules (the "Rulebook") and baseball culture	Heed the CBA, Code, AAA rules, and the parties' culture
Control the pace of the game	Use hearing time wisely
Demonstrate on-field **mobility**	Provide flexibility (travel, site visits, etc.)
Hustle	Issue timely awards
Focus	Watch, listen, take notes
Demonstrate an effective demeanor	Portray integrity and dignity with certainty

But wait, there was more! The above comparison does injustice to the totality of Scott's presentation. A constantly changing field of play, the stress and physical wear and tear of travel, the awareness that every call is being scrutinized, and the "feel for the game" that provides them the best perspective to make the correct call are all parts of the lives of baseball umpires and labor arbitrators.

In addition to being entertaining and informative, Scott provided a cool look at the largely unknown worlds of umpires (and arbitrators). Many aspire to the major leagues of their respective professions, but available slots are few.

PERSUADING THE ARBITATOR:

INFLUENCES ON ARBITRATOR DECISION MAKING

By James Cooper

A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? If you quickly figured this out and answered $0.10, you would have gotten a lot from Cornell Law Professor Jeffrey Rachlinski's presentation on the Cognitive Reflection Test and the outcome of relying on intuition rather than cognitive reflection. The correct answer is $0.05 and the point of this session is that intuition is not a good way to arrive at the correct answer. At the start of this session, Prof. Rachlinski (who holds, in addition to a law degree, a doctorate in psychology, both from that bane of East coast institutions, Stanford University) handed out a short examination to all participants; these had slightly different information in the examination questions; the results were tabulated and they proved Prof. Rachlinski's point: "Intuition is a poor way to decide cases" and that arbitrators are no better than judges at relying on intuition rather than the more arduous task of thoughtful analysis and reflection. While the full scope of Prof. Rachlinski's challenging lecture would be impossible to capture, he clearly made his point. His suggestions forewarn us to recognize when it is likely that our intuition will overpower a more careful thought process and lead to an erroneous conclusion. These included his lessons to judges who, to his mind, are the same as arbitrators:

• Anchoring: When making numeric estimates, judges rely on the first number thrown at them and this sets the initial value in one's mind. While you may move away from this number, typically the adjustment shows far greater influence of the initial value on the final value than it deserves.

• Framing: This occurs when judges ignore statistical or documented information and rely instead on personal speculation based on their own experience. A documented or statistically proven point will frequently be overlooked when personal experience (such as the testimony of a convincing witness) runs counter to the documented or statistically proven point and coincides with the judge's personal experience.

Photo of Professor Jeffrey Rachlinski and NAA Member James C. Oakley

• Hindsight: The bias here is that intuition will predict from the outcome that there was a higher likelihood of this result prior to the incident occurring. This phenomenon places greater responsibility for exercising care, for example, on someone who seriously injures someone versus the same person who causes minor, non-personal injury damages.

Prof. Rachlinksi does not believe that intuition is always on the short end of problem solving. There are many situations where intuition and cognitive reflection will coincide on a particular result. However, he encourages arbitrators, like judges, to recognize where intuition is competing with a more deliberative approach and that initial impressions should be melded with cogent analysis to bring about a fair and accurate result. Prof. Rachlinksi's article Blinking on the Bench, 90 Cornell Law Review #9 (2007) is available at *http://scholarship.law.conrell.edu/clr/vol93/iss1/9* and is well worth reading.

U.S. Designating Agencies Update on Labor Arbitration

By Michelle Miller-Kotula

Joshua Javits, the NAA member who serves as the Designating Agency Liaison Coordinator, moderated this session. The panelists included Jan Holdinski, Vice President of Labor, Employment and Elections for the American Arbitration Association (AAA), Roland Watkins, the Director of Arbitration Services at the National Mediation Board (NMB), and Arthur Pearlstein, Director of Arbitration at the Federal Mediation and Conciliation Service (FMCS). This presentation reviewed current developments and trends in labor arbitration, including statistical information, arbitration procedures, and issues heard in arbitration.

Ms. Holdinski thanked the NAA for inviting the AAA to speak at regional conferences held around the country. She said it is very important for the AAA to stay connected and discuss important topics. She discussed the NAA and AAA work together with advocacy training and webinars and noted the NAA helped to promote a program to the Board of Directors in New York to mentor new arbitrators. She gave her appreciation to the NAA members who have taken time to refer arbitrators to the AAA panels.

Ms. Holdinski explained there are six labor centers and discussed whether the cases increased or decreased in each center. Overall 7,213 cases were filed in 2015, with a total of 1,582 awards being issued. Approximately 4,016 of the cases were closed and 3,197 cases are pending from the 2015 total. The median time from the time cases are filed to an appointment is 20 days, settlements occur around 205 days, and awards are issued around 253 days from when the cases are filed. The per diem rates obviously vary from state to state, but the median per diem rate is $1400.

Photo of Roland Watkins, Janice Holdinski, Arthur Pearlstein, and NAA Member Joshua M. Javits

Ms. Holdinski discussed that, although the labor staff has pushed for expedited services, the parties are not as interested in such services because they generally want to file briefs and have a written opinion. There seem to be more requests for transcripts to be taken at hearings and more subpoena requests. She noted there are not a lot of requests for lists only. She asked the NAA members to keep the AAA informed of any status changes that occur to their profile.

Mr. Watkins explained the make-up of the NMB Board. He indicated two big audits have recently been concluded from independent auditors to determine if the financial records and the procurements are in compliance. The NMB received zero deficiencies. He noted the largest segment of the NMB budget is arbitrators' salaries. He discussed a goal of the NMB has been to clear outside funds from the past fiscal years and continue to have a proper audit trail. He contended that funds allocated in fiscal year 2014 must be used by August 10, 2016. These monies would be available for cases assigned from October 1, 2013 to September 30, 2015. These cases — a likelihood of 2100 in all — have been allocated funding. The budget for 2017 includes more money for arbitrators' salaries and would be very advantageous to the caseload if approved.

Mr. Watkins discussed a system used by the NMB called EAS. An educational webinar was held to promote the mission of the NMB and show how cases run from start to finish. He contended that, when cases are assigned to arbitrators, they must be assigned for a hearing within 60 days. In 2016, the cases must be heard within 120 days of assignment. He stated the EAS system allows the arbitrator to enter the date and keep the parties informed of the process. Mr. Watkins reminded NAA members it is necessary to register in the SAM database prior to the award being issued. The SAM database must be renewed annually to maintain an active status.

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Discovery and Motion Practice in Employment Arbitration

By Richard D. Fincher

This workshop continued the commitment of the Academy to provide informative programming to employment arbitrators, aspiring employment arbitrators, and advocates involved in employment arbitration. This workshop was preceded by a companion workshop, moderated by NAA member Catherine Harris, focusing on best practices for pre-hearing conferences.

Using a hypothetical case of race discrimination in a car dealership, the program provided practice tips for neutrals and advocates concerning how to prepare for and participate in discovery and motion practice, a standard feature of non-union employment arbitration. Some of the topics covered included: Motions to Compel Discovery upon non-responsiveness, Motions to Exclude Evidence (in limine) for good cause, and Motions for a Protective Order. We also discussed dispositive motions, such as Motions for Summary Judgment, and Motions to Dismiss concerning procedural issues.

NAA member Richard Fincher served as moderator. He noted the goals of the workshop and explained the landscape of employment arbitration. He shared that the key differences between employment versus labor arbitration are: in employment arbitration, the neutral is interpreting a statute (normally in discrimination), remedies are different, parties have a right to discovery to obtain relevant information, and parties use motion practice to resolve disputes and shape the case prior to hearing.

Photo of Ted Schroeder, NAA Member Dick Fincher, and Stephen Jordan

Labor and plaintiff advocate Stephen Jordan of Rothman Gordon started the session by discussing discovery from the view of the plaintiff. In response, management advocate Ted Schroeder of Littler Mendelson presented discovery from the view of the defense. Subsequently, advocate Jordan discussed motion practice from the view of the plaintiff, countered by advocate Schroeder from the view of the defense. The final discussion concerned the pros and cons of a motion for summary judgment, often offered by the defense to preclude the hearing.

The panel encouraged current labor arbitrators to consider moving into this practice area, as there are numerous complementary skills.

Update on Labor Arbitration *(Continued from Page 22)*

He said if an arbitrator is not renewed in SAM, cases will not be assigned.

Mr. Watkins noted that the NMB is attempting to increase the diversity of arbitrators. Recently, a special training program was implemented for this purpose and 24 participants were selected. He asked the arbitrators to review their resumes and update the NMB with any pertinent information. He ended his discussion by noting a pay per case system has been implemented instead of a pay per diem system.

Mr. Pearlstein of the FMCS discussed recent trends and the numbers from 2015 for FMCS arbitrators. He explained that requests for panels had significantly increased in 2015, but slightly fewer awards than in 2014 were issued. Mr. Pearlstein went over the contacts at the FMCS Office of Arbitration and each of their roles. He pointed out he has the overall responsibility for the FMCS arbitration program. He handles program management, policy, and outreach in the labor relations community. He also deals with complex issues, disputes over rules and regulations of the program, and matters of first impression.

In his capacity with the FMCS, Mr. Pearlstein receives complaints that relate to the content of awards and he said generally most awards cannot be overturned. He noted an increase in drug-related cases. He receives complaints about disputes over arbitration fees and unusual line items, but not the per diem rate. Mr. Pearlstein is pushing for a new software system. He has been seeing positive results in this regard, which will be better for the arbitrators. He said the FMCS will be asking all arbitrators to provide a point of contact.

The speakers thanked the NAA members for their commitment to their panels. They answered questions presented by the audience. The speakers also thanked the NAA for the opportunity to speak to the NAA members and guests.

DEVELOPING HUMAN RIGHTS ISSUES:

PRACTICAL CONSIDERATIONS FOR ADJUDICATION

By Lise Gelernter

Because Canadian labor arbitrators have the power and obligation to decide not only contractual issues, but also issues arising under statutes and the Charter of Rights, Canadian arbitrators have to keep up with the latest legal developments concerning the workplace. Human rights law, or as it is known in the U.S., anti-discrimination law, is often implicated in labor relations or employment disputes. John L. Stout (NAA, Ontario) moderated a session in which experienced practitioners discussed some of the "hot" topics in human rights law, with the active participation of the audience.

Mark Wright, an attorney at Goldblatt Partners in Toronto who represents employees, took on what he called the "entertaining" changes in the standards for a prima facie human rights claim. A recent Canadian Supreme Court case, Quebec v. Bombardier, 2015 SCC 39, appeared to make some changes in the prima facie standard, but Mr. Wright thought it was the unique set of facts that drove the apparent changes. The case concerned Javed Latif, a pilot of Pakistani origin who had been flying since 1964 and held a United States pilot's license since 1991. But when he had to go for further training in Dallas, the U.S. Department of Justice denied him the necessary security clearance for reasons they would not disclose, citing national security concerns. When the pilot asked Bombardier to do his training in Quebec instead, the company refused, based on the U.S. decision that considered him a security risk, and ultimately fired him because he did not have up-to-date training.

When Mr. Latif pursued a race or national origin discrimination complaint at the Quebec Human Rights Tribunal, the agency ruled in his favor, but the Quebec Court of Appeal overturned that finding.

Photo of Mark Wright, NAA Member John Stout, and Erin Kuzz

The Supreme Court upheld the Court of Appeal, finding that he had not established a prima facie case. The Court said that, although a claimant does not have to establish a causal connection between the adverse employment action and racism to make out a prima facie case, a claimant does have to show that racism is a "factor" in the employment decision. Because Bombardier based the termination only on the U.S. DOJ national security decision, the Court held, the pilot had not established that racism was even a factor in his firing. General sociological evidence of the discriminatory atmosphere against men of Pakistani origin was not enough to sustain a prima facie case, the Court said.

But Mr. Wright thought that the Supreme Court's decision was confusing. Although the Court held that a company cannot "blindly" comply with the arbitrary decision of a foreign authority, the Court nonetheless upheld what appeared to be Bombardier's "blind" reliance on the U.S. DOJ national security decision. Erin Kuzz, an attorney with Sherrard Kuzz in Toronto who represents employers, thought that the evidence was fairly clear that Bombardier had to fire the pilot to maintain its authority to fly in U.S. airspace, so there was evidence that racism was not a "factor" in its decision to fire the pilot. She did agree with Mr. Wright that the Supreme Court's apparent shift from requiring a "causal" connection between discriminatory animus and an adverse employment action to requiring a showing that discriminatory animus is a "factor" was not really a big change. A plaintiff still has to connect racism or other discriminatory motives to the employer's actions.

In a case involving the establishment of a prima facie case for a disability discrimination claim in the Alberta Court of Appeal, Stewart v. Elk Valley Coal Corp., 2015 ABCA 225, issued one month before the Bombardier case, the court determined that the plaintiff did not meet the standards for a prima facie case. Mr. Wright and Ms. Kuzz both found the court's reasoning on the plaintiff's failure to establish a prima facie case problematic because it did not take into account the special circumstances connected with dis-

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ability discrimination. A truck driver was fired for getting into an accident that turned out to be caused by his cocaine addiction. The employer's policy stated that it would not fire anyone with an addiction problem if he or she sought help prior to getting into trouble, but that seeking assistance after an accident or other problem would not save the employee's job. The Court of Appeal held that the plaintiff did not establish a prima facie case because he had not shown the employer had a discriminatory motive; the employer was simply applying a clear, non-discriminatory policy.

However, a strong dissent believed that the majority ignored the nature of addiction, which often causes addicts to deny they even have a problem. Therefore, the employer's seemingly neutral policy actually discriminated against the driver because he was an addict in denial. Mr. Wright thought the dissent got it right, but, although Ms. Kuzz agreed that the reasoning was a bit strange, she did not think that addiction should be turned into a "get out of jail free" card. Where denial is an issue, addicts should have to show, as part of their prima facie case, that they were, in fact, in denial. Mr. Wright agreed that the addict-plaintiff should have to prove denial, but not at the prima facie stage; he thought the plaintiff should get to put in his or her full proof on this issue on the merits.

On the question of accommodation for family status, such as breastfeeding or caring for a family member, recent decisions have dealt with the issue of "self-accommodation." This concerns the level of the plaintiff's responsibility to try to avoid a conflict between his or her family status and workplace requirements. In one case before the Federal Court of Appeal, Flatt v. Canada, 2015 FCA 250, an employee who wanted an accommodation to allow her to breastfeed demanded a specific series of 45-minute paid breaks at certain times of day, which exceeded the paid break time for all other employees. The employer refused and the Court of Appeal upheld the decision of the Public Service Labour Relations and Employment Board that the claimant had not substantiated her claim because she was unwilling to investigate other ways to "self-accommodate" that would not have such a big negative effect on the employer. Mr. Wright commented that he understood the need for a plaintiff to have to show some effort at self-accommodation, but thought that this proof should be required during the consideration of the merits of the accommodation/undue hardship issues, but not at the prima facie case stage.

Ms. Kuzz commented that sometimes an employer acting like a "jerk" will make a court or tribunal more sympathetic to an employee seeking an accommodation. For example, in another case, when a single mother of two children applied for a job that was specifically advertised as having rotating shifts and then sought an accommodation of working on a straight day shift, her failure to "self-accommodate" nonetheless led to a finding that the employer had to accommodate her. Part of the reason for this result, Ms. Kuzz said, was that the employer had apparently accommodated other employees on rotating shifts by giving them straight shifts.

Jules Bloch (NAA, Ontario) commented that something analogous to the doctor's diagnosis for a disability could be required for family status accommodation to show why self-accommodation is not possible. Ms. Kuzz indicated this would be consistent with the treatment of religious accommodations, but Mr. Wright cautioned that it would still be somewhat different than simply getting a doctor's note.

Mr. Wright and Ms. Kuzz also discussed a City of Toronto arbitration case decided by NAA member Paula Knopf, in which she determined that the employer had a procedural duty to accommodate a disabled employee who was "bumped" when the City contracted out part of its garbage services. The City argued it could not make the same accommodations in any other job remaining, so the claimant was laid off. Ms. Knopf found that the employer's actions violated both the CBA and the Human Rights Code because the Union had the contractual right to be involved in layoff and bumping decisions and the failure to accommodate violated the Code. She ordered the parties to meet and see if they could work something out.

After agreeing that mediated settlements in accommodation cases should be attempted, but disagreeing on whether parties should seek non-suits more often if settlement talks were unsuccessful, Mr. Wright and Ms. Kuzz had a chance to take on the question of "hot-tubbing" experts. Mr. Stout explained that this is a process where both sides' experts give evidence on an issue at the same time and have met and discussed the issue in advance. Mr. Wright thought it was very effective in litigation that required experts, but found its efficacy less than optimal in arbitration. Ms. Kuzz agreed that sometimes a "hot tub" takes more time than a regular hearing would. When Mr. Stout asked about the concept of the parties jointly selecting one expert, Ms. Kuzz thought it was a nice idea in theory, but that, in reality, it would never happen. Mr. Wright agreed.

Overall, recent cases show that, from the employee perspective, there is some concern about the use of the prima facie case standard to dismiss too many potentially meritorious lawsuits too early. From the employer perspective, the use of the prima facie standard, accompanied by a willingness to seek a non-suit, should prove to efficiently weed out the weak cases.

An Overview of Alexander J.S. Colvin's Presentation on Current Research on Arbitration and Dispute Resolution

By Sheila Mayberry

Professor Colvin summarized current research on arbitration and other dispute resolution and commented on patterns, perceptions, and trends. The question that was left to us was whether this research does and/or should impact the work of NAA members.

Professor Colvin summarized the research done by Rachel Aleks in her paper *Estimating the Effect on 'Change To Win' Union Organizing.*[1] Ms. Aleks studied the impact that the union organizing effort by the "Change to Win" unions have had on union membership. As you may recall, several unions broke away from the AFL-CIO to form a new federation of unions to ramp up organizing efforts. The Change to Win federation has had mixed results. The data indicated that over a 10-year period, while there was an increase in organizing efforts, the federation failed to increase the overall number of employees represented by unions. While successful campaigns of larger unions brought in higher numbers of members, there was a decrease in the number of overall elections won by all Change to Win unions. Specifically, the positive effect that the creation of Change to Win had on the union win rate and the percentage of workers successfully organized has not been statistically significant. The bottom line: the Change To Win organizing campaign did not produce the expected results in an overall increase in bargaining unit members relative to other AFL-CIO organizing campaigns.

Professor Colvin also reviewed John-Paul Ferguson's paper *Racial Diversity And Union Organizing in the United States, 1999-2008.*[2] The paper analyzed the impact of racial and ethnic diversity in the workforce in over 7000 union campaigns over a ten year period using data from the NLRB and EEOC. The data suggested a minimal difference in the rate of winning an election versus the level of diversity in the workforce. However, the research indicated that unions withdrew from campaigns at a higher rate and the number of unfair labor practice charges were higher where there was a higher level of diversity in the workforce. This suggested to the author that employers' opposition to organizing campaigns was more intense, creating an increase in tension within the workforce. As the author suggests, the question to be resolved by the results of this research is serious: Why do employers intimidate and discharge employees more often when work groups are more diverse?

The summary of Dion Poehler's and Andrew Luchak's paper, *"Balancing Efficiency, Equity, and Voice The Impact of Unions and High-Involvement Work Practices on Work Outcomes"* [3] was also enlightening. This paper looked at the impact of active union involvement with management on productivity in Canada. The data indicates that, where unions are actively engaged with management in high involvement work practices (HIWP), greater "balance" results between efficiency, equity, and voice. Employees work less unpaid overtime, have fewer grievances, and take fewer paid sick days. Job satisfaction appears to be greater under the combination of unions and HIWPs.

In Andrew Weaver's paper *Is Credit Status a Good Signal of Productivity?*[4] the author used unique research strategies to glean credit-related information about job applicants. Credit-related data contained in the National Longitudinal Survey of Youth from 1979 included information on net worth, rejections of credit applications, and credit card debts. Since this proxy data reflected the components of credit reports, it allowed the author to make valid assessments of credit status and test whether a person's credit status was predictive of employee productivity. The author found that the character-related portion of an applicant's credit status was not a significant predictor of productivity. However, he did find that an applicant with a poor credit status would be hired at a lower wage rate.

Employment arbitrators should take note of Dr. Colvin's and Mark D. Gough's research in their paper *Individual Employment Rights Arbitration In The United States: Actors And Outcomes.*[5] They made several findings with respect to employment arbitration. They found that:

1) Self-represented plaintiffs' win-rates were not as high as those who were represented by attorneys.
2) NAA employment arbitrators were less likely to find in favor of unrepresented plaintiffs.
3) Employees who were repeat complainants were less likely to be successful in arbitration.
4) Where an arbitrator heard more than one case against the same employer, the number of favorable outcomes and amount of the award for plaintiffs declined.
5) While approximately 12% of the cases in the data set were heard by NAA members, most repeat arbitrators were not NAA members.
6) The size of the employer did not impact the amount of the award to the plaintiff.
7) Plaintiffs' attorneys did not, as a rule, specialize in employment litigation and were less likely to repeat their representation in employment cases.
8) Female arbitrators and experienced professional labor arbitrators ruled in favor of employers more often than male arbitrators and other types of arbitrators.

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Alexander Colvin and NAA Member Mike McDowell

Questions raised by the data included whether there was an impact on outcomes if the arbitrator had also been a management-side attorney; whether management-side attorneys had a greater sophistication in choosing arbitrators; and whether plaintiffs' attorneys had sufficient knowledge of the arbitrator being chosen. A policy question was whether the institutionalized employment arbitration selection process has steered the outcome of employment arbitration cases.

The findings in their final paragraph make an important assessment:

> We have demonstrated how the outcomes of efforts to enforce substantive employment rights in fact vary widely depending on who the decision makers are and what the institutional context is. Justice in mandatory arbitration is not blind if parties are able to gain an advantage from selecting an arbitrator with desirable characteristics and especially if there are gains from doing repeat business with the same arbitrator.

NAA arbitrators should study this research and decide how or if it should have an impact on their practices.

In their paper *The Impact Of Franchising On Labor Standards Compliance*[6], Minwoog Ji and David Weil asked whether franchise ownership in the fast food industry affected compliance with wage and hour laws. The data found that the larger corporate-owned enterprises, i.e. McDonald's and Wendy's, owed much less in back pay than franchisee-owner enterprises. The data reflected a working theory that franchisee-owners operate outside of the margins and were more than likely to cut financial costs at the expense of risking non-compliance violations.

In another look at a different aspect of compliance, Matthew Amengual, in his paper *Pathways to Enforcement; Labor Inspectors Leveraging Linkages with Society in Argentina*[7], attempted to understand what practices or interventions make labor standards enforcement more effective. The data indicates that, in Argentina, there is a regional disparity in effective enforcement between the Cordoba and the Federal Capital regions. The higher enforcement rates in Cordoba appear to be related to a number of factors. However, the cooperation and involvement of educated, local union representatives seems to be a significant factor. They accompany inspectors, point out problem areas, and provide basic transportation for them. In the Federal Capital, union activism is not as high and inspectors lack cars and must use public transportation, making it more difficult to go to inspection sites. It is, therefore, apparent that creating new strategies, such as community involvement to overcome bureaucratic obstacles, may be a key to improving enforcement of national labor standards.

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[1] Rachel Aleks, 2015, Estimating the Effect on 'Change To Win' Union Organizing, Cornell University, ILR School, DigitalCommons@ILR

[2] John-Paul Ferguson, 2015, Racial Diversity And Union Organizing in the United States, 1999-2008, Stanford University.

[3] Dionne M. Pohler and Andrew A. Luchak, 2014, Balancing Efficiency, Equity, and Voice The Impact of Unions and High-Involvement Work Practices on Work Outcomes, ILR Review October 2014 vol. 67 no. 41063-1094

[4] Andrew Weaver, 2014, Is Credit Status a Good Signal of Productivity? MIT Sloan School of Management.

[5] Dr. Colvin and Mark Gough, 2015, Individual Employment Rights Arbitration In The United States: Actors And Outcomes, Cornell University, ILR School, DigitalCommons@ILR.

[6] MinWoong Ji and David Weil, 2015, The Impact Of Franchising On Labor Standards Compliance, ILR Review October 2015 vol. 68 no. 5977-1006.

[7] Matthew Amengual, 2014, Pathways to Enforcement; Labor Inspectors Leveraging Linkages with Society in Argentina, ILR Review January 2014 vol. 67 no. 13-33.

The Media's Portrayal of Arbitration and the Academy's Response:

Understanding How Journalists Understand Arbitration

Submitted by Randi Abramsky

Panelists:

Moderator: Carli Conklin, University of Missouri Law School

Elizabeth Wesman, NAA

Rafael Gely, University of Missouri Law School

James Urban, Attorney, Jones Day, Pittsburgh

Rafael Gely, NAA Member Betsy Wesman, Jim Urban, and Carli Conklin

In the winter of 2014, the National Academy of Arbitrators and the Center for the Study of Dispute Resolution decided to collaborate to develop a neutral, noncommercial, and comprehensive website about labor arbitration. The NAA was concerned about the manner in which labor arbitration and the arbitration process were being portrayed in the media. This session reviewed this initiative, the website that has been created, *arbitrationinfo.com*, and a study regarding arbitration and the print media.

Arbitrator Elizabeth (Betsy) Wesman led off the session with a description of the website, which started with seed money from the NAA's Research and Education Fund. The website contains arbitration news, articles, court cases, a glossary of terms, and a Frequently Asked Questions section. The goal is to reach journalists and provide them with accurate information about the labor arbitration process as a way to encourage more "informed reporting" about labor arbitration. It is a teaching tool. Members (and nonmembers) can subscribe to the website. Betsy also asked to let her know if you become aware of good articles, so that links may be established.

Professor Raphael Gely described the research project that he, along with others, undertook to determine if the NAA's perception that arbitration was being reported unfavorably in the press was, in fact, accurate. The project was entitled "What and How Journalists are Reporting about Arbitration (What They Are Saying About You)." He reviewed the study's hypotheses and methodology. There were 433 news articles concerning "arbitration" in the mainstream U.S. press between 2000 and 2015, which were reviewed to determine if the portrayal was negative (a "1" rating), neutral (a "2" rating) or positive (a "3" rating). Of the 433 articles, 196 (45%) involved labor arbitration. Who wrote the story – a business writer, legal writer, sports writer, etc. – as well as what stage the case was in when the article was written was also considered. The study looked at who was quoted for the article, too. The study found that most articles (238, or 55%) were neutral; 135, or 31%, were negative, and only 60, or 14%, were positive. Consequently, the negative articles were more than double the positive ones. The articles also became more negative over time. The study found that the NAA was right – there has been more negative reporting, with editorials even more negative than articles.

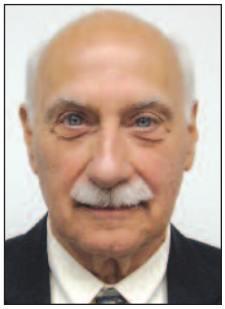
Jim Urban, a management-side lawyer with Jones Day, was the next speaker up. Prior to becoming an attorney, he had spent ten years as a print journalist and four working wire services. One of his print journalism roles was as the "court house reporter," where he knew the judges, lawyers, and clerks. This enabled him to "fully" cover a case. He could ask questions, and the public nature of civil and criminal cases enabled him to hear testimony, check documents, and the record. That kind of access to information and clarification is markedly different than a reporter covering a labor arbitration has, and it results in less in-depth and nuanced reporting. Often, a journalist does not even have access to the arbitration award. He also noted that, much of the time, labor arbitration concerns local issues involving local, low paid reporters who lack experience or knowledge of the process. He surmised that, when an arbitration decision is disclosed, one side wants to "blame the arbitrator."

It appears from the session that the NAA's concerns about how arbitration is portrayed in the press were well-founded and there is a real need for the labor arbitration website that has been created to better educate and inform journalists. Arbitrator Wesman suggested that they will be reaching out to journalism societies and schools to introduce the website to them. It seems that cannot happen soon enough.

NEW MEMBERS WELCOMED IN PITTSBURGH

JOHN C. ALFANO

Biddeford, ME



Neither an attorney nor academic, John Alfano has been an arbitrator and mediator since 1983. Originally attending college to become a pharmacist, he instead became a science teacher who was elected vice president of the local after missing the first union meeting. In 1971, the Maine Teachers Association hired John as a field representative. During that time, he represented members before the labor board and in arbitration, learning from experienced arbitrators, some of whom are current members of the Academy.

In 1983, John changed careers by becoming a member of the Maine Labor Relations Board Panel of Mediators, which launched his arbitration practice. Eventually, he joined the arbitration panels of AAA, FMCS, Massachusetts, New Hampshire, Pennsylvania, and New Jersey. John is also the permanent arbitrator for various employers and unions.

Elected to the Board of the Maine Association of Mediators for eight years and president for two years, John co-founded the Maine Chapter of LERA with Academy member Sheila Mayberry. He currently serves as president of the Central Pennsylvania LERA Chapter. He has trained mediators for the State of Maine and introduced new arbitrators to Maine's labor-management community, and works with Penn State and the University of Southern Maine to provide free internships to undergraduate students interested in labor relations. John promised the person who taught him labor relations that he would pass on his knowledge to those new to labor relations as payment for his help. He continues to honor that commitment 41 years later.

CHARLES F. AMMESON

St. Joseph, MI

Charles Ammeson has been a part-time labor arbitrator since 1983, transitioning his practice since 2009 primarily to arbitration, mediation, and real estate matters. A 1975 graduate of the New York School of Industrial and Labor Relations and a 1982 graduate of the Notre Dame Law School, he started his career administering the basic steel contract in the chemical and steel industries. Charlie also has extensive jury trial experience litigating disability, discrimination, whistleblower, and wrongful discharge matters, representing both employees and employers to verdict. He served on the original Michigan Bar Alternative Dispute Resolution Committee and was a founding member of the Mediation Panel for the U.S. District Court for the Western District of Michigan. Charlie serves as a permanent member on several public employer and steelworker panels, as an interest arbitrator and fact finder with the Michigan Employment Relations Commission, and on the FMCS and AAA labor rosters. Charlie also arbitrates and mediates litigation and real estate matters. He lives in Saint Joseph, Michigan and his arbitration practice encompasses Wisconsin, Illinois, Indiana, Kentucky, Michigan, and Ohio.

PAUL G. CHAPDELAINE

Pearland, TX

Paul Chapdelaine is an honorably discharged U.S. Air Force veteran and has a BS in Business from Northeastern Oklahoma State University.

After working in several management positions at American Airlines, Paul assumed the position of Labor Relations Representative at American's aircraft overhaul facility in Tulsa, Oklahoma where he processed union grievances and represented the Company in arbitration. He transferred to the position of Employee Relations Counsel on American's headquarters staff in 1990 where he processed pilot grievances and participated in contract negotiations.

Following early retirement from American Airlines, Paul transitioned to the union side as Director of Labor Relations with the newly formed Independent Association of Continental Pilots. He established a non-confrontational relationship with management that allowed him to quickly resolve the majority of pilot grievances or avoid them altogether. He was also the Union's election administrator and office staff administrator until IACP merged with ALPA in 2001. He retired from ALPA in 2004.

After retiring from ALPA, Paul started his arbitration practice and is currently serving on the arbitrator rosters of AAA, FMCS, and NMB. He is also on a permanent panel with the Houston Police and several permanent panels with the U.S. Postal Service.

IRA S. CURE

Brooklyn, NY

Ira Cure is presently a full time labor arbitrator and mediator. He is a member of the following panels: American Arbitration Association Labor and Employment; New Jersey Public Employment Relations Commission Interest Arbitration and Discipline; Federal Mediation and Conciliation Service Labor Arbitration; New York Public Employment Relations Board Public and Private Sector; New York City Office of Collective Bargaining; New Jersey State Board of Mediation; National Mediation Board; and FINRA. Mr. Cure is also named as

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an umpire under several collective bargaining agreements. He is a member of the New Jersey Public Employment Relations Commission and the FINRA Mediation panels. Prior to becoming a full time neutral in 2010, Mr. Cure was a member of the following firms where he represented unions, employee benefit funds, and individuals in employment matters: Lewis Greenwald Kennedy Lewis Clifton & Schwartz (Associate 1984-1991, Partner 1991-1995); Kennedy Schwartz & Cure, PC (Partner 1995-2005); Broach & Stulberg, LLP (Counsel 2005-2008). In addition, Mr. Cure was Senior Counsel of the Writers Guild of America, East, Inc. (2008-2010). While in practice, Mr. Cure appeared in numerous judicial and administrative fora. He is a member of the ADR Committee of the Association of the Bar of the City of New York and the New York State Bar Association. He also chaired the subcommittee that drafted the New York City Bar Association's Employment Law Handbook for Non-Lawyers, August 2006. Mr. Cure has taught Labor and Employment Arbitration as an adjunct professor at St. John's University School of Law. He is a 1975 graduate of the State University of New York at Binghamton, has a Master's Degree from the Labor Relations and Research Center at the University of Massachusetts at Amherst, and is a 1983 graduate of Brooklyn Law School where he was a member of the law review.

ROBERT A. GREY

Melville, NY

Robert A. "Bob" Grey has been a full time labor and employment arbitrator and mediator since 2007. Prior to that, he had a twenty year law enforcement career with the New York City Police Department. He was a police officer, sergeant, detective, supervisor, and manager of both uniformed and civilian bargaining unit members. Bob moonlighted as an employment mediator for the US EEOC and Postal Service. In 2007, shortly after retiring from the NYPD, his labor arbitrator career began when he became a permanent arbitrator for the US Postal Service and APWU.

Bob is a Senior Editor of The Railway Labor Act, Third Edition, 2014 and 2015 Cumulative Supplements, and Fourth Edition (in progress). He is a Contributing Author to The Family Medical Leave Act, 2015 Cumulative Supplement (Bloomberg BNA and ABA Section of L&E Law for both publications). Bob is active in several LERA chapters, NARR, and SFLERP. He is admitted to state and federal bars.

He received a BA in Economics from Binghamton University, with an Adjunct in Business Management, and a JD from New York Law School, where he was a John Ben Snow Scholar.

BONNIE J. MCSPIRITT

Londonderry, NH

Bonnie McSpiritt has been a full-time arbitrator, mediator, and fact finder of private and public labor-management disputes since 1994. She is a member of various arbitration panels including FMCS, AAA, regular and expedited Postal Service panels, various state labor relations agencies' arbitration panels, and the State of Maine's public employee reclassification and evaluation system. In addition, she has conducted various dispute resolution and employee surveillance trainings for AAA advocates and other labor-management associations.

Prior to becoming an arbitrator, Bonnie had her own human resources consulting business and worked in labor-management relations, human resources, and personnel for various Massachusetts agencies. She has a BA in Political Science from the University of Massachusetts - Lowell and a Master's in Public Administration from Suffolk University. Bonnie is active in the Boston Labor Guild; Maine, Rhode Island, and Boston LERA chapters; the New England Consortium of State Labor Relations Agencies; and the New Hampshire Business and Professional Women's Association. Bonnie enjoys spending time with her husband, Andrew, and their three children and spouses, meeting with her Book Club, and taking long walks with her dog, Willow.

JACALYN J. ZIMMERMAN

Lake Bluff, IL

Jacalyn J. Zimmerman is a labor arbitrator and mediator with a private practice based in the Chicago area. A career labor relations neutral, she maintained an active arbitration practice from 2006 to late 2009, when she suspended the practice to accept an appointment from Illinois Governor Pat Quinn as the Chair of the Illinois Labor Relations Board. She held that position until resuming her arbitration practice in September 2012. She also served as the agency's founding General Counsel. She began her legal career as a trial attorney for the National Labor Relations Board, Region 13.

Jackie looks forward to continuing her strong participation in professional activities as a member of the Academy. She has already been appointed Local Regional Chair and plans a great welcome to Chicago for all of you as a member of the host committee for next year's annual meeting. Jackie is a fellow of the College of Labor and Employment Lawyers and a vice president of the National Association of Railroad Referees. She is a past neutral co-chair of the American Bar Association Committee on State and Local Government Bargaining and Employment Law, and a past president of the Association of Labor Relations Agencies.

Jackie has been a member of the adjunct faculty at the Institute for Law and the Workplace, Illinois Institute of Technology/Chicago-Kent College of Law, where she taught labor law and legal writing courses. She is a frequent speaker and trainer on labor relations issues. She is a graduate of the University of Illinois and Loyola University of Chicago School of Law, and is admitted to the practice of law in Illinois and California.

Fireside Chat with Jim Harkless

Joe Sharnoff interviewing Jim Harkless

By Linda Byars

NAA member Joe Sharnoff, whose shared association with Ralph Seward and Sy Strongin in the early years of Jim's arbitration career, was Jim's choice as interviewer at the Fireside Chat. Joe previously interviewed Jim for the collection of arbitrator interviews that the NAA REF helped sponsor with the College of Labor and Employment Lawyers, available at the NAA website.

Jim took us back to his roots in this country with the birth of his father's father, born in 1860 as a slave. Jim's father was born in 1890 in Downs, Alabama, but claimed to be from Detroit where he moved as soon as possible after training as a millwright at Tuskegee Institute, Class of 1914. Jim's father worked for Ford Motor Company in Detroit and became one of the first black foremen at Ford, working in the Foundry. Jim's mother was from Houston, Texas, and she also attended college in Texas.

Jim was born in 1931 and had two older sisters, nine and eleven years older than him. Jim enjoyed the favored status of being the baby of the family and only male child, but his parents did not spoil him. He was expected to work and began with a paper route at about ten or eleven and later worked for a shoe repair shop, the A&P, and for the City of Detroit. Jim was president of his eighth grade and senior high school class, was a good student, popular, and had aspirations to go to Harvard. He graduated high school at age 16.

As a child, Jim's memory included his father not coming home for nearly a week because the UAW was organizing the Detroit plant.

During Jim's early years there was no social contact between blacks and whites, and the only black teacher Jim had in school was his sister, who became his art teacher. The year Jim started at Harvard, 1958, there were 1400 students and only four black students. Jim had a black roommate, and the other two black students roomed together. Some of the liberal white students joined with Jim, his roommate, and a few black upperclassmen to form the Harvard society for Minority Rights, affiliated with the N.A.A.C.P. They

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met with the Freshman Dean to protest the Harvard's freshmen rooming policy, and complained about the small number of black students in each class. This resulted in the acceptance of 13 black students in the class of 1954. While at Harvard, Jim tried out for the Harvard Glee Club and became its only black member. He learned to play squash and, after graduation from Law School, joined the Boston Harvard Club where he played on one of the teams and won a handicap tournament. In college, Jim was invited to join Hasty Pudding and was the first black president of the Harvard Glee Club in his senior year. Jim was also one of the first students to break the interracial dating barrier at Harvard, dating the Radcliffe student who later became his wife.

During the summers of his college years, Jim worked for Ford in Detroit and Summerville, Massachusetts. The year after his father died, Jim worked in the Foundry, putting cores in a 1700 degree oven, which Jim described as a "good experience."

Jim's parents strongly influenced his life with an example of hard work, and they provided him a rich cultural life, including church, where he was exposed to sermons of many great black pastors. The Tuskegee Alumni Club, started by Jim's father, met at their home, and poet laureate Robert Hayden was a tenant at their home in the early 1940s. Jim's sisters played the piano and violin, and Jim was blessed with a beautiful soprano singing voice.

After graduation from Harvard, Jim chose Harvard again for a law degree and elected labor law after taking that course and a seminar with Archibald Cox. After graduating law school in 1955, Jim went back to Detroit to take the bar exam and then interned with the only integrated law firm in Detroit. The firm represented the United Electrical Workers and Jim sat in with a partner during an arbitration where Dick Mittenthal was there as an assistant to Harry Platt. Unable to break the racial barrier in Detroit and with a white wife, Jim decided to move to Massachusetts, where his wife had done research for a doctor while Jim was in law school. By chance, a newly appointed judge of the Massachusetts Supreme court, Arthur Whittemore, was looking for a clerk and selected Jim. At the end of the term, the Chief Justice asked Jim to stay on a full term as Chief Law Clerk. He left to work for Grant and Angoff, a law firm that represented unions in New England. While there, Jim participated in negotiations and presented many arbitration cases before some of the leading arbitrators of the day, including his first arbitration before Bill Fallon. He also handled cases in the court of appeals and non-labor law cases with jury trials.

In 1961, during the Kennedy administration, Jim left the law firm for Washington D.C. to work for the House Education and Labor Committee. The chair of the Committee, Adam Clayton Powell, selected Jim to be counsel of an ad hoc subcommittee set up to study the NLRB. At that time, a black professional in business attire was very unusual, and Jim remembers the environment as very old south and the atmosphere on the hill as "not very pleasant." After leaving the Committee in 1962, Jim permanently moved to Washington to become the first black appellate court attorney for the NLRB General Counsel. In January 1964, Hobart Taylor, Jr., counsel to President Johnson, asked Jim to become confidential assistant to the newly appointed Commissioner of U.S. Customs and develop an equal job opportunity program. Within two years, Jim increased the number of black employees from about 450 to 800 and many received promotions. Ebony magazine recognized the success of these efforts in its December 1965 issue. Jim loved his work at Customs but, when he had the chance to work as executive secretary for Sargent Shriver at the Office of Economic Opportunity, he took it.

After OEO, Jim worked for the Kramer law firm in D.C. as general counsel and became reacquainted with Sy Strongin, who by then was a successful arbitrator in the office of Ralph Seward, the Bethlehem Steelworkers Umpire. Sy helped Jim get on the Bethlehem Steel/Steelworkers panel where he sat in on a few hearings with Seward before being assigned to hear cases on his own.

Within a short period of time, Jim was hearing FMCS, AAA, and NMB railroad cases in addition to the panel cases. In 1974, Jim was asked to join the Ford/UAW panel, which was very important to him because of his father's career with Ford. In 1975, American Airlines and the Flight Attendants selected Jim for its panel and it became his longest appointment. Jim has served on many permanent panels, including as national arbitrator for the U.S. Postal Service and the National Rural Letter Carriers Association and the USPS and the National Postal Mail Handlers Union.

Beginning in 1971, Jim attended the NAA annual meetings, becoming a member in 1975. At the time of his admission, the Academy had six black members and approximately eight women members. The Academy gave Jim the opportunity to develop relationships with those he admired in the first generation of arbitrators and, later, to encourage and mentor new members. From the beginning, Jim was an active member, serving on most committees, as regional chair for the D.C. region, Board of Governors for two terms, vice president for two terms, and, in 1988, becoming the first black Academy president.

At the conclusion of the Fireside Chat, Jim treated us to a demonstration of his singing talent with a heartfelt "Let us Break Bread Together on Our Knees." Until recently, he participated in our tennis get-togethers at meetings. Now that he has a new knee, we are hoping he will be back out on the courts.